The relationship between peremptory norms of general international law (*jus cogens*) and obligations *erga omnes*.

by

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Abstract

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. It is mostly agreed that *jus cogens* norms give rise to obligations *erga omnes*, however, not all obligations *erga omnes* flow from *jus cogens* norms. Thus pragmatically, although the use of *jus cogens* to identify, determine and assess obligations *erga omnes* might be fruitful, it is not always conclusive. This study accepts that the relationship between these two notions is a matter of considerable complexity as both of these concepts pose great difficulties and eschew an easy classification.

In light of this, the study seeks to identify the legal framework governing the identification of obligations *erga omnes*, particularly for norms that have not reached the status of *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. The study is undertaken to provide some conceptual clarity as regards the relationship between *jus cogens* norms and obligations *erga omnes*, as well as to confirm or otherwise disprove the allegation that the two concepts must be conflated.

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His Grace is Sufficient, declares the Lord in 2 Corinthians 12:9

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Chapter 1

Jus Cogens and *Erga Omnes*

1. Introduction

The central problem provoking this study 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, as:

> 'a norm accepted and recognized by the *international community of States as a whole*, and as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[1] (own emphasis).

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,[2] where the Court recognised these obligations as obligations which are drawn and owed between States towards the international community as a whole.[3]

Since its pronouncement in the *1970 Barcelona Traction* case,[4] the concept of obligations *erga omnes* has been the subject of much heated academic discussions and has surfaced several times in the judgments, opinions, and in arguments before the ICJ.[5] However, the notion remains surrounded by a considerable lack of

[1] Article 53, *Vienna Convention on the Law of Treaties*, 1969.
[2] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* Judgment, ICJ Reports (1970) para 32-33.
[3] See *Barcelona Traction* (n 2 above) para 33; See also M Koskenniemi 'From Apology to Utopia: The structure of international legal argument' (2005) *Cambridge University Press* 324; G Boas *Public International Law: Contemporary Principles and Perspectives* (2012) 98 and E de Wet 'The International Constitutional Order' (2006) 55 *International and Comparative Law Quarterly* 61; see also generally, E de Wet & J Vidmar *Hierarchy in International Law: The Place of Human Rights* (2012).
[4] See *Barcelona Traction* (n 2 above) paras 33-34.
[5] See *Barcelona Traction* (n 2 above); see also *Case Concerning East Timor (Portugal v Australia)* Judgment, ICJ Reports (1995) para 29; see also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* Judgment, ICJ Reports (2012) paras 66, 103.

conceptual clarity. There is frequent conflation, even at the level of the ICJ,[6] between this concept and the concept of *jus cogens* norms.[7]

Scholars have generally shown support to the proposition that obligations *erga omnes* flow from peremptory norms of general international law (*jus cogens*).[8] 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.[9] It is mostly agreed that *jus cogens* norms give rise to obligations *erga omnes*, however, it is generally also assumed that not all obligations *erga omnes* flow from *jus cogens* norms.[10] Thus pragmatically, although the use of *jus cogens* to identify, determine and assess obligations *erga omnes* might be fruitful,[11] it is not always conclusive. This study accepts that the relationship between these two notions is a matter of considerable complexity as both of these concepts 'pose great difficulties and eschew an easy classification'.[12]

In light of this, the study seeks to identify the legal framework governing 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. In the main, this study is undertaken to provide some conceptual clarity as regards the relationship between *jus cogens* norms and obligations *erga omnes*, as well as to confirm or otherwise disprove the allegation that the two concepts must be conflated or used synonymously.

In view of the above, this study seeks to find an appropriate response to the complexities presented by the relationship between *jus cogens* norms and obligations *erga omnes*, especially as regards the partial identity shared by the two notions as this

[6] See generally *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* Advisory Opinion, ICJ Reports (2019).
[7] See C Eggett & S Thin 'Clarification: Obligations Erga Omnes in the Chagos Opinion' (2019) *European Journal of International Law* available on https://www.ejiltalk.org/clarification-and-conflation-obligations-erga-omnes-in-the-chagos-opinion/ (accessed 04 April 2021).
[8] See M Byers 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 *Nordic Journal of International Law* 211-239.
[9] CJ Tams *Enforcing Obligations Erga Omnes in International Law* (2005) 150-155; A Kaczorowska *Public International Law* (2005) 139.
[10] Tams (n 9 above) 48.
[11] Tams (n 9 above) 145.
[12] Tams (n 9 above) 150.

creates a gap in the identification of obligations *erga omnes* which do not have, as a source, *jus cogens* norms.[13] On that note, the purpose of this study may be considered two-fold: first, it interrogates the definition, nature, scope and extent of *jus cogens* norms and obligations *erga omnes*. Second, it attempts to assess whether there exists a conclusive test for the identification and determination of obligations *erga omnes* that are not linked to being the consequence of *jus cogens* norms and if not, the study assesses what framework may be used to identify *erga omnes* obligations, independent of *jus cogens* norms.

In doing this, the study specifically sets out to (1) explore the relationship between *jus cogens* norms and obligations *erga omnes* to establish the extent of their 'overlap'; (2) explore the theoretical tenets of the concept of obligations *erga omnes* and determine its ability to exist as an independent source of legal obligations without being the consequence of a *jus cogens* norm and (3) propose a legal framework which provides for the understanding and identification of obligations *erga omnes* without placing reliance on *jus cogens*.

2. Research Problem

Recently, the issue of peremptory norms of general international law (*jus cogens*) has received renewed interest.[14] The International Law Commission (ILC) placed the topic on its long term working programme in 2015. Since then, the Special Rapporteur on peremptory norms of general international law (*jus cogens*), Dire Tladi has produced four detailed reports, which set out the methodological approach to the topic, giving a detailed overview of conceptual issues, considering the criteria for and the consequences of *jus cogens*.[15] Tladi maintains that this study remains relevant in contemporary international law as the nature, the legal effects and the place of *jus cogens* norms in the sources of international law remains unclear and thus invites further studies on the subject.[16] In particular, the relationship between *jus cogens*

[13] That being norms *jus cogens* producing obligations erga *omnes*, however, with some obligations *erga omnes* arising independent of *jus cogens* norms.
[14] K Kleinlein 'Jus Cogens Re-examined: Value Formalism in International Law' (2017) 28 *The European Journal of International Law* 296.
[15] International Law Commission 'First Report on *jus cogens* by Dire Tladi, Special Rapporteur' (2016) UN Doc. A/CN.4.693.
[16] International Law Commission 'Report on the Work of Its Sixty-Sixth Session' (2014) UN Doc. A/69/10 Annex.

norms and obligations *erga omnes* remains unclear with the result that some scholars conflate the two concepts.[17]

In 2019, the ILC adopted a set of Draft Conclusions on the topic of peremptory norms of general international law (*jus cogens*).[18] The ILC has attempted to clarify the relationship between the concepts of *jus cogens* and *erga omnes* in Draft Conclusion 17 and its related commentary.[19] The report of the Special Rapporteur on Draft Conclusion 17 suggests that the relationship between *jus cogens* norms and obligations *erga omnes* has been recognized in the practice of States and gives examples to that effect.[20] The report notes that although the ICJ has not expressly declared that there is a link between *jus cogens* norms and obligations *erga omnes*, such a link could be 'deduced from some of [the Court's] judgments and advisory opinions'.[21] In fact, every norm described by the ICJ as invoking *erga omnes* obligations is one which falls within the illustrative list of *jus cogens* norms.[22] In addition, the ILC has acknowledged the close relationship between the two concepts, recognising that although all *jus cogens* norms are *erga omnes*, not all obligations *erga omnes* arise from *jus cogens* norms.[23]

3. Literature Review

A general survey of the existing literature on this subject suggests that there is a gap in understanding the conceptual relationship between the concepts of *jus cogens* norms and obligations *erga omnes*. This introduces a *lacuna* as regards the importance and identification of obligations *erga omnes*, which are not a consequence

[17] See Byers (n 8 above) 211. Byers characterises these two norms as coterminous. See also P Picone 'The Distinction between *Jus Cogens* and Obligations *Erga Omnes*' in E Cannizzaro *The Law of Treaties beyond the Vienna Convention* (2011) 411.
[18] Report of the International Law Commission Seventy-first session (29 April–7 June and 8 July–9 August 2019) General Assembly Official Records Seventy-fourth Session Supplement No. 10 (A/74/10), available on https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/243/93/PDF/G1924393.pdf?OpenElement (accessed on 28 April 2021) at 141 - 208.
[19] Fourth Report by Special Rapporteur (Dire Tladi) on peremptory norms of general international law (*jus cogens*), 2019 (A/74/10) available on https://legal.un.org/ilc/reports/2019/english/chp5.pdf (accessed on 18 March 2021) at 145, 190.
[20] Fourth Report by Special Rapporteur (n 19 above) at 190.
[21] Fourth Report by Special Rapporteur (n 19 above) at 191.
[22] As above.
[23] Fourth Report by Special Rapporteur (n 19 above) at 192.

of *jus cogens* norms.[24] This *lacuna* is created by the absence of a solid definition of and requirements for obligations *erga omnes*.[25] Of course, there is vast literature declaring the existence of obligations *erga omnes*, irrespective of their peremptory or dispositive status.[26] However, what still remains unclear is how such an obligation ought to be identified, and how important such an obligation ought to be in order to be an obligation *erga omnes* sans reaching the status of a *jus cogens* norm.[27]

This study seeks to explore and conceptualise the relationship between *jus cogens* norms and obligations *erga omnes*. To this end, Tams and Asteriti pose that *jus cogens* norms and obligations *erga omnes* must be conceptualised as two different subcategories of a broader notion of norms that seek to protect the fundamental interests of the international community as a whole.[28] Similarly, Picone supports the view that although the two notions are intricately linked and have a very close nexus as they have largely developed in tandem, there are sound reasons, both conceptual and pragmatic, to maintain the distinction between the two concepts.[29]

To illustrate their position, Tams and Asteriti discuss that whereas *jus cogens* norms are characterised by their elevated hierarchical status, a so called 'higher class' categorisation in the normative hierarchy of international law - obligations *erga omnes* can well operate on an 'ordinary' hierarchical level.[30] Moreover, whereas the status of *jus cogens* norms affects the validity of conflicting norms and establishes a hierarchy of norms amongst international obligations, *erga omnes* status merely affects the position of third States in relations to an obligation in question and thus goes to the

[24] See Tams (n 9 above) 151; see also D Møgster '*Erga Omnes* and Countermeasures by Non-Injured States in Response to Mass Atrocities' (2014) *University of Oslo Duo Research Archive* 10, Masters' Thesis available online https://www.duo.uio.no/discover (accessed 20 April 2021).
[25] Møgster (n 24 above) 12.
[26] Amongst other commentators, see Tams (n 9 above) 151; See Byers (n 8 above) 211-239; see also Eggett & Thin (n 7 above); see generally the work of J Vidmar 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?' in De Wet & Vidmar (n 3 above); M Bradley 'Jus Cogens' Preferred Sister' in Tladi *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (2021) 193-226; M Ragazzi *The Concept of International Obligations Erga Omnes* (1997) 43-73; E de Wet '*Jus Cogens* and obligations *erga omnes*' *Oxford Handbook on Human Rights* (2013).
[27] See Tams (n 9 above) 151; see also Møgster (n 24 above) 10-15.
[28] C Tams & A Asteriti '*Erga omnes, jus cogens* and their impact on the law of responsibility' in Evans & Koutrakis (eds) *The International Responsibility of the European Union* (2013).
[29] See P Picone 'La distinzione tra norme internazionali di *jus cogens* e norme che producono obligghi *erga omnes*' (2008) 91 *Rivista di Diritto Internazionale* 5.
[30] Tams & Asteriti (n 28 above); See also See S Villalpando 'L'émergence de la communauté internationale dans de la Responsabilité des États' (2005) *Presses Universitaires de France* 106.

issue of standing.[31] In blatant words, Byers and Villalpando suggest that a norm *jus cogens* creates an *erga omnes* obligation for States to comply with a rule whereas an obligation *erga omnes* is the consequence of a rule being characterized as *jus cogens*.[32] However, both scholars also recognise that while all *jus cogens* norms entail obligations *erga omnes*, not all obligations *erga omnes* arise from *jus cogens* norms.[33] As such, these scholars conclude that while *jus cogens* norms and obligations *erga omnes* may be related through the fundamental interests they seek to protect, and there may be significant overlap, they are functionally distinct.[34]

According to scholars such as Tams, Asteriti and Byers, the understanding to be employed when conceptualising the relationship between *jus cogens* norms and obligations *erga omnes* is that firstly, certain fundamental norms are so important that no State may deviate from them by concluding treaties.[35] If *jus cogens* norms were not *erga omnes*, but only protected the legal interests of specific States, then other States would not have to be prevented from disapplying the rule by concluding a treaty.[36] Accordingly, these scholars conclude that the substantive understanding of *jus cogens* norms seems to presuppose the existence of a general legal interest typical of *erga omnes* status.[37]

Secondly, Tams points out that States have seldom commented on the relationship between the concept of *jus cogens* norms and obligations *erga omnes*.[38] In instances where they have, they seemed to endorse the view that *jus cogens* norms impose obligations *erga omnes*. For example, the comments made by States to the ILC's work on State responsibility supports the view that all States have a legal interest in the

[31] See Kaczorowska (n 9 above) 52 noting the definition of *erga omnes* in Article 1 of the 2005 Resolution of the Institut de Droit International as: '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.

[32] See Byers (n 8 above) 211-239, who describes in blunt terms that the generality of standing, rather than the status of non-derogability, is the consequence of rules *erga omnes*; see also Villalpando (n 30 above) 106.

[33] See Byers (n 8 above) 211-239; see also Eggett & Thin (n 7 above); see further Villalpando (n 30 above) 106. Many other scholars, including Møgster (24 above); YB Gülgeç 'The Problem of *Jus Cogens* from a Theoretical Perspective' (2017) *Ankara Üniversitesi Hukuk Fakültesi Dergis* 73-116 available online at https://dergipark.org.tr/en/pub/auhfd/article/509882 [accessed 20 April 2021]; V Serafimov 'Peremptory Norms of General International Law' available online at https://journals.indexcopernicus.com/api/file/viewByFileId/423919.pdf. [accessed 18 April 2021].

[34] See Byers (n 8 above) 211-239.

[35] Tams (n 9 above) 148.

[36] See Tams (n 9 above) 148-149.

[37] As above.

[38] See Tams (n 9 above) 149.

protection of *jus cogens* norms.[39] The Commission's report on the work of its seventy-first session noted the widely accepted view that all *jus cogens* norms were by definition *erga omnes*, however, the inverse cannot be said to be true.[40]

Tladi notes that for example, 'certain rules relating to common spaces, in particular common heritage regimes, may produce *erga omnes* obligations independent of whether they have peremptory status'.[41] Gülgeç also argues that obligations such as diplomatic immunity are *erga omnes* although they do not constitute *jus cogens*.[42] On the other end, Gastorn has argued that even the right of innocent passage under the law of the sea, for instance, is also an obligation *erga omnes* even though it is not *jus cogens*.[43] The viability of these arguments remains to be evaluated in the subsequent chapters.

On the one hand, there is abundant literature supporting the position taken by scholars such as Byers, Tams and Asteriti, that while all *jus cogens* norms entail obligations *erga omnes*, not all obligations *erga omnes* arise from *jus cogens* norms.[44] On the other hand, some scholars seem to espouse that there are no material distinctions between *jus cogens* norms and obligations *erga omnes*, thus conflating the

[39] See Comments made by Germany during the first reading of the ILC's Articles on State Responsibility reproduced in UN Doc. A/CN.4/488, 165 para 5 'Germany would encourage the Commission to re-evaluate the importance of the concepts of obligations erga omnes and of *jus cogens* in the field of State responsibility. If the Commission uses as a starting point the idea that violations of peremptory norms of international law (*jus cogens*) lead to *erga omnes* obligations, it could very well succeed in drafting provisions that are acceptable to the international community as a whole'.

[40] Report of the International Law Commission (ILC) *Seventy-first session: Peremptory norms of general international law (jus cogens)* (2019) 192 available online at https://legal.un.org/ilc/reports/2019/english/chp5.pdf [accessed 21 February 2021]; see Kaczorowska (n 9 above) 48; see also for example Switzerland's comment on article 40, para 3 of the 1996 first reading of the draft articles, reproduced in UN Doc. A/CN.4/488, 100; see also the German Statement on article 40, para 3 of the 1996 first reading of the draft articles, reproduced in UN Doc. A/CN.4/488, 137 and the 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 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 M Koskenniemi, *Report of the International Law Commission*, Fifty-eighth session, General Assembly Official Records, (A/cn.4/L.682) (2006).

[41] Report of the International Law Commission (2019) (n 40 above) 192.

[42] Gülgeç (n 32 above).

[43] K Gastorn 'Defining the Imprecise Contours of Jus Cogens in International Law' (2017) 16 *Chinese Journal of International Law* 643–662.

[44] See Byers (n 8 above) 211-239; see also Eggett & Thin (n 7 above). Many more scholars support this position, see for example the works of J Vidmar (n 26 above); Bradley (n 26 above); Ragazzi (n 26 above) 43-73; De Wet (n 26 above).

concepts.[45] Perhaps the boldest statement thus far is by Petsche who espouses that even the ICJ has suggested that *jus cogens* norms and obligations *erga omnes* are identical in its 2004 *Wall the Advisory Opinion*.[46]

As such, this study aims to add on to the literature which identifies this gap. The study introduces both *jus cogens* norms and obligations *erga omnes* as concepts that continue to be the subject of much contemporary contentions. This is because in contemporary international law, even though the existence of these concepts has received widespread international support, there is still much disagreement surrounding the nature, effect and possible source of the concepts.[47] The study attempts to assess the interface between *jus cogens* norms and obligations *erga omnes* and how obligations *erga omnes* not emanating from (or without placing reliance on) *jus cogens* norms are to be identified.

This study is intended to capture, the relationship between peremptory norms of general international law (*jus cogens*) and obligations *erga omnes*. The study seeks to show that peremptory norms of general international law (*jus cogens*) give rise to obligations *erga omnes*. This specific wording is rooted on the ILC's Articles on State Responsibility in which obligations *erga omnes* are characterised as those obligations which 'arise under peremptory norms of general international law'.[48] However, if it is as most scholars argue that not all obligations *erga omnes* are identified from peremptory norms of general international law, then a clear test for the determination of obligations *erga omnes* beyond *jus cogens* must be identified. To achieve this, it is necessary to commence a comparative study between the two concepts to facilitate the determination of a test for the identification of obligations *erga omnes*, sans being (or relying on being) the consequence of a peremptory norm of general international law.[49]

[45] See T Weatherall *Jus Cogens: International Law and Social Contract* (2015) 355-362; see also A Bianchi 'Dismantling the Wall: the ICJ's Advisory Opinion and its Likely Impact on International Law' (2004) 47 *German Yearbook International Law* 343-391.
[46] see M Petsche '*Jus Cogens* as a Vision of the International Legal Order' *Penn State International Law Review*.
[47] D Shelton 'Normative Hierarchy in International Law' (2006) 100 *American Journal of International Law* 299.
[48] Articles on Responsibility of States for Internationally Wrongful Acts, 2001, paragraph (7) of the general Commentary to Part Two, Chapter III.
[49] Tams (n 9 above) 141.

There is a conspicuous paucity of scholarly work for the concept of obligations *erga omnes* without being the consequence of *jus cogens* norms. Accordingly, the overview undertaken in this section aims to show the need to present both a comprehensive analysis and a coherent interpretation of the concept. This study is thus conceived as a contribution to address the identified *lacuna*. The study attempts to provide a conceptual and theoretical framework that defines the concept of obligations *erga omnes*, to establish a plausible and effective framework for the determination of *erga omnes* obligations independent of *jus cogens*.

Within this broad study, the following themes will be discussed:

1. The shortcomings of jus cogens norms in defining erga omnes: The partial identity gap

Commentators such as Gaja,[50] De Wet,[51] Paulus,[52] and Meron,[53] amongst others, have discussed the partial identity gap between *jus cogens* norms and obligations *erga omnes*.[54] While these commentators seem to suggest that all *jus cogens* norms are *erga omnes*, they do not agree that all obligations *erga omnes* are *jus cogens*.[55]

As noted earlier, Tams suggests that although the use of *jus cogens* norms to identify, determine and assess obligations *erga omnes* might be fruitful,[56] it is not always conclusive. Therefore, this theme of the study seeks to explore the partial identity shared by *jus cogens* norms and obligations *erga omnes* in order to assess the gap created by the relationship established between the two notions. The study will look into the meaning, nature, and scope of the notions separately and comparatively.

The study discusses the extent to which international jurisprudence and State practice cover the relationship and overlap between the concepts of *jus cogens* norms and

[50] G Gaja 'Jus Cogens Beyond the Vienna Convention' (1981) 172 *Recueil des Cours* 281.
[51] E de Wet *The International Constitutional Order* (2005) 61.
[52] AL Paulus *Die internationale Gemeinschaft im Vollkerrecht. Eine Untersuchung zur Entwicklung des Volkerrechts im Zeitalter der Globalisierung* (2001) 158-159.
[53] T Meron 'On a Hierarchy of International Human Rights' (1986) *The American Journal of International Law* 11.
[54] See also Møgster (n 24 above) 12.
[55] See Tams (n 9 above) 146, roughly suggesting that scholars such as Walter Kalin support the opposite view that all *erga omnes* obligations necessarily derive from *jus cogens* norms.
[56] Tams (n 9 above) 145.

obligations *erga omnes*. Conversely, the study will propose how challenges presented by the lack of conceptual clarity between these concepts can be overcome.

2. The absence of a universally acceptable definition of erga omnes obligations

The principal tenets of obligations *erga omnes*, most notably the definition, the constitutive elements, criteria and the scope of the concept, remain largely unclear. Arnardottir and Bradley claim that these tenets seem to evade the international legal community and thereby rendering the concept's relationship to *jus cogens* susceptible to various interpretations.[57] Tams has even called the jurisprudence of the ICJ inconclusive in providing clarity to the content of obligations *erga omnes*.[58] Tams notes, that although the Court has been cautious in providing clarity on this concept, the Court has now gone beyond the narrowly defined examples of obligations *erga omnes*.[59] In other words, the Court has recently recognised that the right of a peoples self-determination,[60] the prohibition on the use of force and obligations protecting planetary welfare are applied *erga omnes*. While qualifying these obligations with the status of *erga omnes*, the Court has not illustrated the reasons and criterion upon which it bases its categorisation of these obligations as *erga omnes*.[61]

The absence of a clear, unequivocal and universally acceptable definition of obligations *erga omnes* introduces a degree of uncertainty as to the exact nature of obligations *erga omnes* and complicate their relationship with *jus cogens* norms. It is this gap, arising from the lack of a conclusive and detailed analysis of the concept of obligations *erga omnes* (in particular, without placing reliance on *jus cogens* norms), which this study seeks to fill.

Therefore, in view of the opposing literature expressed above, this study will consider three main issues. In the first part: the development and evolution of the concept of *jus cogens* norms; on a subsidiary level, this part will assess whether there exists a

[57] See OM Arnardottir 'Res Interpretata, *Erga Omnes* Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights' (2017) 28 *European Journal of International Law* 819; see also Bradley (n 44 above) 197.
[58] Tams (n 9 above) 117.
[59] See Tams (n 9 above) 117, Tams gives examples which include prohibitions against aggression, slavery, racial discrimination, and genocide.
[60] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion ICJ Reports (2004) para 155.
[61] Tams (n 9 above) 118.

normative hierarchy in the governance of international law, in particular, whether *jus cogens* and *erga omnes* share a similar position in this hierarchy, if such a hierarchy exists. This part of the study will also assess the types of sources of obligations *erga omnes* emanating from the different levels of norms in the hierarchy such as custom or even treaties giving rise to obligations *erga omnes partes*. To this end, the study considers that the inclusion of a provision in the VCLT setting-out that *jus cogens* norms are of a peremptory character and may not be derogated from by treaty, has led a considerable amount of scholars to conclude that such norms have a rank and status that is superior to all other norms of international law.[62]

The second part will assess the development, evolution and enforcement of obligations *erga omnes*. However, since the specific features of *jus cogens* norms or obligations *erga omnes* cannot be fully appreciated if the concepts are interpreted in isolation, the third section of this study considers the relationship between the two concepts. In the main, the study considers the intersection between *jus cogens* norms and obligations *erga omnes* and in so doing, a detailed comparative analysis between the two concepts will be ventured into. This analysis will assess both the similarities and distinctions of the concepts to understand the extent of the overlaps between them. To this end, two arguments strongly suggest that obligations arising under *jus cogens* norms are necessarily *erga omnes*.[63]

4. Research Questions

This study intends to clarify one of the most difficult and ambiguous subjects in international law, the relationship between *jus cogens* norms and obligations *erga omnes*. As such, this research study is designed to respond to the following questions:

1. What is the relationship between *jus cogens* norms and obligations *erga omnes*?
2. What is the criteria to identify *erga omnes* obligations not flowing from *jus cogens* norms?

5. Methodology

[62] A Cassese *International Law* (2005) 199.
[63] Tams (n 9 above) 148.

This dissertation will embody a desktop-based research methodology. Although desktop based, the study will embody an innovative method of research analysis as focus will be placed on complex legal concepts and principles of international law and no empirical research will be conducted. The approach employed will interrogate and investigate the research questions identified above. Succinctly put, the study will also consider the relationship between the various sources of international law and the extent to which they are interfaced or overlap with one another, explain areas of difficulty and predict future developments for the concepts of *jus cogens* norms and obligations *erga omnes*. This method will allow the study to embody a systematic exposition of the relationship between *jus cogens* norms and obligations *erga omnes* in international law.

6. Structure Outline

The author's dissertation embodies a coherent structure with each chapter ultimately answering the scholarly questions raised in respect of the subject matter being explored herewith. The dissertation is divided into five chapters comprising of (1) this introduction, wherein the author outlines the research problem, the objectives and aims, (2) three substantive chapters which are outlined below, and (3) a conclusion indicating the results of the study.

Chapter 2: *Jus Cogens*

In this chapter the author provides a basic introduction to the concept of peremptory norms of general international law (*jus cogens* norms). The aim of the chapter is to assess in great detail the nature, scope, extent and standards maintained in the identification of *jus cogens* norms. The study discusses the concept of *jus cogens* and its treaty law context under the framework of the VCLT. In particular, this study relies on the work of the ILC to clarify how the ILC expanded the concept to issues relating to State responsibility. The study considers, that although the concept of *jus cogens* norms is given content in Articles 53 and 64 of the VCLT, the contours and legal effects of *jus cogens* have remained contentious, especially beyond the VCLT.[64] While the study accepts that the existence of the norm is not in controversy, its precise nature,

[64] Gaja (n 50 above) 172, *Collected Courses of the Hague Academy of International Law* 271.

the kind of norms that qualify as *jus cogens* and the consequences of such norms remain much debatable.[65]

Chapter 3: The Conflation of *Jus Cogens* with other related concepts

In this chapter, the study attempts to introduce the concept of obligations *erga omnes*. The chapter seeks to clarify in great detail the nature, scope and extent of obligations *erga omnes*. The study sets out that the lack of a fixed definition for the notion of obligations *erga omnes* without being *jus cogens* presents us with considerable difficulties in the identification and determination of obligations *erga omnes*. Accordingly, the chapter assesses how the ICJ has avoided making references to *jus cogens* and has instead relied on *erga omnes* and this has resulted in the conflation of the two concepts to a great extent. Conversely, the lack of clarity evidenced in the Articles on State Responsibility will be explored in order to provide the starting points for analysing and synthesising obligations *erga omnes*. The study will clarify that given the difficulty in finding a generally recognized criteria for the identification of obligations *erga omnes*, the usual method is to analyse State practice with respect of cases in which States not directly affected by an internationally wrongful act took counter-measures without being held liable for a wrongful act themselves.

Chapter 4: *Erga Omnes* Beyond *Jus Cogens*

In this chapter the study seeks to inform the reader on the relationship between *jus cogens* norms and obligations *erga omnes*. In different words, the chapter will comparatively assess the extent to which *jus cogens* norms overlap with obligations *erga omnes*. The chapter sets to identify whether there exists *erga omnes* obligations beyond *jus cogens* norms. Accordingly, this chapter seeks to fill up the gap in the literature as regards the relationship between these two concepts, especially the issue of the partial identity of the two concepts. It is suggested that the proposals advanced in this section of the study will assist in expressly and unequivocally conceptualising the place for the tenets of a well-defined relationship between *jus cogens* norms and

[65] The 2014 recommendation of the Working-Group on the long-term programme of work, UN Doc A/69/10; See also Part 1: Chapter III of the Articles on the Responsibility of States for Internationally Wrongful Acts (2001).

obligations *erga omnes* in international law. The chapter will also seek to identify and discuss norms other than *jus cogens* which have *erga omnes* status.

Chapter 5: Conclusion

This chapter will indicate the results of the study - as to whether there exists a conclusive test for the establishment of obligations *erga omnes* sans being the consequence of (or at all relying on) *jus cogens* norms and if not, whether such a test can be established.

Chapter 2: *Jus Cogens*

1. Introduction

The debate surrounding the concept of peremptory norms of general international law (*jus cogens*) has gained much momentum in recent years and the term itself has become popular in the sphere of public international law.[1] The growing literature on the topic has sparked heated debates across the globe and has led to a proliferation of scholarly opinions regarding the meaning of the concept and more controversially, remains the contours of *jus cogens* beyond the Vienna Convention on the Law of Treaties (VCLT).[2] Nonetheless, any attempt at clarifying the legal framework regulating *jus cogens* norms must begin with an analysis of Article 53 of the VCLT.[3]

This chapter seeks to clarify the precise legal content of *jus cogens*, including the process by which international norms might qualify as peremptory norms. This is done in order to have a clear point of comparison when assessing obligations *erga omnes* in the subsequent chapters and the extent to which they can relate to *jus cogens*. In other words, since the specific features of obligations *erga omnes* cannot be fully appreciated if they are interpreted in isolation, this chapter lays the content for which such obligations must be assessed, that is, against *jus cogens* and subsequently, beyond *jus cogens*. This makes a valuable contribution to the overall aim of the study as it allows us to understand the relationship between *jus cogens* norms and obligations *erga omnes* better; it allows us the opportunity to be able to carve out exactly what *jus cogens* is, so that in the subsequent chapter we are able to carve out what *erga omnes* is without confusing it with *jus cogens*. This in turn, will allow us the opportunity to observe what and where the confusion between the two concepts origanates from.

[1] See Carnegie Endowment for International Peace *The Concept of Jus Cogens in Public International Law Papers and Proceedings* (1967); L Hannikainen *Peremptory Norms (Jus Cogens) in International Law: Historical Development* (1998); JA Frowein 'Ius Cogens' (2013) *Max Plank Encyclopedia of Public International Law*.

[2] See for example G Schwarzenberger 'The problem of International Public Policy' (1965) 18 *Current Legal Problems* 191 – 214; J Barberis 'La liberte de traiter des Etats et *jus cogens'* (1970) 30 *Zeitschrift fur auslandisches offentliches Recht and Vilkerrecht* 19 – 45; C Roxakis *The Concept of Jus Cogens in the Law of Treaties* (1976); E Suy & A Lagerwall 'Article 54 / Article 64' in O Corten & P Klein *The Vienna Conventions on the Law of Treaties: A Commentary* (2011) 1224-1235, 1455-1480.

[3] See ME Villiger *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 661-678.

The chapter will start with a historical overview of the evolution of the concept of *jus cogens* norms in section 2. This section will analyse the evolution of *jus cogens* in international law, including the period leading to the adoption of the VCLT. The aim of the section is to show the progressive development of *jus cogens* over the years and its perception today. The chapter proceeds to section 3 which will then analyse the criteria or requirements for a *jus cogens* norm. To do this, the section will examine the elements that should be present before a rule or principle can be called (or elevated to) a norm of *jus cogens*. However, it must be noted that the identification of *jus cogens* norms is not an easy one as there is no simple criterion by which to identify a *jus cogens* norm.[4] This complexity, may be the basis upon which *jus cogens* becomes conflated with *erga omnes*. Accordingly, it is important to consider Article 53 of the VCLT which provides the basic framework for the constitutive elements of *jus cogens*,[5] to ensure an independent assessment of *jus cogens* without confusing it with *erga omnes*. Section 4 will then assess a core set of elements that have emerged in State practice and international jurisprudence in the characterisation of *jus cogens* norms.

2. Historical Overview and the Development of *Jus Cogens* over time

Even prior to the adoption of the VCLT, some international lawyers (natural law proponents) agreed that some principles of international law were so important that

[4] United Nationals General Assembly, Official Records (2016) Seventy First Session, Statement of Sudan, A/C.6.71/SR.25, para 73 available online at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/349/02/PDF/N1634902.pdf?OpenElement [accessed 21 April 2021]; see para 2 of the Commentary to Draft Article 50 of the Draft Articles on the Law of Treaties (1966), *Yearbook of the International Law Commission*, vol II, United Nations Publications, Sales no. 67. V2, Part II, Chap. II, Section C; see also International Law Commission Sixty Ninth Session, Second Report on *jus cogens* by Dire Tladi, Special Rapporteur (2017) 16 (hereafter 'Second Report'), available online at https://undocs.org/pdf?symbol=en/A/CN.4/706 [accessed 18 February 2021].

[5] During the debate in the Sixth Committee in 2016, various States stressed that the criteria for *jus cogens* should be based on Article 53 of the Vienna Convention on the Law of Treaties, 1969. Although Article 53 provides 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, to this end, see U Linderfalk 'The creation of *jus cogens* – making sense of Article 53 of the Vienna Convention' (2011) 71 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht : Heidelberg Journal of International Law* 362; T Weatherall *Jus cogens: International law and social contract* (2015) 6; see also Second Report (n 4 above) 16 – 18 where the Special Rapporteur cites the following authorities in support of this conclusion: the statement by Czechia (A/C.6/71/SR.24 para. 72); see also the statements by Canada (A/C.6/71/SR 27 para. 9); Chile (A/C.6/71/SR 25 para. 101); China (A/C.6/71/SR.24 para. 89); the Islamic Republic of Iran (A/C.6/71/SR.26 para 118: "The aim of the Commission's work on the topic was not to contest the two criteria established under Article 53 ... on the contrary the goal was to elucidate the meaning and scope of the criteria ...") and Poland (A/C.6/71/SR.26 para. 56); see further, the statement by Ireland (A/C.6/71/SR.27 para. 19: "Her delegation agreed with the view that Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties should be central to work on the topic...").

they ought to be obligatory and binding upon all States.[6] The concept of *jus cogens* finds its origins in the natural law thinking approach that there are certain rules of international law that are not only binding on States without the consent of such States, but also regardless of the State's express opposition to be bound by the norms.[7] For example, in 1758, Vattel expressed that natural law is the necessary law of States, and because of its 'immutable' force, all States are bound by such law, and if any one State acts against such law, it has violated obligations *erga omnes*.[8] In his words, he wrote:

> …the law which arises from this application, and the obligations resulting from it, proceed from that immutable law founded on the nature of man; and thus the law of nations certainly belongs to the law of nature: it is therefore, on account of its origin, called the natural, and, by reason of its obligatory force, the necessary law of nations. That law is common to all nations; and if any one of them does not respect it in her actions, she violates the common rights of all the others.

This expression by Vattel, seems to fit the description for what is now known as a norm of *jus cogens*. The concept of *jus cogens* norms overrides the notion that international

[6] See firstly, H Grotius *The Right of War and Peace in Three Books* (1652) who indicates that 'what the law allows cannot be contrary to the law of nature'; see also EG Lorenz 'Commercial Arbitration – International and Interstate Aspects' (1934) 43 Yale Law Journal 716; A Verdross 'Forbidden Treaties in International Law' (1937) 31 American Journal of International Law 571. In a recent publication AC de Beer *Peremptory norms of general international law (jus cogens) and the prohibition of terrorism* (2019) 62 supports the view that the premise of *jus cogens*, that certain rules of law are binding upon all States without exception, predates the VCLT.

[7] E de Vattel *Law of Nations, or Principles of the Law of Nature Applied to Conduct and Affairs of Nations and Sovereigns* (1758) available online at https://oll.libertyfund.org/title/whatmore-the-law-of-nations-lf-ed#Vattel_1519_93; see L Oppenheim *International law: A Treatise* (1905) 528; see also generally J Vidmar 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?' in De Wet & Vidmar (eds.) *Hierarchy in International Law: The Place of Human Rights* (2012); AC de Beer *Peremptory norms of general international law (jus cogens) and the prohibition of terrorism* (2019) 62.

[8] Vattel (n 7 above).

law is a voluntary based legal system.[9] This means, rules of *jus cogens* permit no derogation as they derive their origin from a higher source, namely, natural law.[10]

De Beer notes that although the idea of peremptory, non-derogable norms was firmly rooted in natural law, 'it eventually received a positivist slant with its formal inclusion in' what eventually became Article 53 of the VCLT.[11] In the text of Article 53, the International Law Commission (ILC) established the definition of *jus cogens* and from the definition we are able to deduce the criteria by which norms must comply to qualify as *jus cogens*.[12]

The established criteria, as we know it today, was developed by Sir Humphrey Waldock, the then Special Rapporteur on the Law of Treaties. During his tenure as Special Rapporteur, he concluded six reports which enabled the ILC to consider draft articles on the law of treaties.[13] In his second report, Sir Waldock proposed a working definition for '*jus cogens'*, defining the term as:

> a peremptory norm of general international law from which no derogation is permitted except upon a ground specifically sanctioned by general international law, and which may be modified or annulled only by a subsequent norm of general international law.[14]

In that report, he also proposed Draft Article 37 which provided that:

[9] See commentators who generally agreed that some rules of international law are applicable to all States independent of the States will to be bound by the rules: Von Martens *Precis de Droit de gens* (1864); R Phillimore *et al Commentaries upon International Law* (1879), W Hall *A Treatise on International Law* (1884). Although in the early 20th century, the idea of positivism also started to gain momentum, for example in the case of *SS Lotus, France v Turkey* (7 September 1927) Permanent Court of International Justice Ser A No. 10 Case 18 para 44, the Court observed that international law rules are only binding upon States that freely accept them as binding, numerous events post the second world war indicated a shift from this view – to one where international law is believed to impose limits on the idea of State sovereignty. See D Tladi & P Dlagnekova 'The will of the State, consent and international law: piercing the veil of positivism' (2006) *South African Public Law* 112, these scholars suggest that the positivistic approach to international law was countered by natural law proponents who base the authority of international law sources on an ideal that is extra-consensual.

[10] See GM Danilenko 'International Jus Cogens: Issues of Law-Making' (1991) *European Journal of International Law* 42-65; De Beer (n 7 above) 62 who discusses the development and evolution of the concept of *jus cogens* over time.

[11] See De Beer (n 7 above) 63; see also YB Gülgeç 'The problem of *jus cogens* from a theoretical perspective' (2017) 66 *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 86.

[12] See Article 53 of the Vienna Convention on the Law of Treaties (VCLT), 1969; see also De Beer (n 7 above) 63. An assessment of these requirements reveals that there exists no single theory for adequately synthesising the uniqueness of *jus cogens* in international law. To this end, the peremptory force of *jus cogens* may be best understood as an interaction between natural law and positivism.

[13] See reports available online at https://legal.un.org/ilc/guide/1_1.shtml.

[14] Second Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, *Yearbook of the International Law Commission* (1963) 39 available online at https://legal.un.org/ilc/documentation/english/a_cn4_156.pdf [accessed 23 March 2021].

> a treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[15]

The ILC agreed to refer the Draft Article to the Drafting Committee.[16] In 1966, the wording of the Draft Article was discussed once more by the ILC, this time, as Draft Article 50. The ILC opined that the view that some rules of international law are so important that they cannot be derogated from by consensual acts of States is proving too difficult to reject, and that in codifying the law of treaties, the ILC must acknowledge the existence of peremptory norms of international law that are non-derogable by States and which may only be modified by subsequent norms of the same character.[17] This provision, with minor modifications, is what later became Article 53 of the VCLT.

Since the adoption of the VCLT, the concept of *jus cogens* has received much international attention. To date, *jus cogens* is widely recognised and cited by international scholars.[18] The concept has been subject to countless discussions in international, regional and domestic courts.[19] Nevertheless, the precise nature of *jus cogens norms*, which norms qualify as *jus cogens*, and the consequences of *jus cogens* in international law remain the subjects of much contemporary debates.[20] The ILC considered the topic of *jus cogens* a plausable area of law that falls within its mandate to promote the progressive development and codification of international law when it decided to place the topic in its long-term working programme.[21] Fittingly, the

[15] See Report of the International Law Commission (ILC) on the work of its Fifteenth Session, 6 July 1963, Official Records of the General Assembly, Eighteenth Session, Supplement (A/5509) *Yearbook of the International Law Commission* (1963) available on https://legal.un.org/ilc/documentation/english/reports/a_cn4_163.pdf [accessed 23 March 2021].

[16] See De Beer (n 7 above) 66.

[17] See De Beer 66 (n 7 above), see also Summary records of the 877th Meeting A/CN/4/SR877 *Yearbook of the International Law Commission* (1966) vol 1 (part 2) 227 – 231 available online at https://legal.un.org/ilc/documentation/english/summary_records/a_cn4_sr877.pdf [accessed 28 March 2021]. Although some States raised concerns that *jus cogens* was not well established under international law and only constituted a new or emerging aspect of international law, the existence of *jus cogens* norms was widely supported by States, see for example the statements by Mr Suarez (Mexico) at the 52th Meeting, 294 paras 6-8 indicating that the existence of *jus cogens* norms is beyond doubt; similarly supported by Mr Yasseen (Iraq) 52nd Meeting, 295 para 21. For a detailed overview of states that supported the existence of *jus cogens*, see De Beer (n 7 above) 67 at footnote 33. See also D Tladi '*Jus cogens* in the Report of the International Law Commission 66th Session' (2014) A/69/10 Annex 274 - 277; see further A McNair *The Law of Treaties* (1961) 215.

[18] See Tladi & Dlagnekova (n 9 above); see also Vidmar (n 7 above) 2-17; A Orakhelashvini *Peremptory Norms in International Law* (2008); R Kolb *Peremptory International Law Jus Cogens – A general Inventory* (2015); De Beer (n 7 above) 61-101.

[19] See discussion by De Beer (n 7 above) 69 at footnote 39.

[20] D Tladi (n 17 above).

[21] See Report of the ILC on the work of its 66th Session (2014) A/69/10 Supplement No 10 at 240; See also the Report of the ILC on the work of its 67th session A/RES/70/236 (2015) para 7.

ILC does not discuss the concept of *jus cogens* in a vacum. Much like this study, albeit more brief, the ILC considers the concepts' relation to obligations *erga omnes*,[22] and State responsibility.[23]

In order to be more elaborative on the *jus cogens* discussion, the subsequent section considers the content of Article 53 of the VCLT to assess the criteria for *jus cogens* as well as give consideration to the core characteristics of *jus cogens* beyond the VCLT.

3. Examining the Identification of Peremptory Norms of General International Law (*Jus Cogens*)

It is widely accepted that Article 53 of the VCLT contains the definition of *jus cogens*.[24] Various authors have interpreted this definition as setting out the requirements that must be satisfied to qualify a norm with the status of *jus cogens* and numerous reconfigurations of the criteria that must be satisfied have been proposed by such authors.[25] Some propose that texually, Article 53 of the VCLT sets out a number of cumulative requirements, namely, (i) a *jus cogens* norm is a norm accepted and recognised by the international community of States as a whole;[26] (ii) as a norm from which no derogation is permitted;[27] and (iii) is a norm of general international law.[28]

Others, such as Knuchel, reconfigure the elements from the provision differently. For example, Knuchel's interpretation of the definition is that it presents us with the following requirements, (i) a norm of general international law, (ii) acceptance and recognision as a norm from which no derogation is permitted and (iii) such norm may only be modified by a subsequent norm of *jus cogens*.[29] Notwithstanding this, the

[22] First report on *jus cogens* by Dire Tladi, Special Rapporteur (2016) 3; See Third report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur (2018) generally.
[23] Second report on *jus cogens* (n 4 above) 20, 44; Third report on peremptory norms of general international law (n 22 above) 29.
[24] See the discussions on De Beer (n 7 above) 69; Gülgeç (n 11 above) 73.
[25] See L Alexidze 'Legal Nature of Jus Cogens in Contemporary International Law' (1981) *Collected Courses of the Hague Academy of International Law* 172-270; D Shelton 'Normative Hierarchy in International Law' (2006) 100 *The American Journal of International Law* 299 – 304; C Djeffal 'Commentaries on the Law of Treaties: A Review Essay Reflecting on the Genre of Commentaries' (2013) 24 *The European Journal of International Law* 1226-1227; J Menkes 'Article 53 of the Vienna Convention on the Law of Treaties – Codification or Development?' (2013) 2 *Polish Review of International and European Law* 18 – 26; N Gagnon-Bergeron 'Breaking the Cycle of Deferment: Jus Cogens in the Practice of International Law' (2019) 15 *Utrecht Law Review* 52-57; U Linderfalk *Understanding Jus Cogens in International Law and International Legal Discourse* (2020) 7-9, 110-133,
[26] As above.
[27] As above.
[28] As above.
[29] S Knuchel *Jus Cogens: Identification and Enforcement of Peremptory Norms* (2015) 49-136.

Special Rapporteur on peremptory norms of general international law has commented that only two requirements appear from the text of Article 53.[30] First, the norm must be a norm of general international law. Second, same norm must be accepted and recognized as non-derogable and can be modified only by a subsequent norm of *jus cogens*.[31]

According to the Special Rapporteur's interpretation of Article 53, the supposed 'third element' identified by Knuchel is not a criterion but rather describes how an existing norm of *jus cogens* can be modified.[32] Moreover, the textual breakdown of Article 53 above also suggests the existence of three requirements. However, the Special Rapporteur finds that the supposed 'third requirement' identified in the textual approach to Article 53 renders the first element tautologous as 'general international law' must be 'generally accepted and recognised by the international community'.[33] This means for a rule to qualify as *jus cogens*, it essentially has to meet two requirements per the Special Rapporteur's proposed interpretation of Article 53 of the VCLT. Namely, (i) it must be a norm of general international law, (ii) that is accepted and recognised as a norm from which no derogation is permitted. This construction had received the support of the ILC.[34]

Authors such as Linderfalk are of the view that while Article 53 reflects the formal requirements that must be complied with in order for a norm to qualify as *jus cogens*, it does not necessarily explain how norms of *jus cogens* are created, rather, it merely contemplates the basis upon which *jus cogens* norms can be founded.[35]

In addition to the elements identified in Article 53 of the VCLT, practice, doctrine and the literature surrounding this topic reveal a core set of characteristics that give more content to the notion of *jus cogens*.[36] De Beer, for example, is of the view that these characteristics express 'the typical features or qualities of *jus cogens* norms which flow from and are a necessary consequence of the criteria'.[37] The Special Rapporteur had

[30] See Second Report (n 4 above) 18.
[31] As above.
[32] As above.
[33] See Second Report (n 4 above) 19.
[34] See the Report of the International Law Commission (2019) (A/74/10) where the ILC endorses Draft Conclusion 4 of the Draft Conclusions set out by the special rapporteur. Draft Conclusion 4 indicates the two requirements for the identification of *jus cogens* norms as indicated above.
[35] Linderfalk (n 5 above) 359 – 364, Linderfalk argues that the process by which *jus cogens* is formed is similar to that of formulating customary international law.
[36] First Report on *jus cogens* (n 22 above) 38.
[37] De Beer (n 7 above) 70.

identified these characteristics in Draft Conclusion 3 paragraph 2 in his first report on *jus cogens*.[38] The ILC Draft Committee provisionally adopted this proposed draft conclusion, as Draft Conclusion 2 at its sixty-ninth session.[39] From that draft conclusion, the following characteristics can be identified: first, *jus cogens* norms are universally applicable. Second, *jus cogens* norms are superior to other norms of international law.[40] Last, *jus cogens* norms serve to protect the fundamental values or interests of the international community.[41] Although these characteristics are not explicitly spelled out in Article 53 of the VCLT, they are commonly welcomed as forming salient characteristics of *jus cogens*.[42] Herewith below, section 3.1 will assess the requirements that establish or elevate a norm to *jus cogens* status as set out in Article 53 of the VCLT, and section 3.2 will assess the core characteristics of *jus cogens*.

[38] First Report (n 22 above) 45.

[39] See ILC 'Peremptory Norms of General International Law (*Jus Cogens*)' Statement of the Chairman of the Drafting Committee, Mr. Aniruddha Rajput (26 July 2017) 2 available online at https://legal.un.org/ilc/documentation/english/statements/2017_dc_chairman_statement_jc.pdf [accessed 13 April 2021].

[40] MK Yasseen 'Reflextions sur la determination du "*jus cogens*" in *Societe francaise pour le droit international' L'elaboration du Droit International* (1975) 206.

[41] First Report (n 22 above) 38. See for example, the statements by Germany (A/C.6/55/SR.14) para 56 where the German delegation expressed its opinion in relation to the need to 'define more clearly' peremptory norms of general international law that 'protected fundamental humanitarian values'; see also the statement in relation to Italy (A/C.6/56/SR.13) para 15 where the delegation expressed the support that peremptory norms protected basic human values. Similarly, Mexico (A/C.6/56/SR.14) para 13 was of the opinion that 'the very concept of peremptory norms had been developed to safeguard the most precious legal values of the community of States' and Portugal (A/C.6/56/SR.14) para 66 espoused that amongst others, the notion of *jus cogens* was grounded on the common belief that such norms seek to protect certain fundamental values of international law. Equally, see cases and advisory opinions such as the *case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Judgment, ICJ Reports (2007) 43; the *case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* Preliminary Objections, Judgment, ICJ Reports (2008) 412; the c*ase concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* Judgment (3 February 2015); *Advisory Opinion concerning the Reservations to the Convention on Genocide*, Advisory Opinion, ICJ Reports (1951) 15 at 23; *Prosecutor v. FurundzÃåija* (Judgement) Case No. IT-95-17/1-T, T.Ch., (10 December 1998) paras 153 - 154, where the Tribunal explicitly pronounced and associated the status of the prohibition of torture as a *jus cogens* norm to the 'importance of the [fundamental] values it protects', noting that '[c]learly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community'. This was quoted with approval by the European Court of Human Rights in *Al-Adsani v. United Kingdom* (Application No. 35763/97), Judgement (21 November 2001) para 30 and in *Michael Domingues v. United States*, Case No. 12.285 (2002) Inter-American Commission on Human Rights, Report No. 62/02 para 49.

[42] First Report (n 36 above) 38; see also comments by the Kingdom of the Netherlands during the 73rd session of the ILC (2021), see page 6 of the report attached in the comments, indicating that the Commissie van Advies voor Volkenrechtelijke Vraagstukken believes that these essential characteristics do indeed reflect the general nature of peremptory norms of general international law (*jus cogens*), report available on https://legal.un.org/ilc/sessions/73/pdfs/english/jc_netherlands.pdf.

3.1. The Criteria for *Jus Cogens*

(i) A Norm of General International Law

Article 53 of the VCLT explicitly provides that *jus cogens* norms are norms of general international law. This criterion speaks to the process by which a *jus cogens* norm acquires its peremptory status.[43] Although there is no generally accepted definition as to what constitutes 'general international law',[44] Tladi argues that the elements that constitute this concept can be inferred from practice and literature.[45] In his analysis of the distinction between general international law and *lex specialis* or treaty law, he concludes that the term 'general' in 'general international law' refers to the scope of applicability. Tladi agrees with Cassesse that the most common manifestation of general international law is customary international law, which may be seen as a common basis for the formation of *jus cogens* norms.[46] Several States have raised support to the idea that customary international law is indeed a basis for the formation of *jus cogens*.[47] Similarly, both international[48] and national[49] jurisprudence show support to this conclusion. An assessment of the ILC's Draft Conclusion 5 on peremptory norms also indicates the ILC's approval of customary international law as a common basis for *jus cogens*.[50] Therefore, for purposes of the criterion established

[43] See S Knuchel *Jus cogens: identification and enforcement of peremptory norms* (2015) 19.
[44] See Second Report (n 4 above) 20; see also R Rivier *Droit international public* (2013) 566.
[45] See Second Report (n 4 above) para 41.
[46] See Second Report (n 4 above) 21; see also discussion regarding what constitutes general international law other than custom as evidenced in international practice in De Beer (n 7 above) 70-74.
[47] See for example statements by Pakistan at the thirty-fourth session of the General Assembly (A/C.6/34/SR.22) para 8, indicating that the principle against the use of force, and its corollary, were *jus cogens* not only by virtue of Article 103 of the Charter of the United Nations, but also 'because they had become norms of customary international law recognized by the international community'. See also the statements by the United Kingdom (A/C.6/34/SR.61) para 46 as well as Jamaica (A/C.6/42/SR.29) para 3 indicating that the right of a peoples self-determination and their independence is a right of customary international law status, and perhaps even a peremptory norm of general international law.
[48] See *Case concerning Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment ICJ Reports (2012) 457 para 99; *Advisory Opinion concerning Legality of the Threat or Use of Nuclear Weapons,* ICJ Reports (1996) 257 para 79; *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) ICJ Reports 14 (27 June 1986) para 274; *Bosnia and Herzegovina v. Serbia and Montenegro* (n 41 above) 161; *Prosecutor v. Delalić, et al*., Case No. IT-96-21-T, Judgment (16 November 1998) Trial Chamber, International Criminal Tribunal for the Former Yugoslavia para 454.
[49] For a detailed discussion with examples of national jurisprudence, see the Report of the ILC, Seventy-first session (29 April–7 June and 8 July–9 August 2019), General Assembly Official Records, Seventy-fourth Session Supplement No. 10 (A/74/10) 160.
[50] See Draft Conclusion 5 and Commentaries thereto on the Report of the International Law Commission (n 34 above) 158 – 164.

in Article 53 of the VCLT, customary international law rules qualify as norms of general international law.[51]

(ii) Acceptance and Recognition of the Norm by the International Community as a Norm from which no Derogation is Permitted

It must be noted, that most norms of general international law are voluntary (*jus dispositivum)*, meaning they can be amended, derogated from and even abrogated by consentual acts of States.[52] But, in order for norms of general international law to become endowed with the status of *jus cogens*, they must meet an additional requirement, namely, such norm must be accepted and recognised by the international community of States as a whole, as a norm which no derogation is permitted.[53] The ILC in its 2019 Report argues that textually, the requirement of acceptance and recognition may seem to presuppose two seperate elements, namely, (i) acceptance and recognition by the international community of States as a whole and (ii) acceptance and recognition of non-derogability.[54] Although this may seem correct, it must be noted that the second element is not itself a criterion by which a norm acquires *jus cogens* status, but on its own, the consequence thereof.[55]

Nonetheless, for purposes of this section, it is sufficient to recall that the international community of States as a whole must accept and recognise that any rules or other norms of *jus dispositivum* that are inconsistent with the candidate norm in question are not only invalid, but void.[56] In other words, the international community of States as a

[51] Second Report (n 4 above) 24. Although this study is much more focused on customary international law as a basis for *jus cogens*, it must be noted that the formation of *jus cogens* does not stop with custom. For example, the Special Rapporteur for *jus cogens* considers that general principles of law also serve as a basis for *jus cogens*.

[52] See also the *case concerning the North Sea Continental Shelf (Federal Republic of Germany v. Netherlands)* Judgment, ICJ Reports (1969); 42 para 72. To the contrary, peremptory norms of general international law are absolute laws that can only be affected by subsequent norms having the same status. For example, see the consideration of the Constitutional Court of Colombia in its *Decision C-291/07* where the Court observed that State consent is of no effect to the binding character of *jus cogens* norms as the purpose of such norms is precisely to transcend issues of State consent. The court observed that *jus cogens* norms fundamentally hold a higher status to other rules of international law and therefore, States cannot deviate from them – in effect, *jus cogens* norms have the ability to limit a State's freedom to conclude treaties and adopt unilateral acts. For a detailed discussion on this see A Miron 'International *Jus Cogens* in National Law' (2018) *Max Planck Encyclopedia of Comparative Constitutional Law* at paras 14-15.

[53] Second Report (n 4 above) 32.

[54] Follow the interpretation of this requirement in the Report of the ILC, see Draft Conclusion 6 and Commentaries thereto (n 34 above) 164 – 165.

[55] Second Report (n 4 above) 37.

[56] As above. Also note that this requirement presupposes a positivist approach to *jus cogens*. It suggests that norms can only achieve *jus cogens* status once they have been consented to in some way by States. However, this view is contrary to, or at least at odds with, the idea of higher set of norms from which no derogation, even if by consent or will of States, is permissible. See for example *Separate opinion of Vice-*

whole must accept that unlike other norms of general international law, the norm in question is universally applicable and is not subject to fragmentation.[57] That is, it is not possible to 'repeal or abrogate, to destroy and impair the force and effect [or] to lessen the extent of authority'[58] of the norm in question. The element of acceptance and recognition is a core element that underlies the elevation of a norm to *jus cogens* status.[59] It has also been argued that this element implies a double standard of acceptance.[60] First, acceptance as a general norm of international law,[61] and then as a peremptory norm of international law.[62]

Fittingly, De Beer points out that the wording of Article 53 of the VCLT, 'accepted and recognised by [the] international community of States as a whole as a norm from which no derogation is permitted'[63] has been subject to various debates.[64] Some authors support the positivist and voluntarist view that the words 'accepted and recognised' in Article 53 denote State consent to the peremptory character of the candidate norm in question.[65] However, the non-derogable character of *jus cogens* makes it difficult to accept the consent based argument. This is because non-derogability implies that *jus cogens* norms do not rely on, nor are they affected by State consent.[66]

De Beers argues that 'it is hardly conceivable that, if States withold their recognition of and acceptance that a rule is non-derogatory, that rule no longer enjoys *jus cogens*

President Ammoun in the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) 77 indicating that derogation from *jus cogens* norms is not permissible under any circumstances, Raphaële also holds a similar view in R Rivier *Droit International Public* (2013) 565.

[57] Second Report (n 4 above) 38.

[58] See A Orakhelashvili 'Audience and authority – the merit of the doctrine of *jus cogens*' (2015) *Netherlands Yearbook of International Law* 73.

[59] Second Report (n 4 above) 38.

[60] See E de Wet '*Jus cogens* and obligations *erga omnes'* in D Shelton (eds.) *The Oxford Handbook of International Human Rights Law* (2013) 542, where she notes that Article 53 of the VCLT, by implication, suggests that 'a particular norm is first recognised as customary international law, whereafter the international community of States as a whole further agrees that it is a norm from which no derogation is permitted. The international community of states as a whole would therefore subject a peremptory norm to "double acceptance"'.

[61] Here, the norm is accepted as law for customary international law purposes, or is recognised by civilised nations as a general principle of international law.

[62] Second Report (n 4 above) 38 – 39. Here, the norm is accepted as a norm whose consequence is non-derogability.

[63] VCLT (n 12 above), Article 53.

[64] See De Beer (n 7 above) 75; see E Criddle and E Fox-Decent 'A fiduciary theory of *jus cogens*' (2009) 34 *Yale Journal of International Law* 339.

[65] See De Beer (n 7 above) 75, see also D Shelton 'Hierarchy in international law' (2006) 100 *American Journal of International Law* 299.

[66] See De Beer (n 7 above) 76; see also M Koskenniemu *From Apology to Utopia: The Structure of International Legal Argument* (1989) 363.

status'.[67] Evidently, the phrase 'international community of States as a whole' is not intended to imply that each and every single State must recognise and accept the norm as *jus cogens*.[68] In an attempt to interpret this phrase, Ambassador Yasseen, the then Chairperson of the Drafting Committee of the Vienna Diplomatic Conference clarified that the fact that the provision requires a peremptory norm to be recognised by the international community of States as a whole does not necessitate the consensus of all individual States across the world.[69] In essence, the 'recognition by the international community of *States as a whole'* (own emphasis) does not mean that it should be a norm that every single State in the world individually recognises, such that if there is one deviant State, the norm is defeated.[70] Such an interpretation would be logically irreconcilable as it would mean that a State would defeat the norm by refusing to recognise it and engaging in practice that is incompatible with it. Therefore, although the threshold for gaining peremptory status is high, it does not require the recognision of all States, it is sufficient if a very large majority of States recognised the norm in question as a norm of *jus cogens*.[71] In effect, if a State refused to accept the peremptory character of a norm, or if that State was supported by a very small number of States, the acceptance and the recognition of the norm as peremptory by the international community would not be affected. This interpretation was met with approval by the ILC when it adopted Draft Conclusion 7 on peremptory norms.[72]

Since a *jus cogens* norm can only be modified by a subsequent norm of similar status, contrary to dispositional custom, the principle of persistent objector as well as reservation to the norm are inadmissible.[73] Therefore, once a norm is established as a peremptory norm of general international law, all States are bound by the norm and

[67] See De Beer (n 7 above) 76.
[68] See De Beer (n 7 above) 77.
[69] See Statement by Mr Yasseen, Chairman of the Drafting Committee, Official Records of the United Nations Conference on the Law of Treaties (1968) 80th meeting, para 12 available online https://documents-dds-ny.un.org/doc/UNDOC/GEN/G69/162/46/PDF/G6916246.pdf?OpenElement [accessed 27 April 2021].
[70] See M Koskenniemi 'From Apology to Utopia: the structure of International Legal Argument' *Cambridge University Press* (2005) 324; see also G Boas *Public International Law: Contemporary Principles and Perspectives* (2012) 98; see also Vidmar (n 7 above) 26.
[71] See E de Wet 'The International Constitutional Order' 55 *International and Comparative Law Quarterly* (2006) 61; moreover, support for this position can be found in the *case concerning the Barcelona Traction, Light and Power Company Ltd (Belgium v. Spain)* Second Phase, ICJ Reports (1970) 32. Although the ICJ did not expressly refer to *jus cogens*, it implied as much by the types of norms it mentioned as examples of *erga omnes* norms (i.e. prohibition of unilateral use of force, genocide and the prohibition of slavery and racial discrimination).
[72] See Draft Conclusion 7 and Commentaries thereto on the Report of the International Law Commission (n 34 above) 167 para 5.
[73] T Kleinlein '*Jus Cogens* as the "Highest Law"? Peremptory Norms and Legal Hierarchies' (2015) 46 *Netherlands Yearbook of International Law* 173–210.

no State may derogate from the norm, whether the State consents or not to the norm is of no effect to the binding force of the norm upon the State.[74]

This is made clear in respect of the incident with South Africa, where South Africa's government claimed that it was a persistent objector to the prohibition of racial discrimination and apartheid and this declaration was universally rejected on the basis that peremptory law does not exempt persistent objectors.[75] In this regard, one would consider that the concept of *jus cogens* norms is reminiscent of 'the Roman law distinction between *jus strictum* (strict law) and *jus dispositivum* (voluntary law) as well as the natural law thinking according to which rules exist independent of the will of the States and law makers'.[76]

3.2. Core Characteristics

In addition to the elements identified in Article 53 of the VCLT, practice, doctrine and the literature surrounding the topic of *jus cogens* norms reveal a basic set of characteristics that are fundamental to the notion of *jus cogens*.[77] The ILC, in Draft Conclusion 2 describes norms of *jus cogens* as norms that (i) protect the fundamental values of the international community, (ii) are hierarchically superior to other norms of international law and (iii) are universally applicable.[78] A discussion of these characteristics is ventured into below in order to fully conceptualise the concept of *jus cogens* before venturing into its comparison with *erga omnes*.

(i) Protection of Fundamental Values

The ILC has explicitly recognised that *jus cogens* norms reflect and protect fundamental values of the international community.[79] The ILC notes that State practice

[74] See Koskenniemi (n 70 above) 99; see also Third Report on Peremptory norms of general international law (n 22 above) 28 where the Special Rapporteur makes clear that 'a reservation to a treaty provision that reflects a peremptory norm of general international law does not affect the binding nature of that norm, which shall continue to apply'.
[75] Vidmar (n 7 above) 26.
[76] International Law Commission 'Report of the Study Group on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' (A/CN.4/L.682) (2006) para 361; see also De Wet (n 60 above).
[77] First Report (n 22 above) 38.
[78] See Draft Conclusion 2, Peremptory Norms of General International Law (*jus cogens*) provisionally adopted by the ILC Drafting Committee at its 68th and 69th sessions of the ILC (2017) Annex, available online at https://legal.un.org/ilc/documentation/english/statements/2017_dc_chairman_statement_jc.pdf [3 May 2021]..
[79] As above.

as well as judicial jurisprudence, both at national and international spheres,[80] evidence the consensus that *jus cogens* norms reflect and protect fundamental values of the international community. Fittingly, *jus cogens* rules must be understood as rules that prevent States from violating fundamental interests of the international community.[81] The International Court of Justice (ICJ) in *Bosnia Genocide*[82] and in the Advisory Opinion on *Reservations to the Genocide Convention*;[83] the ICTY in its *FurundzÃåija*[84] decision and the Inter-American Commission on Human Rights in its *Michael Domingues* decision,[85] all support the idea that *jus cogens* norms protect the fundamental values and interests of the international community and no reservations may be made to them.[86]

On a domestic level, the Supreme Court of Argentina has observed that the purpose of *jus cogens* is to 'protect States from agreements concluded against some values and general interests of the international community of States as a whole'.[87] In the same vein, the German Constitutional Court held that *jus cogens* rules are 'firmly [grounded] in the legal conviction of the [international] community of States, which are indispensable to the existence of public internationl law, and the compliance with which all members of the community of States may require'.[88] Similarly, the South

[80] See for example *Bosnia and Herzegovina v. Serbia and Montenegro* (n 41 above) 43; Croatia v. Serbia, Preliminary Objections (n 41 above) 412; *Croatia v. Serbia*, Judgment (n 41 above); *Reservations to the Convention on Genocide* (n 41 above) 23.

[81] K Hossain 'The Concept of Jus Cogens and the Obligation Under The UN Charter' (2005) *Santa Clara Journal of International Law* 74.

[82] *Bosnia and Herzegovina v. Serbia and Montenegro* (n 41 above) 43.

[83] *Reservations to the Convention on Genocide*, Advisory Opinion, ICJ Reports (1951) 23.

[84] *Prosecutor v. Furundžija*, Judgement, Case No. IT-95-17/1-T, T.Ch., 10 December 1998 paras. 153 and 154, where the Tribunal expressly linked the status of the prohibition of torture as a *jus cogens* norm to the "importance of the values it protects", noting that "[c]learly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community".

[85] *Michael Domingues v. United States*, Case No. 12.285 (2002), Inter-American Commission on Human Rights, Report No. 62/02 para. 49.

[86] For a thorough discussion on this, see the Second report on jus cogens (n 4 above) 10 – 14; J Frowein 'Reservations and the International Ordre Public' in J Makarczyk *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (1996) 403-412; K Kawasaki 'A brief on the Legal Effects of Jus Cogens in International Law' (2006) 34 *Hitotsubashi Journal of Law and Politics* 27-43; J Verhoeven 'Droit des traits, reserves et ordre public (*jus cogens*)' (1994) 113 *Journal des Tribunaux* 765-768.

[87] *Recurso de Hecho en la Causa* No. 259 c. *Arancibia Clavel, Enrique Lautaro s/ delitos de homicidio calificado, asociación ilícita y otros*, 259 (Argentina: Corte Suprema de Justicia) 24 August 2003, para 29 available online at https://www.refworld.org/cases,ARG_SC,41c6dc1a4.html [accessed 2 June 2021].

[88] Order of the Second Senate, 26 October 2004, 2 *BvR* 955/00 2, *BvR* I038/0 I para 97, see discussion from the Permanent Mission of the Federal Republic of Germany to the United Nations, New York available online at https://legal.un.org/ilc/sessions/68/pdfs/english/jc_germany.pdf [accessed 5 June 2021]; see also See Miron (n 52 above) para 8. For more domestic case law discussions see Second Report (n 4 above) 10 – 11.

African Constitutional Court in its *Kuanda* decision observed that norms of *jus cogens* 'reflect the most fundamental values of the international community'.[89] The Special Rapporteur in his second report points to a multitude of authorities that 'ought to be a sufficient basis for the [conclusion] that norms of *jus cogens* protect the fundamental values of the international community.[90]

(ii) Hierarchical Superiority

It is generally accepted that peremptory norms of general international law enjoy a higher status in the normative hierarchy of sources of international law.[91] Some authors describe *jus cogens* as a form of 'supercustom'[92] that holds the highest hierarchical position amongst other norms of international law.[93] The ILC has already concluded that *jus cogens* norms are of a higher status to other rules of international law and according to the Special Rapporteur, that conclusion on its own, ought to be a sufficient basis upon which to include hierarchical superiority as a characteristic of *jus cogens*.[94] This conclusion is well supported by States,[95] judicial decisions,[96] and

[89] Constitutional Court of South Africa, *Kaunda and Others v. President of the Republic of South Africa* 2005 (4) SA 235 (CC) 169.

[90] See Second Report (n 4 above) 10. For a recent, comprehensive and specialised discussion on the subject, see PG Teles 'Peremptory Norms of General International Law (Jus Cogens) and the Fundamental Values of the International Community' in Tladi *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (2021) 44 – 67.

[91] See Yasseen (n 40 above) 206, who espoused that a peremptory norm of general international law is a norm that is hierarchically superior to other rules of international law in view of its importance to the international community of states; see also Kolb (n 18 above) 11. See further and generally, M den Heijer & H van der Wilt '*Jus Cogens* and the humanization and fragmentation of international law' (2015) *Netherlands Yearbook of International Law: Jus Cogens — Quo Vadis?*.

[92] See SD Murphy *Principles of International Law* (2018) 106 – 108 who refers to *jus cogens* as super customary international law. See also, the reference to super customary international law in recent discussions by M Garg 'Doctrine of Jus Cogens under International Law' *Pleaders Intelligent Legal Solutions: Blog* (2020) available online at https://blog.ipleaders.in/jus-cogens/ [accessed 2 November 2021]; MJ Alarcon 'Consequences of Recognizing Environmental Protection as an Emerging *Erga Omnes* Obligation in the ISDS Context' (2021) *Kluwer Arbitration Blog* available online at http://arbitrationblog.kluwerarbitration.com/2021/08/31/consequences-of-recognizing-environmental-protection-as-an-emerging-erga-omnes-obligation-in-the-isds-context/ [accessed 2 November 2021].

[93] See C Focarelli 'Promotional *jus cogens*: A critical appraisal of *jus cogens*' legal effects' (2008) 77 *Nordic Journal of International Law* 429-459; De Beer (n 7 above) 83.

[94] See Second Report (n 4 above) 12; see also the conclusions of the work of the Study Group on Fragmentation of International Law, *Yearbook of the International Law Commission* (2006) (2) Part Two (*United Nations Publication*, Sales No. 12.V.13 (Part 2)), chap. XII, sect. D.2, paras 33 - 34.

[95] See the statements by the Netherlands (A/C.6/68/SR.25) para 101 indicating that *jus cogens* is hierarchically superior in the international legal system; see also the United Kingdom (Official Records of the United Nations Conference on the Law Treaties) First Session (1968) Summary Records of the plenary meetings and of the meetings of the Committee of the Whole, 53rd meeting para 53 where the delegation agreed that in a well-structured international society there [is] a need for rules of international law that [are] of a superior status to rules of a dispositive nature from which States could contract out of, available online at https://legal.un.org/diplomaticconferences/1968_lot/docs/english/sess_1/a_conf39_c1_sr53.pdf [accessed 26 August 2021].

[96] See for example, *Prosecutor v. FurundzÃåija* (n 41 above) para 153 '…a peremptory norm or *jus cogens* [is] a norm that enjoys a higher rank in the international hierarchy than treaty law and even ordinary

even scholarly writings.[97] The Special Rapporteur notes in his first report that 'to the extent that *jus cogens* implies hierarchy, then natural law, which is premised on the idea of higher norms, whether derived from divinity, reason or some other source of morality, would seem to be a natural basis for *jus cogens*'.[98] Fittingly, proponents of natural law argue that the idea of international rules which are normatively placed higher to 'and beyond the reach of State consent (or the free will of State[s]) can only be explained through the natural law idea of superior law, which is based on morality and values'.[99]

(iii) Universal Application

Generally, rules of international law are only binding upon States that have agreed to them, in case of treaties. On the other hand, in the case of customary international law, such rules would be binding to States that have not persistently objected to the formation of the customary rule in question.[100] However, *jus cogens*, is an exception to this basic rule as it presupposes the existence of rules 'binding upon all members of the international community'.[101] Fittingly, unlike with dispositional custom, the principles of persistent objector as well as reservation are not applicable to norms of *jus cogens*.[102]

In effect, this means that the idea that *jus cogens* norms are universally applicable simply denotes that *jus cogens* norms are applicable to all States.[103] The very fact that

customary rules'; see also paragraph 1 of the joint dissenting opinion of Judges Rozakis and Caflisch in the *case of Al-Adsani v. The United Kingdom (Application no. 35763/97)* European Court of Human Rights (2001) 29, where they acknowledged that 'the majority recognise that [*jus cogens* norms are] hierarchically [superior to] any other rule of international law'). For further discussions on this, see the Second Report (n 4 above) 12 - 15.

[97] See for example G Danilenko 'International *jus cogens*: issues of law-making' (1991) *European Journal of International Law*; W Conklin 'The peremptory norms of the international community' (2012) *European Journal of International Law* 838 indicating that 'the very possibility of a peremptory norm once again suggests a hierarchy of international law norms with peremptory norms being the "fundamental standards of the international community" at the pinnacle'; see also M Whiteman '*Jus cogens* in international law, with a projected list' (1977) *Georgia Journal of International and Comparative Law* 609; M Janis 'The nature of *jus cogens*' (1988) *Connecticut Journal of International Law* 360.

[98] First Report (n 22 above).

[99] First Report (n 22 above).

[100] See Draft Conclusion 15 of the Draft Conclusions on the identification of customary international law with commentaries for a discussion on the persistent objector rule, available online https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf [accessed 18 February 2021].

[101] GM Danilenko *Law Making in the International Community* (1993) 211; L Alexidze 'The Legal Nature of *Ius Cogens* in Contemporary International Law' (1981) 172 *Recueil de Cours de l'Académie de Droit International de La Haye*.

[102] Kleinlein (n 73 above) 173–210.

[103] Conklin (n 97 above) 837; see C Rozakis *The Concept of Jus Cogens in the Law of Treaties* (1976) 78, see also G Gaja '*Jus Cogens* Beyond the Law of Treaties' (1981) 172 *Recueil de Cours de l'Académie de Droit International de La Haye* 283; J Horowitz 'Regina v. Bartle and the Commissioner of Police for

no State may derogate from *jus cogens* norms serves as evidence of the universal nature of *jus cogens* norms.[104] This characteristic, also establishes the relationship between *jus cogens* norms and obligations *erga omnes* as the universal application of *jus cogens* norms means that these norms give rise to obligations which are owed by and to the international community as a whole.[105]

Once a norm is endowed with the status of a peremptory norm of general international law, all States are bound by the norm and no State may derogate from the norm, whether the State consents (or not) to the norm is inconsequential to the binding force of the norm upon the State.[106] Indeed there is vast support for the idea that *jus cogens* are universally applicable,[107] both in State practice and in jucidial decisions. For example, the ICJ in its *Advisory Opinion on the Reservations to the Convention on Genocide*, referred to 'the universal character… of the condemnation [of] a peremptory norm of international law, genocide'.[108] Similarly, Judge Moreno Quintana in his separate opinion in the *case concerning the Application of the Convention of 1902 governing the Guardianship of Infants*, described peremptory rules of international law to have a universal scope of application.[109]

At a regional level, the Inter-American Court of Human Rights has described *jus cogens* norms as being 'applicable to all States' and as norms which 'bind all States'.[110] The Inter-American Commission of Human Rights also held a similar view in its *Michael Domingues* decision where it observed that peremptory norms of general

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the Metropolis and Others Ex Parte Pinochet: Universal Jurisdiction and Sovereign Immunity for Jus Cogens Violations' (1999) 23 *Fordham International Law Journal* 489-527.

[104] See De Beer (n 7 above) 86.

[105] De Wet (n 60 above) 542; see also De Beer (n 7 above) 86.

[106] See Koskenniemi (n 70 above) 99; see also *case concerning the North Sea Continental Shelf* (n 52 above); See also the Draft Conclusion 15 (n 100 above).

[107] See *Nicaragua v. United States of America* (n 48 above) 190; G Danilenko (n 101 above) 211; L Alexidze 'Legal nature of *jus cogens* in contemporary international law' (1981) *Collected Courses of the Hague Academy of International Law* 246; D Dubois 'The authority of peremptory norms in international law: State consent or natural law?' (2009) *Nordic Journal of International Law* 135 indicating that norms of *jus cogens* are applicable to all States, even to those states that withhold their consent; as well as M Saul 'Identifying *jus cogens* norms: the interaction of scholars and international judges' (2014) *Asian Journal of International Law* 31 indicating that *jus cogens* norms are by their universal nature, meant to bind all States.

[108] See *Advisory Opinion concerning Reservations to the Convention on Genocide* (n 41 above) 23 where the ICJ describes a jus cogens norm to have a universal character.

[109] Separate Opinion of Judge Moreno Quintana in the *case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden)*, Judgment (28 November 1958) 106 – 107 where the court observed that *jus cogens* norms have a universal scope of application available on www.icj-cij.org/docket/files/33/2271.pdf.

[110] See *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of (17 September 2003) requested by the United Mexican States, paras 4 and 5.

international law are binding on all members in the international community regardless of objection, recognition or acquiescence.[111]

At domestic level, the United States Court of Appeals in its *Smith v Socialist People's Libyan Arab Jamahiriya* decision described *jus cogens* norms as those norms that 'do not depend on the consent of individual States but are universally binding by their very nature'.[112] The court was of the opinion that:

> the observance of *jus cogens* is so universally recognized as vital to the functioning of a community of nations, every nation impliedly waives its traditional sovereign immunity for violations of such fundamental standards by the very act of holding itself out as State. No explicit consent is required for a State to accept [*jus cogens* norms as binding upon them]; the very fact that it is a State implies acceptance. It is also implied that when a State violates such a norm, it is not entitled to immunity.[113]

In addition, the United States Court of Appeals for the District of Columbia in *Belhas v. Moshe Ya'Alon* described *jus cogens* norms as norms that are so universally accepted that all members of the internatioanl community are considered bound by them under international law.[114] Comparably, the Swiss Federal Supreme Court has described *jus cogens* norms as norms that bind all subjects of international law.[115] In fact, the Swiss Federal Constitution explicitly provides that no referendum aimed at achieving a constitutional amendment may be in conflict with *jus cogens* norms.[116]

Authors such as Conklin have contributed to the literature, suggesting that peremptory norms possess a universal scope of application.[117] To that extent, no State may derogate from *jus cogens* norms, 'despite the will of the State to do so'.[118]

4. Concluding Observations

[111] *Michael Domingues v. United States*, Case No. 12.285 (2002) *Inter-American Commission on Human Rights*, Report No. 62/02, para 49.
[112] *Smith v Socialist People's Libyan Arab Jamahiriya* 101 F.3d 239 (2nd. Cir. 1996) 242; see also arguments made by the United States in *Nicaragua v United States* (n 48 above) para 313. Other States have expressed similar views about *jus cogens*, equating them to 'universally-recognised principles', see for example the statement by Mongolia, 26th session of the United Nations General Assembly, Sixth Committee, Agenda Item 89: 'Report of the Special Committee on the Question of Defining Aggression' para 34.
[113] *Smith v Socialist People's Libyan Arab Jamahiriya* (n 112 above).
[114] *Belhas v. Moshe Ya'Alon*, 515 F.3d 1279 (District of Columbia Cir. 2008 Cir. 2008) 1291-1292.
[115] *Youssef Nada v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Administrative Appeal, Judgment (14 November 2007) Federal Supreme Court of Switzerland, Case No. 1A 45/2007, ILDC 461 (CH 2007) para. 7.
[116] Article 139 (3), The Federal Constitution of the Swiss Confederation, 1999.
[117] See W Conklin (n 97 above) 838.
[118] See W Conklin (n 97 above) 837.

The above analysis illustrates that Article 53 of the VCLT has laid the foundation for the substantive framework by which *jus cogens* norms must be identified. In addition to Article 53, international practice and jurisprudence reveal a set of key characteristics underlying any norm with *jus cogens* status. However, the criteria or requirements for *jus cogens* as laid out in Article 53 of the VCLT must not be confused with the characteristics of *jus cogens* norms. Article 53 sets out the formal requirements for a norm to qualify as *jus cogens*, whereas practice and jurisprudence reveal the characteristics, that is, in order words, a reflection of the qualities that underlie a *jus cogens* norm. De Beer describes them as 'the necessary consequences of the criteria'.[119] This comprehensive analysis of *jus cogens* and the manner in which *jus cogens* norms are to be identified, form the foundation upon which this study will compare *erga omnes* to *jus cogens*, in order to clarify the conflation between the two, but also to indentify a criteria by which *erga omnes* obligations can be identified without placing reliance on *jus cogens*.

[119] De Beer page 70.

Chapter 3

Erga Omnes: The Conflation of *Jus Cogens* with Other Related Concepts

1. Introduction

The International Court of Justice (ICJ), in its 1970 decision of the *Barcelona Traction* case, gave rise to the concept of obligations *erga omnes* in the realm of international law.[1] The ICJ made a contrast between, on the one hand, obligations *erga omnes* that a State has towards the international community and in whose protection all States have a legal interest, and, on the other hand, obligations of a State *vis-à-vis* another State (obligations *erga omnes partes*).[2] Since its formal introduction into the corpus of international law the concept has fascinated many international law scholars and has been the subject of multiple debates, however, its precise implications remain unclear to this day.[3]

Many international law scholars have placed reliance on defining the term '*erga* omnes' by reference to *jus cogens* norms. Because of this, the theoretical divergence which the two concepts – *erga omnes* and *jus cogens* – 'have caused in the academy has yet to be fully traced'.[4] Although there are several important contributions by

[1] See *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)* Judgment, ICJ Reports (1970) 32 paras. 33-34, in search of a theoretical basis for the universal application of the obligation to prosecute, the ICJ formally introduced the concept of obligations *erga omnes* in the corpus of international law. See a discussion by A Memeti & B Nuhija 'The concept of obligations *erga omnes* in international law' (2013) 14 *New Balkan Politics* 31 - 47; see also DW Christiani 'The "Modern" Concept of *Erga Omnes* to Establish the Obligation of Impunity Eradication: Towards the Primacy Jurisdiction of the International Criminal Court' (2018) 5 (2) *Padjadjaran Jurnal Ilmu Hukum* 214.

[2] *Barcelona Traction* (n 1 above).

[3] C Tams *Enforcing obligations erga omnes in international law* (2005) xiii; see CM Bassiouni 'International Crimes: *Jus Cogens* and Obligations *Erga Omnes*' (1996) 59 *Law and Contemporary Problems* 63-74; OM Arnardottir '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) 28 *European Journal of International Law* 211; C Eggett & S Thin 'Clarification: Obligations *Erga Omnes* in the Chagos Opinion' (2019) *European Journal of International Law* available online at https://www.ejiltalk.org/clarification-and-conflation-obligations-erga-omnes-in-the-chagos-opinion/ (accessed 04 April 2021); see also, the reference to the *erga omnes* concept as 'unclear and ambivalent' in a recent discussion, MJ Alarcon 'Consequences of Recognizing Environmental Protection as an Emerging *Erga Omnes* Obligation in the ISDS Context' *Kluwer Arbitration Blog* (2021) available online at http://arbitrationblog.kluwerarbitration.com/2021/08/31/consequences-of-recognizing-environmental-protection-as-an-emerging-erga-omnes-obligation-in-the-isds-context/ [accessed on 2 November 2021].

[4] As above. The dearth of literature in this area (the relationship between *erga omnes* and *jus cogens*) can be considered an opportunity for the international community, in particular, the law making bodies such as the International Law Commission (ILC) to clarify the relationship. In his reports, the ILC's Special

scholars with regard to the relationship between *jus cogens* and *erga omnes*, most of these contributions are made through the lens of *jus cogens*.[5] On one hand, legal literature has been receiving valuable contributions on the nature of *jus cogens*.[6] On the other hand, the amount of attention received by *erga omnes* in scholarly writing is brief compared to that received by *jus cogens*.[7]

In view of the paucity in scholarly writing with regards to *erga omnes*, this chapter seeks to fill in some of the gaps which exist in relation to the concept by assiduously clarifying the nature, scope and extent of obligations *erga omnes*. The study sets out that the lack of a fixed definition for the notion of obligations *erga omnes* without relying on *jus cogens* presents us with considerable difficulties in the identification and determination of obligations *erga omnes*.

In section 2, the chapter assesses the ICJ's jurisprudence surrounding the concept of *erga omnes*, in particular, this section will consider how the ICJ has avoided making

Rapporteur on Peremptory Norms of General International Law (*Jus Cogens*) has attempted to clarify the relationship briefly, thus, more work on the subject is desirable.

[5] See MC Bassiouni 'International Crimes: *Jus Cogens* and Obligations *Erga Omnes*' (1996) 59 *Law and Contemporary Problems* 63–74 who sees *erga omnes* squarely as a consequence of a given international crime having risen to the level of *jus cogens*. See also K Zemanek 'New Trends in the Enforcement of *Erga Omnes* Obligations' (2000) 4 *Max Planck Yearbook of United Nations Law* 1 - 52; M Petsche '*Jus Cogens* as a Vision of the International Legal Order' (2010) 29 *Penn State International Law Review* 233; as well as E de Wet 'Invoking Obligations *Erga Omnes* in the Twenty-First Century: Progressive Developments Since *Barcelona Traction*' (2013) 38 *South African Yearbook of International Law* 5 – 9.

[6] See a number of scholarly works substantively addressing the topic of *jus cogens* such as E Schwelb 'Some Aspects of International *Jus Cogens* as Formulated by the International Law Commission' (1967) 61 *American Journal of International Law* 946; MW Janis 'Nature of *Jus Cogens*' (1987) 3 *Connecticut Journal of International Law* 359; GA Christenson '*Jus Cogens*: Guarding Interests Fundamental to International Society' (1987) 28 *Virginia Journal of International Law* 585; A D'amato 'It's a Bird, it's a Plane, it's *Jus Cogens*' (1990) 6 *Connecticut Journal of International Law* 1; GM Danilenko 'International *Jus Cogens*: Issues of Law-Making' (1991) 2 *European Journal of International Law* 42; A Bianchi 'Human Rights and the Magic of *Jus Cogens*' (2008) 19 *European Journal of International* Law 491 - 508; J d'Aspremont '*Jus Cogens* as a Social Construct Without Pedigree' (2015) 46 *Netherlands Yearbook of International Law* 85; D Shelton 'Sherlock Holmes and the Mystery of *Jus cogens*' (2015) 46 *Netherlands Yearbook of International Law* 23; S Kadelbach 'Genesis, Function and Identification of *Jus Cogens* Norms' (2015) 46 *Netherlands Yearbook of International Law* 147; R Kolb 'General Principles of Law, *Jus Cogens* and the Unity of the International Legal Order' in M Andenas *et al* (eds.) *General Principles and the Coherence of International Law* (2019) 60–64; A de Beer *Peremptory Norms of General International Law (Jus Cogens) and the Prohibition of Terrorism* (2019); A Alexander 'Ulf Linderfalk: Understanding *Jus Cogens* in International Law and International Legal Discourse' (2020) 41 *Liverpool Law Review* 1; U Linderfalk 'The Emperor's New Clothes – What If No *Jus Cogens* Claim Can Be Justified?' (2020) 22 *International Community Law Review* 139; D Tladi *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Dispositions* (2021).

[7] MM Bradley 'Jus Cogens' Preferred Sister' in Tladi (n 6 above) 194 – 195. Bradley generally refers to *erga omnes* as '*Jus Cogens'* Preferred Sister' in the history of the ICJ. Be as it may, she also acknowledges that 'unlike its "big sister" *erga omnes* has not received' much scholarly attention.

references to *jus cogens,*[8] and has instead relied on *erga omnes* and how this trend has resulted in the conflation of the two concepts.[9] Section 3 will explore the possibilities of using the ILC's work, in particular, the Articles on State Responsibility (and their commentaries) in providing the starting points for analysing and synthesising obligations *erga omnes*. Section 4 will analyse State practice with respect to cases in which States not directly affected by an internationally wrongful act took counter-measures without being held liable for a wrongful act themselves because the violations of international law to which the States were responding to where *erga omnes* in nature and thus allow third States certain rights of reactions. This is done because such an analysis might reveal factors that can be relevant to the identification of *erga omnes* obligations, especially since it is often hard to find a set criteria that is accepted for identifying *erga omnes* obligations.

2. Conflation of *Erga Omnes* and *Jus Cogens*

Erga omnes and *jus cogens* have often been conflated in international law.[10] Since there is no commonly accepted definition for *erga omnes*, multiple legal scholars have placed reliance on the concept of *jus cogens* in order to define *erga omnes*.[11] This follows as a result of the criterion to *jus cogens* in Article 53 of the Vienna Convention on the Law of Treaties (VCLT) compared against the Court's characterisation of *erga omnes* in *Barcelona Traction*. On one hand, repeated verbatim, Article 53 of the VCLT provides that *jus cogens* is 'a norm accepted and recognized by the international community of States as a whole, and as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[12] On the other hand the Court's description of *erga omnes*

[8] The Court usually refers to *jus cogens* in a rather indirect and somewhat distanced manner. See for example in *North Sea Continental Shelf (Federal Republic of Germany v. Netherlands; Federal Republic of Germany v. Denmark)*, Judgment, ICJ Reports (1969) 3, it held that the case gave no reason to enter into the question as to whether the equidistance principle laid down in the 1958 Geneva Continental Shelf Convention derogated from *jus cogens*.

[9] Although the Court has relied on *erga omnes*, there is none much clarification to the content of what makes up obligations *erga omnes*. The court's discussions of the notion are rather brief, much more like the academic discussions surrounding the concept.

[10] See D Contreras-Garduno & I Alvarez-Rio 'A barren effort? The jurisprudence of the Inter-American Court of Human Rights on Jus Cogens' (2013) *Social Science Research Network* 4 available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2308878 [accessed 23 August 2021], this paper provides that multiple scholars and even courts have used the terms *erga omnes* and *jus cogens* interchangeably, causing some confusion. See also P Picone 'The Distinction between *Jus Cogens* and Obligations *Erga Omnes'* in Cannizzaro *The Law of Treaties Beyond the Vienna Convention* (2011) 411.

[11] See Tams (n 3 above) 139.

[12] Article 53, *Vienna Convention on the Law of Treaties*, 1969.

as 'obligations owed to the international community as a whole', takes up the language used to define the concept of *jus cogens*, albeit without the reference to States.[13] This part of the chapter will assess the origins of the conflation between *erga omnes* and *jus cogens* by assessing the jurisprudence of the ICJ in relations to *erga omnes*, as well as the ICJ's treatment of *erga omnes*.

2.1. Descriptive overview of ICJ cases

The term *erga omnes* has now appeared numerous times in the decisions of the ICJ. Here follows an examination of the use of the term in the numerous cases in which the term was employed. The discussion below will assess the use of the term in order to elucidate the concept and provide clarity on areas from which the conflation originates. Of course, the cases discussed here will be selectively examined, to the limited extent that they shed some light on the particular subject of this chapter.

2.1.1. Barcelona Traction Case

A closer inspection of the Court's decision in *Barcelona Traction* is warranted. The *Barcelona Traction* case concerned the exercise of diplomatic protection when Belgium brought a claim for reparations on behalf of its people who were shareholders in the Barcelona Traction Company, a Canadian company with its headquarters in Spain. The claim was brought against Spain for the expropriation of assets which belonged to the company. When assessing whether Belgium could submit a claim of this nature, the Court held that:

> 33. ... an essential distinction should be drawn between the 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 very nature the former are the concern of all States. In 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*.
>
> 34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules

[13] Tams (n 3 above) 140; see also A de Hoogh 'The Relationship between *Jus Cogens*, Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective' (1991) 42 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 193; ID Seiderman *Hierarchy in International Law. The Human Rights Dimension* (2001) 124.

> concerning the basic rights of the human person, including protection from slavery and racial discrimination….

Despite the conflation caused by the definitions of the two concepts under study, the Court causes another point of conflation when it identifies examples of *erga omnes* from norms which are recognised as *jus cogens*, especially since the Court does not demonstrate the methodology by which it identifies these obligations. All the norms which the Court identifies as examples of *erga omnes* in paragraph 34 belong to a group of norms accepted and named as key examples of *jus cogens* norms in the Vienna Conference.[14] Moreover, while the ICJ in its majority decision refrains from categorising the community interests in question as *jus cogens*, but rather terms them as *erga omnes*, Judge Ammoun, in his separate opinion, treated the same issue under the rubric of *jus cogens*.[15] Thus, although treated distinctly, it must be noted that these facts taken together, that is, first, the examples specifically referred to by the ICJ arising from *jus cogens*,[16] and second, the fact that the judgment of the Court when assessed with and opposite to the separate opinion of Judge Ammoun, seems to address *erga omnes* and *jus cogens* as if synonymous. As such, confusion is bound to occur in such instances.

Since 1970, the Court has used the concept of *erga omnes* various times in its decisions,[17] advisory opinions, and even in arguments made by States before the Court.[18] However, over 50 years later, the notion of *erga omnes* remains surrounded

[14] See Tams (n (n 3 above) 140; see also E de Wet '*Jus Cogens* and Obligations *Erga Omnes*' in D Shelton (ed.) *The Oxford Handbook of International Human Rights Law* (2013) 554 – 555; Bradley (n 7 above) 215.

[15] See *Barcelona Traction* (n 1 above) Separate Opinion of Judge Ammoun 204 – 325; see also Tams (n 3 above) 140; A de Hoogh *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (1996).

[16] These were the out-lawing of the unilateral use of force, genocide, the prohibition of slavery and racial discrimination.

[17] See *Case concerning the Nuclear Tests (Australia v. France*) Judgment, ICJ Reports (1974) 253; *Case Concerning East Timor (Portugal v Australia)* Judgment, ICJ Reports (1995); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Judgment, ICJ Reports (2007) 43; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* Advisory Opinion, ICJ Reports (1971) 16. See also discussions in Ragazzi (1997) *The concept of international obligations erga omnes* 12, 164.

[18] See *Barcelona Traction* (n 1 above); see also *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; *Legality of the use by a State on Nuclear Weapons in Armed Conflict (Request for Advisory Opinion Submitted by the World Health Organisation)* 1993; see also a list in Ragazzi (n 17 above) 12 at footnotes 50 to 52; and see also discussion on C Eggett & S Thin 'Clarification: Obligations Erga Omnes in the Chagos Opinion' (2019)

by a considerable lack of conceptual clarity and the concept is still often confused with other international legal concepts.[19]

2.1.2. Namibia Advisory Opinion

Sixteen months after the Court pronounced on *Barcelona Traction*, the Court handed down its *Namibia Advisory Opinion*.[20] In that matter, the Court had to consider the legal consequences that the continued presence of South Africa in Namibia had for South Africa and it held that:

> … the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law: in particular, no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of such relationship, or of the consequences thereof. The Mandate having been terminated by decision of the international organization in which the supervisory authority over its administration was vested, and South Africa's continued presence in Namibia having been declared illegal, it is for non-member States to act in accordance with those decisions.

Here, the Court espouses that all States have an international obligation *erga omnes* not to recognise as legal, South Africa's continued presence in Namibia and confirms that the nature of an *erga omnes* obligation is that it is applicable to all States, including non-member States to a particular Treaty. Ragazzi is of the view that 'a possible explanation of the international obligation *erga omnes* not to recognise the legality of South Africa's continued presence in Namibia is related to the concept of *jus cogens*'.[21] This construction would mean that there is a duty on States not to recognise the situation in Namibia as legal because it amounts to a breach of an international norm with *jus cogens* status.[22] Ragazzi's comprehension acknowledges the fact that the ICJ does not itself refer to *jus cogens* at all in this matter, instead it relies on the concept

European Journal of International Law available on https://www.ejiltalk.org/clarification-and-conflation-obligations-erga-omnes-in-the-chagos-opinion/ [accessed 04 July 2021].

[19] As above.

[20] *South West Africa cases* (n 17 above).

[21] Ragazzi (n 17 above) 169, Ragazzie relies on J Crawford *The Creation of States in international law* (1979) 123 that 'when the illegality invoked is substantial, and in particular when it involves a norm of *jus cogens*' then there is a duty of non-recognition that exists *erga omnes*.

[22] Ragazzi (n 17 above) 169 and see his referrals to discussions on footnote 31; see also T Christakis 'L'obligation de non-reconnaissance des situations creees par le recours illicite a la force ou d'autres actes enfreignant des regles fondamentales' in C Tomuschat & JM Thouvenin *The Fundamental Rules of the International Legal Order* (2005) 127 – 166.

of *erga omnes* and in so doing, he concludes, the Court fails to show how the obligation not to recognise the legality of South Africa's continued presence in Namibia would be opposable *erga omnes*, and not binding only on member States of the United Nations.[23] For that reason, he provides that the logical conclusion to follow is that the ICJ finds the United Nations as having 'the reservoir of necessary powers resulting in legal obligations opposable to all States when rules of *jus cogens* are involved', meaning the rules involved in this case would qualify as *jus cogens*, hence they are opposable to and beyond member States of the United Nations.[24]

Although the passage from the *Namibia Advisory Opinion* remains relevant to the concept of *erga omnes*, it bares very little contribution to the mission to clarify the concept, if anything, it allows for the further conflation of the concept with *jus cogens*.[25] In fact, similar references of *erga omnes* appear in the context of the *Nuclear Test* case,[26] *Bosnia Genocide*,[27] as well as *Nicaragua*,[28] however, none of them provide any useful methodology by which to clarify the conceptual understanding of the concept, especially beyond *jus cogens* and this continues to happen.

2.1.3. East Timor

The case concerning East Timor relates to the right of a peoples self-determination. The case involved issues arising between Indonesia (a non-member State of the ICJ) as well as Portugal and Australia. In 1991, Portugal had filed proceedings against Australia for certain activities conducted by Australia relating to East Timor and alleged that Australia had failed to observe the obligation to respect the duties and powers of Portugal as the Administering Power of East Timor and the right of the people of East Timor to self-determination. To that end, Portugal argued that Australia had incurred international responsibility to the people of East Timor and her Administering Power, Portugal. However, Australia objected to the matter, indicating that Indonesia, a non-member to the ICJ had a direct interest in the matter. Indonesia, rejected the compulsory jurisdiction of the ICJ and thus devoided the Court of the jurisdiction to

[23] Ragazzi (n 17 above) 171.
[24] Ragazzi (n 17 above) 170.
[25] See Ragazzi (n 17 above) generally.
[26] *Nuclear Tests* (n 17 above).
[27] *Bosnia Genocide* (n 17 above)
[28] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Jurisdiction and Admissibility, Judgment, ICJ Reports (1984) 416 - 417.

adjudicate on the matter. In paragraph 29, the Court held that 'the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things' such that:

> whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.

Same principle was confirmed by the Court in its decision regarding the *Croatian Genocide Convention* when the Court reiterated that the *erga omnes* nature of the obligation in question does not automatically give the ICJ the requisite jurisdiction to adjudicate on the matter.[29] In summation, the contribution that the *Croatian Genocide Convention* case as well as *East Timor* may be considered to have in the academy, is the clarification that while *erga omnes* may grant a right of standing, it does not grant automatic jurisdiction to hear a matter. Nonetheless, the ICJ then also describes the right to self-determination as one of the 'essential principles of contemporary international law'[30] and having an *erga omnes* characterisation is very important as it appears to amount to its elevation as a norm of *jus cogens*.[31] Opinion is divided on the question whether indeed self-determination is a norm of *jus cogens*, however, most of the existing authority supports that conclusion.[32] Although the ICJ itself had not pronounced directly on this point, certain judges have for long described self-

[29] See the Court placing reliance from the *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, ICJ Reports (2006) 6 para. 64; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* ICJ Reports (2015) 3 para. 88. In 1999, Croatia instituted proceedings against Serbia, wherein it alleged that Serbia was responsible for violations of the Convention on Genocide during the period of 1991-1995. Serbia argued that the majority of the alleged crimes took place before the Socialist Federal Republic of Yugoslavia became party to the Genocide Convention and as such, the allegations fell outside the scope of Article IC of the Genocide Convention. In the Court's consideration of applicable law and the possible consequences of the classification of the crime of genocide as having *erga omnes* character, the Court espoused that jurisdiction regarding the commission of the crime of genocide is derived from article IX of the Genocide Convention and is not the inherent consequence of the characterisation of an *erga omnes* obligations that has been (allegedly) violated.

[30] See *East Timor* (n 17 above) 102.

[31] Naldi GJ 'The East Timor Case and the Role of the International Court of Justice in the Evolution of the Right of Peoples to Self-determination' (1999) 5 (1) *Australian Journal of Human Rights* 106.

[32] See *Western Sahara,* Advisory Opinion, ICJ Reports (1975) 25-26; I Brownlie *Principles of Public International Law* (1990) 513; A Cassese *Self-Determination of Peoples: A Legal Reappraisal* (1995) 133-40; J Dugard *International Law: A South African Perspective* (1994) 76; M Dixon *Textbook on International Law* (1996) 35; J Sebutunde 'Is the Right to Self-Determination Jus Cogens Reflections on the Chagos Advisory Opinion' in Tladi (n 6 above) generally. For contrary views, see M Pomerance *Self-Determination in Law and Practice: The New Doctrine in the United Nations* (1982) Ch IX; J Crawford *The Creation of States in International Law* (1979) 81.

determination as a norm *jus cogens*.[33] Therefore, the existing debates surrounding the characterisation of self-determination as *jus cogens* must be considered when assessing this case, and when this is done, not only does the decision prove to have limited contribution towards the clarity of *erga omnes* beyond *jus cogens*, but it also facilitates the continued conflation between *erga omnes* and *jus cogens*.

2.1.4. Chagos Advisory Opinion

On a more recent matter, the ICJ handed down an Advisory Opinion concerning the *Legal Consequences of the separation of the Chagos Archipelago from Mauritius*.[34] The request for the advisory opinion was submitted by the United Nations General Assembly (UNGA) via a resolution.[35]

The Court was confronted with a matter involving the determination of the legal consequences flowing from the United Kingdom's continued administration of the Archipelago, thus, a question relating to the right to self-determination and the consequences in the event of a breach of such right. At paragraph 180, the Court acknowledges the *erga omnes* character of the obligation to respect self-determination and finds that 'there exists an obligation, binding on all States, to cooperate with the UN to complete the decolonisation of Mauritius'.[36] Quoted verbatim, the Court held:

> Since respect for the right to self-determination is an obligation [owed] *erga omnes*, all States have a legal interest in protecting that right […].The Court considers that, while it is for the General Assembly to pronounce on the modalities required to ensure the completion of the decolonization of Mauritius, all Member States must co-operate with the United

[33] See *Barcelona Traction* (n 1 above) Separate Opinion of Judge Ammoun 304; *South West Africa cases* (n 17 above) 73-75; Judge Weeramantry stated that the right to self-determination, which he agreed was also a right erga omnes, `constitutes a fundamental norm of contemporary international law, binding on all States' in East Timor (n 17 above) Dissenting Opinion of Judge Weeramantry 197.

[34] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) ICJ Reports (2019) 95.

[35] See United Nations General Assembly Resolution 71/292 (2017).

[36] Eggett & Thin (n 18 above); see also the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) ICJ Reports (2004) where the Court stressed the obligation of third States not to recognize the illegal situation resulting from the construction of the Wall, to see to it that any illegal consequence resulting from that activity be brought to an end and, as parties to the universally accepted Fourth Geneva Convention, to ensure compliance with humanitarian law embodied in that Convention. The Court relies on *East Timor* (n 18 above); see also *Barcelona Traction* (n 1 above); and also cites the United Nations General Assembly Resolution 2625 (XXV), *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, 1970.

> Nations to put those modalities into effect**.** As recalled in the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations:
>
> Every State has the duty to promote, through joint and separate action, the 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…' (references omitted).

Eggett and Thin are of the opinion that paragraph 180 of the *Chagos Opinion* seems to provide for a potential source of confusion between *erga omnes* and *jus cogens*.[37] They argue that the specific *erga omnes* obligation referred to in paragraph 180 to cooperate with the UN towards the decolonisation of Mauritius arises from a self-standing customary rule of international law in relation to decolonisation which is reflected in Resolution 2625 of the General Assembly as cited by the Court in its Advisory Opinion, and not as a rule of *jus cogens*.

These scholars base their conclusion on the fact that in the Advisory Opinion, the Court had made an oblique reference to General Assembly Resolution 1514 (XV) having 'a declaratory character with regard to the right to self-determination as a customary norm'.[38] Accordingly, they conclude that since the Court did not explicitly recognize that the right has evolved into a peremptory norm of international law (*jus cogens*) from which no derogation is permitted and the breach of which has consequences not just for the Administering Power concerned, but also for all States,[39] it cannot be said that the candidate norm is *jus cogens* – but merely, a norm of customary international law similarly giving rise to obligations *erga omnes*.[40]

Although this nuance seems correct at face value, it has received criticism from the Special Rapporteur on Peremptory Norms (*Jus Cogens*). In his commentary to the blog post, Tladi is of the view that 'the customary international [law] duty itself, has, by virtue of its general connection with a peremptory norm (the right to self-

[37] Eggett & Thin (n 18 above); see also Bradley (n 7 above) 210.
[38] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) ICJ Reports (2019) 95 paras. 152-153.
[39] Sebutunde (n 31 above) 386–412.
[40] Eggett & Thin (n 18 above).

determination), been elevated to the status of [a] peremptory norm'.[41] Tladi concludes that the duty to cooperate is simply an application of the consequences for the peremptory status of self-determination.[42]

Tladi further notes that while the ICJ does not itself use the words peremptory norms or *jus cogens* in its Advisory Opinion, several judges do,[43] with none of the judges challenging the assumption that the right to self-determination is a norm *jus cogens*, giving rise to obligations *erga omnes*. Moreover in the course of the proceedings, several States[44] as well as the African Union, representing 55 States,[45] also referred to the peremptory status of the right to self-determination, still, not a single State challenging this view.

Seen from this perspective, the Court's application of Article 41 of the Articles on the Responsibility of States for Internationally Wrongful Acts ('ARSIWA') is correct.[46] Deductively, if self-determination produces *erga omnes* obligations and it is not a norm related to common spaces,[47] then a conclusion can be reached that it is *jus cogens*.[48] In this respect, the Court's application of Article 41 to the breach of the obligation *erga*

[41] See commentary on the blog article by Eggett &Thin (n 18 above).
[42] See generally S Kadelbach '*Jus Cogens*, Obligations *Erga Omnes* and other Rules: The Identification of Fundamental Norms' in C Tomuschat & J-M Thouvenin (eds.) *The Fundamental Rules of the International Legal Order* (2005).
[43] In my view, Tladi's analysis seems more apt than the first. Nonetheless, it is regrettable that the Court failed to explicitly recognize the peremptory nature of the right to self-determination and this opens the floor for speculation as to whether *jus cogens* and *erga omnes* mutually coincide in all cases. See the following separate opinions from the Chagos Advisory Opinion (n 38 above): Separate Opinion of Judge Cançado Trindade; Separate Opinion of Judge Sebutinde, especially para 11; see also Separate Opinion of Judge Robinson.
[44] See Statements of States available online at https://www.icj-cij.org/en/case/169 [accessed 13 October 2021]: Written Statement of Belize (30 January 2018) 11; see also Written Statement submitted by the Republic of Cyprus (12 February 2018) 4, 11; Written statement of the Kingdom of the Netherlands (27 February 2018) 2, 4, 8, 9, 18, 19; Written Statement submitted by the Republic of Serbia (27 February 2018) paras 30, 32; Written Statement submitted by the Federative Republic of Brazil (1 March 2018) para 15; Written Statement submitted by the Government of the Republic of South Africa (1 March 2018) 4.
[45] Written Statement of the African Union (1 March 2018) 17, 66.
[46] *Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001 (hereafter referred to as 'ARSIWA' or 'Articles on State Responsibility' unless otherwise indicated).
[47] Tladi is of the view that the only norms capable of producing *erga omnes* obligations outside the realm of *jus cogens* are norms arising in terms of common spaces.
[48] See J Sebutinde 'Is the Right to Self-Determination *Jus Cogens*: Reflections on the Chagos Advisory Opinion' in Tladi *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (2021) 387-388, who agrees that the right to self-determination is a *jus cogens* norm, however, she does not purport to arrive at this conclusion by the deductive reasoning which Tladi proposes, namely, that the only norms capable of producing *erga omnes* obligations outside the realm of *jus cogens* are norms arising in terms of common spaces and therefore, if self-determination produces *erga omnes* obligations and it is not a norm related to common spaces, then a conclusion can be reached that it is *jus cogens*.

omnes arising out of the peremptory norm (self-determination) is appropriate,[49] and for Tladi, this confirms what the Court is reluctant ('perhaps because it is unnecessary') to say expressly.[50]

It is worth noting that the ICJ has for a long time avoided using the term '*jus cogens'* and has instead placed reliance on using the term '*erga omnes*' to describe obligations arising from certain norms and/or community interests.[51] The first time the term *jus cogens* is mentioned expressly in the jurisprudence of the ICJ was in the *North Sea Continental Shelf* judgments of 1969.[52] Even that reference was completely irrelevant as the reference was made in passing without attempting to address any questions or issues relating to *jus cogens*.[53] However, following this, there was a decline in the use of the term by the Court. Even in some circumstances where the Court was particularly presented with an opportunity to appropriately discuss and use this notion at length, the Court has been extremely cautious.[54] Krivenko's analysis of the practice of the Court indicates that the term *jus cogens* was 'mentioned three times in the *Nicaragua* judgment on merits;[55] once in the *Nuclear Weapons* advisory opinion[56] and once in

[49] See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) ICJ Reports (2019) Separate Opinion of Judge Sebutinde (n 43 above) 270 – 202, as well as Sebutinde (n 48 above) 386 – 412 where Judge Julia Sebutinde expresses that in her separate opinion concerning the Chagos Opinion, she considers the Court's omission or failure to explicitly recognise the right to self-determination as *jus cogens* is regrettable particularly because it had led to the failure to sufficiently articulate the full consequences of the United Kingdom's continued administration of the Chagos Archipelago. Nonetheless, Sebutinde agrees that where a peremptory norm is breached, the contents of Article 41 of ARSIWA are a correct consequence. See also *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) ICJ Reports (2019) Separate Opinion of Judge Cançado Trindade (n 43 above) 193, who expresses that 'the fundamental right of peoples to self-determination indeed belongs to the realm of *jus cogens*, and entails obligations *erga omnes*, with all [relevant] legal consequences ensuing therefrom'. In his understanding, 'there is no reason nor justification for the ICJ, in its present Advisory Opinion, not having expressly held that the fundamental right of peoples to self-determination belongs to the realm of *jus cogens* [norms]*'*.

[50] See commentary by D Tladi on the blog article by Eggett & Thin (n 18 above), See Separate Opinion of Judge Robinson (n 43 above) where it is remarked that the Court's reluctance to address the *jus cogens* character of the right to a peoples self-determination is an interesting feature of the Advisory Opinion in light of the fact that 'a high number of participants in the proceedings argued that the right to self-determination is a norm of *jus cogens*'.

[51] Bradley (n 7 above) generally, who refers to *Erga Omnes* as '*Jus Cogens'* Preferred Sister' in the history of the ICJ.

[52] *North Sea Continental Shelf* cases (n 8 above) 41-42.

[53] As above.

[54] EY Krivenko 'The ICJ and *Jus Cogens* through the Lens of Feminist Legal Methods' (2017) 28 (3) *European Journal of International Law* 959–974.

[55] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* Merits, ICJ Reports (1986) 100, para. 190.

[56] *Case Concerning the Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Reports (1996) 258 para. 83.

the *Gabčíkovo-Nagymaros* case (as well as two more references to peremptory character as a synonym of *jus cogens*)'.[57]

Krivenko's analysis of the specific cases he refers to is crucial as from that analysis, he correctly points out the Courts failure to engage the notion of *jus cogens* in detail, ad thus, causing its confusion with *erga omnes*.[58] The Court used the term simply to respond to the arguments made by the parties, 'mostly affirming that there was no need to consider the notion'.[59] Since then, the limited manner in which the ICJ engages with the concept of *jus cogens* has continued to the present day and this continues to lead the conflation between *jus cogens* and *erga omnes*.[60] Of course, this is not to say that the Court has abandoned discussing the concept of *jus cogens* at all. There has been other instances where the Court referred to the term such as in *Jurisdictional Immunities*,[61] *Belgium v Senegal*,[62] *Armed Activities*,[63] as well as in the *Kosovo Advisory Opinion*.[64]

3. *Erga Omnes* through the Lens of the International Law Commission and its Articles on State Responsibility

The general point of departure to State responsibility is that where there has been a breach of an obligation by a State, such a breach must be attributed to the State, principally by the injured State.[65] Article 42 of the Articles on State Responsibility provides that the implementation of State responsibility is in the first place an

[57] *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* Judgment, ICJ Reports (1997) 62, para. 97, see also paras 50, 112.
[58] See Krivenko (n 54 above).
[59] See Krivenko (n 54 above). In footnote 40, Krivenko notes that one slight departure from this attitude is represented in the *Nicaragua* case, where the ICJ refers to some statements about the *jus cogens* character of the prohibition of the use of force as evidence of the customary nature of the prohibition. However, the ICJ never engaged in any discussion of the juridical value of such statements. See *Nicaragua* (n 55 above) 100 para. 190.
[60] See Krivenko (n 54 above). Perhaps the following cases are some of the limited cases fitting for an exception to the content of this paragraph: *Case Concerning the Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* Judgement ICJ Reports (2012) 99, as well as the *Case Concerning Armed Activities on the Territory of the Congo* (New Application: 2002) *(Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, ICJ Reports (2006) 6. It must also be noted that notwithstanding the conflation between *erga omnes* and *jus cogens*, it is generally agreed that *jus cogens* and *erga omnes* are distinct concepts, infact, they are often described as 'two sides of the same coin', for this see De Wet (n 5 above); Kadelbach (n 42 above) 26; Bassiouni (n 5 above).
[61] See *Jurisdictional Immunities of the State* (n 60 above) 99.
[62] *Questions relating to the Obligation to Prosecute or Extradite* (n 60 above) 422.
[63] *Armed Activities on the Territory of the Congo* (n 60 above) 6.
[64] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports (2010) 437.
[65] See Article 42 of the Articles on State Responsibility (n 46 above); see discussion of Article 42 in the *Report of the International Law Commission on the work of its fifty-third session* (2001) 117 para 1.

entitlement of the 'injured State'.[66] However, *erga omnes* allows us to depart from this position as it permits any party in the international community to invoke State responsibility, even if not directly injured or affected by such a breach.[67] In order words, being described as obligations which are owed to the international community of States as a whole, *erga omnes* obligations impose special duties on any State that may violate international obligations which 'go beyond the bilateral reparation scheme which applies in reciprocal legal relationships'.[68] Since State responsibility flowing from the breach of an *erga omnes* obligation entails the right of States not directly affected by an internationally wrongful act to invoke the responsibility of the delinquent State, such a State, may be invoking the responsibility of the delinquent State on their own behalf, on behalf of subjects of international law who are unable to bring a claim themselves, or merely as members of the international community of States.[69]

Noori and Louyeh are agreed that the principal 'rules and obligations that hold an *erga omnes* status are not [merely] prioritized over ordinary commitments, but are also accompanied by a stronger enforcement mechanism, and therefore, a more severe responsibility regime'.[70] *Erga omnes* status suggests that for certain obligations (obligations which are owed to the international community as a whole), the right of enforcement belongs to all States. Some commentators propose a rather restrictive interpretation of the Court's description of *erga omnes* as being owed 'towards the *international community as a whole'*.[71] These scholars propose that 'the enforcement of obligations *erga omnes* requires a collective response',[72] in other words, individual States do not possess the requisite standing to enforce obligations *erga omnes* on their own.[73] However, this argument does not hold out against closer inspection.

[66] As above.
[67] See particularly, Article 48 (1) (b) (n 46 above) and the commentaries thereto, as well as discussions in De Wet (n 5 above); Kadelbach (n 42 above) 26.
[68] Kadelbach (n 42 above) 26. Perhaps it is worth mentioning here, that the aim of the Articles of State Responsibility is exactly this - an attempt to transcend this bilateral restriction. See I Scobbie 'The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law"' (2002) 13 (5) *European Journal of International Law* 1204.
[69] Kadelbach (n 42 above) 26.
[70] SM Noori and SE Louyeh 'When Environmental Obligations Collide with State Sovereignty: An International and Sharia Law Perspective' *Consensus* 2020 3 - 4 available online at https://scholars.wlu.ca/cgi/viewcontent.cgi?article=2438&context=consensus [accessed 6 September 2021].
[71] See M Dawidowicz *Third-party countermeasures in international law* (2017) 49.
[72] As above.
[73] In effect, these scholars suggest that collective standing is necessary for the invocation of obligations *erga omnes*.

Dawidowicz reveals that although the Court described obligations *erga omnes* as being owed 'towards the international community as a whole' without the reference to 'all States', the 'international community as a whole' is in fact equated to all States.[74] Furthermore, the International Law Commission also explains in its commentary that the use of 'any State' in Article 48 of the Articles on State Responsibility is meant to clear any confusion that these States must act collectively.[75]

Therefore, any State can 'invoke the responsibility of a State which is in breach of an *erga omnes* obligation before an international [judicial organ] without having any legal pitfalls as regards to *locus standi'*.[76] Notwithstanding the significant step taken by the ICJ to create a multilateral dimension of State responsibility by affirming obligations *erga omnes*, the ICJ did not provide the means by which obligations *erga omnes* could be enforced under the international law of State responsibility. This raises the question whether a third State can respond to breaches of obligations by way of third-party countermeasures in order to ensure the compliance of obligations *erga omnes* and protect rights flowing from norms with *erga omnes* status. This question is explored in detail in section four below. While this is so, an analysis of third-party countermeasures, will also assist us in the quest to establish the criteria to be used to identifying *erga omnes* obligations beyond *jus cogens*.

Incidentally, while on the subject of State responsibility in respect of breaches of obligations *erga omnes*, it is worth mentioning that there is general agreement in legal

[74] See Dawidowicz (n 71 above) 51

[75] See Commentary to Article 48, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) 126 at para (4). Verbatim, the ILC notes 'the term "any State" is intended to avoid any implication that these States have to act together or in unison. More- over, their entitlement will coincide with that of any injured State in relation to the same internationally wrongful act in those cases where a State suffers individual injury from a breach of an obligation to which article 48 applies'. In other words, this means that the reference in the *Barcelona Traction* to obligations *erga omnes* as being owed towards the international community as a whole means that these obligations are owed to each individual State.

[76] Noori & Louyeh (n 70 above) 4; see also T Meron 'On a Hierarchy of International Human Rights' (1986) 80 *American Journal of International Law* 11-12. Perhaps it is worth mentioning that for many years, it was unclear whether a State might have standing before the ICJ to initiate proceedings against another State for alleged violations of international law if such a State was not directly affected by the breach concerned. In its *South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa)* Judgment, ICJ Reports (1966) 6 the ICJ had held that 'an *actio popularis*, or right resident in any member of a community to take legal action in vindication of a public interest… is not known to international law as it stands at present.' Therefore, when the ICJ pronounced in its dictum in the 1970 *Barcelona Traction* that certain international law obligations are *erga omnes* and that as a consequence, 'all States can be held to have a legal interest in their protection', it was not clear whether the ICJ had intended to overturn its decision in the *South West Africa* cases and, if not, how these two conflicting decisions could be reconciled.

literature that the most authoritative and comprehensive codification of the law of State responsibility is contained in the ILC's Articles on State Responsibility.[77] In 2001, the ILC adopted a complete text of the Articles on State Responsibility. The Articles make clear that whether the relevant obligation is owed to an individual State, several States or to the international community as a whole, the legal consequences for violating international law norms are the same.[78] Consequently, a violating State must (1) cease the violation,[79] (2) offer necessary assurances of non-repetition,[80] and (3) make full reparation for the injury suffered.[81]

However, for all other matters not concerning the breach of obligations owed *erga omnes*, Brunnée is of the view that the collective interest questions becomes a vital point of consideration when issues regarding the invocation of responsibility by any State other than the injured State; the remedies available, and the countermeasures which may be taken by such non-injured State to induce the responsible State's compliance, are at play.[82]

An assessment of Articles 42 and 48 of the Articles on State Responsibility reveals that the ILC makes a general distinction between injured and non-injured States in order to maintain the delicate balance between bilateral relations that exist between States as well as protect the collective interest of States.[83] The latter is done to ensure that the important collective interests of States are afforded the appropriate significance in the regime of State responsibility.[84] This means, that a non-injured State, much like the injured State itself, has the requisite standing to invoke the responsibility of the delinquent State for the breach of an obligation which is owed *erga omnes* (thus protected collectively), and this has been codified in Article 48 of the

[77] TM Ndiaye and R Wolfrum *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A Mensah* (2007) 38.
[78] Ndiaye & Wolfrum (n 77 above) 38 – 39.
[79] See Article 30, *Articles on Responsibility of States for Internationally Wrongful Acts*, 2001.
[80] As above.
[81] Article 31, *Articles on Responsibility of States for Internationally Wrongful Acts*, 2001.
[82] Ndiaye & Wolfrum (n 77 above) 39.
[83] See provisions and commentaries to Article 42 and 48, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001.
[84] See Ndiaye and Wolfrum (n 77 above) 39; see also M Koskenniemi 'Solidarity Measures: State Responsibility as a New International Order?' (2001) 72 *British Yearbook of International Law* 348-349. It must be highlighted however, that perhaps this is one of the factors that cause confusion between *erga omnes* and *jus cogens* as both concepts are doctrinal concepts which were developed to express community interests.

Articles on State Responsibility which provides us with the starting point through which we can analyse and synthesize obligations *erga omnes*.

The Articles on State Responsibility provide us an avenue through which *erga omnes* status can impact the enforcement of obligations.[85] In particular, Article 48 establishes a regime of State responsibility for violations of international obligations towards the international community as a whole (*erga omnes*). More specifically, under paragraph (1) (b), the provision stipulates that States *other than the injured State* may invoke the responsibility of a State in breach if the obligation being breached is owed to the international community as a whole.[86] The ILC has highlighted that this provision is specifically intended to 'give effect to the ICJ's statement in the *Barcelona Traction* case, where the Court drew "an essential distinction" between obligations owed to particular States and those owed "towards the international community as a whole"'.[87] In other words, this means that the nature of an obligation *erga omnes* changes or influences the regime of State responsibility – from being a bilateral one, to a multilateral duty.[88]

Fittingly, a four-fold conclusion follows here.[89] First, that a State has standing to invoke the responsibility of an offending State as an 'injured' State for the breach of an obligation that was owed to it individually.[90] Second, that an injury can also result from the breach of an obligation owed to a group of States, subsequently giving standing to any of the members of States to whom the obligations are owed (*obligations erga omnes partes*).[91] Third, that any State may have standing to invoke the responsibility

[85] De Wet (n 5 above).
[86] Article 48(1)(b), *Articles on Responsibility of States for Internationally Wrongful Acts, 2001*.
[87] See *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001 at 127 para 8. See International Law Commission Report, UN Doc A/56/10 (August 2001) available online on https://casebook.icrc.org/case-study/international-law-commission-articles-state-responsibility [accessed 10 June 2021].
[88] A Pigrau 'Reflections on the effectiveness of peremptory norms and *erga omnes* obligations before international tribunals, regarding the request for an advisory opinion from the International Court of Justice on the Chagos Islands' (2018) 55 *Questions of International Law* 131-146 available online at http://www.qil-qdi.org/reflections-on-the-effectiveness-of-peremptory-norms-and-erga-omnes-obligations-before-international-tribunals-regarding-the-request-for-an-advisory-opinion-from-the-international-court-of-justice-on/ [accessed 10 June 2021].
[89] Although this section draws four conclusions for each of the types of grounds upon which a state can claim standing to invoke the responsibility of another State, in practice, these Articles established two types of legal standing: (i) standing derived from *injury* (Article 42) and (ii) standing derived from *common interests* (Article 48 (own emphasis).
[90] Ndiaye & Wolfrum (n 77 above) 38 – 39.
[91] See Article 48(1)(a), *Articles of State Responsibility*, 2001, which seeks to protect the collective interest of a group of states and the relationship is generally incorporated into multilateral treaties which seek to

of another State for violations of international law if such violation specifically affects such a State, or the breach radically changes the position of the States to which the obligation is owed.[92] Finally, that 'when a violation affects only a State's legal interest in the upholding of collective concern obligations'[93], such a State can only invoke the offending State's responsibility as a 'non-injured' State, and this places limitations on what such a State can claim from the responsible State and what measures it can take to ensure compliance.[94]

Perhaps the most obvious efforts made by the ILC to strengthen the collective interest elements of the State responsibility regime may be perceived in Articles 40 and 41 of the Articles on State Responsibility regarding the treatment of 'serious breaches' of peremptory norms of international law.[95] Although the Articles mainly address the ordinary consequences of a violation of international law norms, they also set-out special duties that must be observed by other States when an international law norm has been breached. For example Article 41 paragraphs (1) & (2), indicate that third States must cooperate to end a serious breach through lawful means, and may not recognize a situation created by a serious breach or assist in maintaining that situation.[96]

The question that then looms large is what measures a third State may take to protect collective interests flowing from obligations *erga omnes*. In particular, this begs the question as to whether third States may take third-party countermeasures to ensure compliance with obligations *erga omnes*. This question is immediately addressed below.

4. Third-party Countermeasures

Dawidowicz is of the view that the underlying concept of countermeasures, that is, those traditionally concerned with bilateral situations of responsibility arising between

protect violations of the State's collective interests, thus establishing the invocation of responsibility *erga omnes partes* since every State party has an interest in the compliance of others.

[92] See Article 42(b), *Articles of State Responsibility*, 2001.

[93] Ndiaye and Wolfrum (n 77 above) 38 – 39. See Article 48(1)(b), *Articles of State Responsibility*, 2001 which intends to address obligations *erga omnes* outside of treaty law.

[94] Ndiaye and Wolfrum (n 77 above) page 39.

[95] See Articles 40 and 41, *Articles of State Responsibility*, 2001.

[96] See for example the Wall Advisory Opinion (n 36 above) para. 159; see also the Chagos Advisory Opinion (n 38 above) para. 180.

the injured State and the responsible State, has been firmly grounded in international law for a long time now.[97] In order words, the concept is traditionally understood to concern itself with bilateral relations of responsibility where an injured State takes actions against the responsible State to invoke compliance from the responsible State.[98] By contrast, the notion of third-party countermeasures is remarkably a new development of international law, albeit, widely connected with an extensive record of discourse concerning 'the possible invocation of responsibility for breaches of communitarian norms'.[99] The use of third-party countermeasures is one of the most controversial issues in the law of State responsibility.[100] Within the body of international law, the notion of third-party countermeasures is recognised as 'the use of countermeasures by one State against another in response to a breach of an international obligation owed to the international community as a whole (i.e. obligations *erga omnes*),[101] and are taken in defence of some common interest of the international community'.[102] Although their legal position remains largely uncertain, the use of third-party countermeasures is an increasingly common phenomenon in international relations.[103] As a result, some scholars consider that a right to third-party

[97] See Dawidowicz (n 71 above) 16-31.

[98] Dawidowicz (n 71 above) 31. Although the concept of traditional countermeasures has been accepted into the ambit of international law, there are still controversial discussions on various issues, such as what kind of actions a State is allowed to take. For a detailed discussion surrounding these issues, see Part Three, Chapter II of the Report of the International Law Commission on the work of its fifty-third session (2001) 128-137 available online at https://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf (accessed 28 August 2021); in its discussions, the ILC notes for example that in taking countermeasures, 'the injured State effectively withholds performance for the time being of one or more international obligations owed by it to the responsible State'.

[99] Dawidowicz (n 71 above) 31.

[100] See A Bills 'The Relationship Between Third-Party Countermeasures and the Security Council's Chapter VII Powers: Enforcing Obligations Erga Omnes in International Law' (2019) *Lund University Faculty of Law, JURM02 Graduate Thesis* (on file with author) 8; see also G Gaja 'The Concept of an Injured State' in J Crawford *et al* (eds.) *The Law of International Responsibility* (2010) 957, 962; and Tams (n 4 above) 198 – 251.

[101] Barcelona Traction (n 1 above) paras. It must be noted that the ICJ in *Barcelona Traction* is actually not explicit as to the position whether states are entitled to third-party countermeasures as a corresponding right of protection of obligations *erga omnes*. However, it is often said that this conclusion is an automatic flow of what the court said in paragraph 33 when it affirmed that all states have a legal interest in the protection of obligations *erga omnes*. It is said that this *dictum* supports the idea that 'the logical and consequential link between the nature of the relevant violations and the standing of third states [is] to take countermeasures', any contrary interpretation would effectively mean that breaches of international law are left without redress. Albeit, it is important to understand that the affirmation of a states' legal interest in the protection of obligations *erga omnes* (the confirmation that each state is individually entitled to institute judicial proceedings), is far different from the conclusion that a legal interest can be enforced by way of third-party countermeasures. However, whether third-party countermeasures have in fact emerged as a right of protection is a question of state practice which will be ventilated later in this section. See discussion in Dawidowicz (n 71 above) 52 - 53).

[102] See Bills (100 above) 8 – 9, see D Alland 'Countermeasures of General Interest' (2002) *European Journal of International Law* 1229.

[103] For the substantial literature and examples, see the discussion of jurisprudence proving this point in Part Three, Chapter II of the Report of the International Law Commission on the work of its fifty-third session

countermeasures seems to be emerging under customary international law, as a possible means for implementing State responsibility for violations of obligations *erga omnes* in terms of Article 48 of the Articles on State Responsibility.[104]

The recent attention received by collective interests in international law has made the Security Council to place emphasis on 'its own enforcement competences for breaches of community interests such as obligations *erga omnes* or peremptory norms of international law'.[105] The Security Council has incorporated the relevant violations of international law among its resolutions of what constitutes a threat to peace under Article 39 of the UN Charter. This inclusion allows the Council to rely on an extensive body of interpretations of its mandate for the maintenance of international peace and security and allows it the opportunity to provide a collective or institutionalised response to breaches of collective interest norms.[106] On the other hand, third-party countermeasures have the potential to guarantee the protection of the common interests of the international community.[107] However, some fear that the aftermath of recognising a right to third-party countermeasures carries with it potential disruption on the institutional stability created under the UN Charter and that such recognition may enable powerful States to have an excuse for power politics and unnecessary interventions, under the pretence of lawful countermeasures.[108]

Thus, when the subject of third-party countermeasures came to the attention of the ILC it was met with a great degree of polarisation.[109] On one end, opponents

(2001) 138-139. available online at https://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf (accessed 28 August 2021); see also Dawidowicz (n 71 above).

[104] See J Charney 'Third States Remedies in International Law' (1989) 10 *Michigan Journal of International Law* 57 – 101; Bills (n 100 above) 9; Dawidowicz (n 71 above) 282 - 284; EK Proukaki *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (2010) 201 - 209. The ILC affirms the notion that non-injured States have the requisite standing to invoke responsibility for breaches of *erga omnes* obligations and this remains the basis upon which a possible entitlement to take third party countermeasures must be assessed.

[105] See Bills (100 above) 9; V Gowland-Debbas *et al United Nations sanctions and international law* (2001) 1 - 28. See also UN Security Council Resolution 161 (1961) (The Congo Question) and UN Security Council Resolution 418 (1977) (South Africa) 4.

[106] See Bills (100 above) 8, 9.

[107] See Bills (100 above); J Frowein 'Reactions by Not Directly Affected States to Breaches of Public International Law' (1994) *Recueil des Cours de l'Académie de Droit International* 423; A Orakhelashvili *Peremptory Norms in International Law* (2006) 272; Alland (n 102 above) 1239; Proukaki (n 104 above) and Tams (n 4 above) 158.

[108] Dawidowicz (n 71 above) 8-13.

[109] See discussion of D Alland 'Countermeasures of General Interest' (2002) *European Journal of International Law* 1221 – 1239.

suggested that third-party countermeasures might put world peace at a risk,[110] whereas the supporters suggested that third-party countermeasures are a possible 'saving grace for international law'.[111] Notwithstanding the concerns regarding this subject, it must be pointed out that in 2000, when the Special Rapporteur on State responsibility proposed the idea of third party-countermeasures, the proposal was met with a significant level of approval.[112]

This did not get rid of the extreme controversies regarding the topic, which ultimately prompted the ILC to reserve its position on third-party countermeasures when it adopted the Articles on State Responsibility in 2001.[113] In its 'reservation', the ILC reduced Article 54 from a substantive clause, to a 'savings clause'[114] on the matter. The provision seeks to find a balance between the competing legal and policy considerations.[115] Repeated verbatim, the provision reads:

> 'This chapter [i.e. on countermeasures taken by States other than the injured State] does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached'.[116]

The ILCs commentary to the Articles on State Responsibility clarifies that at the time of adoption, State practice was simply 'limited and rather embryonic' to adopt a provision allowing States a right to take third-party countermeasures in the circumstances contained under Article 48 of the Articles on State Responsibility.[117]

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[110] These states were of the view that third-party countermeasures may be used in an abusive fashion by powerful states purporting to act in the interest of the international community. However, practice at the time of adoption, albeit limited, demonstrated that third-party countermeasures had not been used in any abusive fashion by a state said to be acting to protect the interests of the international community.

[111] Follow the thorough discussions in Dawidowicz (n 71 above) 5 – 13.

[112] ILC 'Report of the International Law Commission on the Work of its 52nd Session' (1 May - 9 June and 10 July - 18 August 2000) UN Doc A/55/10, 62, para 385.

[113] M Dawidowicz 'Third-party countermeasures: A progressive development of international law?' (2016) 29 *Questions of International Law* 3 – 15; see also Dawidowicz (n 71 above) 93-110 to follow the debates amongst states regarding third-party countermeasures.

[114] See J Crawford 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 (4) *American Journal of International Law* 875, 881; see also Bills (100 above) 34.

[115] See Dawidowicz (n 71 above) 13.

[116] Article 54, ARSIWA. The ILC uses the phrase 'lawful measures' instead of 'countermeasures', fundamentally reserving its position on the question of third-party countermeasures in order to place safeguards on all perspectives on the matter.

[117] ARSIWA Commentary (2001), Article 54, paras. 3-7. James Crawford has argued that this conclusion by the ILC seems rather unwarranted, as there existed sufficient state practice to draw conclusions from at the time of adoption, see Crawford (n 114 above).

Crawford suggests that it would not have been appropriate for Article 54 of the Articles on State Responsibility to employ an affirmative language as 'no clearly recognised entitlement' to take third-party countermeasures under international law seemed to have materialised at the time.[118] For that reason, the ILC adopted the text in Article 54 to neither endorse nor preclude that a right to third-party countermeasures may arise as a result of the further development of international law and the formation of customary international law.[119]

There are debates around whether State practice supports the conclusion that third-party countermeasures are allowed in international law. Currently, there are contrasting interpretations to various decisions taken by the ICJ which may elucidate on the matter. For example, on the one hand, paragraph 126 of the *Namibia* opinion[120] of the ICJ is often interpreted by others as an indirect endorsement of third-party countermeasures.[121] On the other hand, others believe that the Court did not, whether directly or indirectly, endorse third-party countermeasures. In fact, Dawidowicz argues that the Court simply endorsed what later became Article 41(2) of the Articles on State Responsibility.[122] However, whatever the import of the *Namibia* opinion is in respect of collective interests, what is clear is that, on its terms, it does not address the issue of third-party countermeasures.

Perhaps amongst others, one should, as a starting point, consider the *Tehran Hostages* case which by implication provides some, albeit limited, guidance on third-party countermeasures.[123] In that case, a group of protestant students took the United

[118] Crawford (n 81 above); see also Report of the International Law Commission on the Work of its 52nd Session (n 112 above) 139 para 6.
[119] ARSIWA Commentary (n 117 above) Article 54, para 7.
[120] *Legal Consequences for States of the Continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970) Advisory Opinion, ICJ Reports 1971, 56 at para 126.
[121] Dawidowicz (n 71 above) 58; see L-A Sicilianos 'Les réactions décentralisées à l'illicite: Des contre-mesures à la légitime défense' (1990) *Librairie générale de droit et de jurisprudence* 151-152; the discussion by Sicilianos suggests that when the ICJ held at para 128 that non-member states are called upon by Resolution 276 to act in accordance with decisions made in the resolution entitled states to take third-party countermeasures.
[122] Dawidowicz (n 71 above) 61; see also Article 41(2), ARSIWA which provides that no State shall recognize as lawful a situation created by a serious breach within the meaning of the article, nor render aid or assistance in maintaining that situation.
[123] More particularly, it is relevant to consider the dissenting opinion of Judge Morozov who states that the actions of the US were 'incompatible not only with the Treaty of 1955 but with the provisions of general international law, including the Charter of the United Nations' and suggests that the Court's failure to address this, reinforces the interpretation that the court's silence suggests its acceptance of third-party countermeasures.

States embassy in Tehran by force. The Tehranis police / security did nothing to prevent the situation or to address it. Consequently, the United States (US) claimed that Tehran infringed obligations under both the 1961 and 1963 Vienna Conventions on Diplomatic and Consular Relations.[124] While the matter was before the United Nations Security Council and pending before the ICJ, the United States adopted a number of measures against Iran including countermeasures by way of freezing all of its assets held in the country. In its decision, the ICJ failed to condemn the United States in taking countermeasures. Schachter considers that this 'silence is noteworthy'[125] and implies that the Court indirectly accepted that 'the existence of treaty based enforcement mechanisms, notably in the form of judicial proceedings, does not as such exclude recourse to [third-party] countermeasures'.[126] This interpretation seems supported by Judge Morozov in his dissenting opinion.[127]

Nonetheless, perhaps the Court addressed the issue of third-party countermeasures more directly in the *Nicaragua* decision.[128] In that case, Nicaragua had instituted proceedings against the US for the responsibility of military and paramilitary activities taken by the US in and against Nicaragua. Nicaragua alleged that the US had been in violation of the principles of non-use of force and non-intervention under customary international law. It further alleged that the US violated the Friendship, Commerce and Navigation (FCN) treaty when it imposed a general trade embargo as part of the coercive measures it had adopted against Nicaragua. In its response, the US submitted that it used force against Nicaragua in its exercise of the right to collective self-defence in response to requests made by neighbouring States of Nicaragua against Nicaragua's armed aggression. The Court held that it did not consider Nicaragua responsible for the most serious breaches of the use of force (armed attack), and as such, the US was not qualified to take forcible measures as an armed attack in the exercise of the right to collective self-defence. In effect, the Court endorsed that 'third-party countermeasures could only be taken – if at all – in response

[124] Dawidowicz (n 71 above).
[125] O Schachter 'International Law in Theory and Practice: General Course in Public International Law', (1982) 178 *Recueil des Cours de l'Académie de Droit International* 173 – 174.
[126] See the discussions in Dawidowicz (n 71 above) 63, who also refers to the works of Tams (n 4 above) 297, and Schachter (n 125 above) 173 – 175.
[127] *Legal Consequences for States of the Continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970) Dissenting Opinion of Judge Morozov, ICJ Reports 1971, 52-53.
[128] Nicaragua (n 55 above).

to serious breaches of obligations *erga omnes'*.[129] Various scholars diverge from this conclusion, to them, although the Court was applying customary international law and not treaty law, it is clear that the Court based its assessment of customary international law on the UN Charter and its contents, which together with the Friendly Relations Declaration[130] provide for collective self-defence, seen from this view, the Court did not base its conclusions on third-party countermeasures.[131]

For example, Crawford suggested that the Court unequivocally rejected the arguments that the US regarded itself as having taken action in the form of third-party countermeasures in response to obligations *erga omnes*.[132] However, the Court in paragraph 249 of its decision merely stated that 'the acts of which Nicaragua is accused… could only have justified proportionate countermeasures on the part of the State which had been the victim'[133] they could not justify forcible third-party countermeasures. This cannot be interpreted to support the inadmissibility of third-party countermeasures as the Court did not address concerns about non-forcible third-party countermeasures taken by a third State in response of a breach on an obligation *erga omnes*. The Court specifically addressed the use of force taken by the US under the guise of third-party countermeasures and rejected that specific argument. This leads to conclude that 'the Court also seemingly did not exclude the possibility that third-party countermeasures might be permissible in order to enforce obligations *erga omnes (partes)* to the extent that treaty-based mechanisms of enforcement are ineffective'.[134]

[129] See Dawidowicz (n 71 above) 64 – 70.
[130] United Nations General Assembly Resolution 2625, "The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States" 1970.
[131] See D Alland *Justice privée et ordre juridique international : étude théorique des contre-mesures en droit international public* (1994) 337-338.
[132] J Crawford *Brownlie's principles of public international law* (2012) 586-589.
[133] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States) Judgment, ICJ Reports (1986) p. 127, para. 249.
[134] See Dawidowicz (n above) 67.

(i) State Practice on Third-Party Countermeasures.[135]

State practice on the question of third-party countermeasures was not examined in great detail during the adoption of Article 54 of the Articles on State Responsibility.[136] The ILC had merely considered six instances of State practice on the subject of third-party countermeasures and then came to the conclusion that there was insufficient or sparse State practice to make a conclusive determination on the matter, hence Article 54 was adopted as an open clause.[137] However, the relevant instances involving State practice on the question of third-party countermeasures had already exceeded the limited examples which were identified by the ILC in its work and has simply continued to grow over the years.[138] This section will consider a vast deal of State practice in an attempt to establish whether there is support or resistance to the idea of third-party countermeasures in response to a breach of obligations *erga omnes* in international law.

From as early as the 1960s, one can already deduce the position of States in respect of third-party countermeasures. For example, in response to the actions of the apartheid South African police forces who had fired at a crowd and killed masses of black protestors in Sharpeville, a number of States in the international community imposed a trade embargo against South Africa. Even before then, some developing States had adopted numerous unilateral coercive measures against South Africa and its unlawful apartheid policies.[139] In 1962, when the United Nations General Assembly (UNGA) adopted Resolution 1761, it condemned South Africa's disregard to its obligations under the UN Charter and requested for member States to individually or collectively take unilateral and coercive measures against South Africa.[140]

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[135] This section does not do an extensive study on the issue of State practice. However, for a comprehensive study on the issue of State practice assumed in support of third-party countermeasures see Dawidowicz (n 71 above) 111 – 238.

[136] See ILC, Third report on State responsibility, by Mr. James Crawford, Special Rapporteur (2000) 102 para 390-393 available online at https://legal.un.org/ilc/documentation/english/a_cn4_507.pdf.

[137] See Special Rapporteur's third report as above. The ILC considered instances between 1978 and 1998, as listed in the report: *United States – Uganda* (1978); *Certain Western countries - Poland and the Soviet Union* (1981), *Collective measures against Argentina* (1982), *United States - South Africa* (1986), *Collective measures against Iraq* (1990) and *Collective measures against the Federal Republic of Yugoslavia* (1998); See Dawidowicz (n 71 above) 240.

[138] See discussion on Dawidowicz (n 71 above) 111.

[139] Dawidowicz (n 71 above) 113, 114.

[140] UNGA Resolution 1761 (XVII) The policies of the Apartheid Government of the Republic of South Africa (1962), see especially para 4, available online at http://www.worldlii.org/int/other/UNGA/1962/21.pdf. Of course, some might argue that these measures are collective measures not qualifying as

In 1963 in response to the requests made by the General Assembly in the resolution, the UNSC called upon all States to impose an arms embargo against South Africa.[141] Dawidowicz makes specific references that States such as Ghana, Malaysia, Indonesia, Kuwait, Nigeria, Pakistan, Sierra Leone, Tanzania and Uganda reacted by imposing a trade embargo against South Africa.[142] Although these States were party to the General Agreement on Tariffs and Trade (GATT) with South Africa, and did not place embargoes on SA by virtue of the security exceptions provided for in the treaty, they did not consider their actions illegal, whether justified by general international law or not.[143] From this, Dawidowicz draws the conclusion that these States relied on the concept of third-party countermeasures to respond to serious breaches of obligations owed *erga omnes* (obligations concerning the abandonment of apartheid; crimes against humanity and the right to self-determination), all of which give rise to *important* obligations.[144] This conclusion is supported by Dugard, who suggests that there is evidence in State practice supporting the existence of third-party countermeasures such as when States imposed 'sanctions against South Africa, which in fact violated agreements they had with [South Africa]'. Dugard suggests that States did not act on the basis of or place reliance on the UN Charter, but on the concept of countermeasures.[145]

Similarly, when Colonel Papadopoulos and his army seized control in Greece and led numerous violations of fundamental human rights and freedoms, the Consultative Assembly of the Council of Europe adopted a resolution condemning the appalling human rights violations in Greece and calling upon member states to the European

countermeasures, however, such an interpretation is unbefitting. For example, the Special Rapporteur in his third report on State responsibility (n above) 99 para 375 states that the right of every State to invoke responsibility for breaches of obligations *erga omnes* entails, 'as a minimum, that all States have a legal interest to secure cessation of any breach of these norms and to obtain appropriate assurances or guarantees of non-repetition. The draft articles should give effect to that entailment. *It may be noted that there is no risk of conflict or contradiction where several or many States seek the cessation of a breach*, *or a declaration of a breach* (or for that matter restitution, where what is to be restored is an objective situation, the status *quo ante*, in the interests of the victims of the breach'. This conclusion, suggests that third-party countermeasures may include individual and collective (counter)measures.

[141] United Nations Security Council, Resolution 181 (1963), [adopted by the Security Council at its 1056th meeting], of 7 August 1963, available online at https://digitallibrary.un.org/record/112181?ln=en.

[142] Dawidowicz (n 71 above) 115, 116.

[143] Dawidowicz (n 71 above) 116.

[144] Dawidowicz (n 71 above) 116 - 117.

[145] See Statement by Mr John Dugard on ILC Yearbook (2001) (1) 44 para 17, also available online at https://www.un-ilibrary.org/content/books/9789211561579/read. Nonetheless, this does not completely extinguish the counter argument that the States may have acted in accordance with the provisions of Article 103 of the UN Charter, allowing obligations of the UN Charter to prevail over those in the GATT.

Convention on Human Rights (ECHR) to either individually or jointly, refer the situation in Greece to the European Commission on Human Rights.[146] Subsequently, numerous States, including Denmark, Norway, Sweden and the Netherlands instituted complaints against Greece before the Commission for flagrant violations of the ECHR.[147] The Commission found Greece responsible for the alleged violations. Subsequently, in view of Greece's continued violations of various human rights, member States of the European Community suspended the Agreements establishing an Association between the European Economic Community and Greece, in particular, member States suspended the financial assistance obligations they owed to Greece.[148] Although the obligation to provide financial assistance under the Association Agreement was not subject to compliance with human rights obligations, and no reasonable notice was provided to Greece to indicate such suspension as required under customary international law, Dawidowicz concludes the *prima facie* unlawful suspension of financial assistance by the member States is justified under the concept of third-party countermeasures.[149]

The same conclusion can be drawn from the US's response to the egregious violations of international law perpetuated by Uganda under the leadership of General Idi Amin and his army. In that case, the United States and member States of the European Community took unilateral coercive measures against Uganda to put pressure on the Government of Uganda to end the heinous crimes against humanity. While the US was party to the GATT under which it owed Uganda trade obligations, the US nonetheless imposed a trade embargo against Uganda and considered this justified under general international law through third-party countermeasures.[150] Comparably, the European Community member States decided to review development assistance owed to Uganda under the Lomé I Convention,[151] subsequently, only 5% of the assistance owed to Uganda was actually paid out. Tams and Dawidowicz are agreed that this substantial reduction, evidently constituted a *de facto* suspension of development assistance owed to Uganda under the Convention. Although such

[146] See Dawidowicz (n 71 above) 117.
[147] See Dawidowicz (n 71 above) 117, see also the 'Greek case', (Denmark, Norway, Sweden and the Netherlands v. Greece) *Yearbook of the European Commission on Human Rights* (1969), 1 para. 3.
[148] See Dawidowicz (n 71 above) 118. To this end, when Greece requested a loan to the amount of USD 10 million, it was denied.
[149] Dawidowicz (n 71 above) 119; for a similar conclusion, see Tams (n 3 above) 91.
[150] Dawidowicz (n 71 above) 121.
[151] See Dawidowicz (n 71 above) 121, and Lomé I Convention, 1976.

conduct was not justifiable under the Lomé I Convention, and in the absence of treaty-based justification, it is conceivable that the States placed reliance under third-party countermeasures.[152]

By the same token, when Colonel Bokassa seized control in the Central African Republic and commenced with a series of human rights violations, the European Community member States responded by suspending the allocation of development assistance owed to the Central African Republic under the Lomé I Convention. The only way in which this could be explained, is through placing reliance on the doctrine of third-party countermeasures.[153] A fair assessment reveals that even during the time that the issue of third-party countermeasures had to be considered by the ILC, there was quite recent State practice on the issue that the ILC had not considered. For example, in 1983, Sudan was 'engulfed in a protracted civil war between the Government of Sudan and the Sudan People's Liberation Army'.[154] Ten years later, the UNGA in its Resolution 48/147 condemned the various egregious human rights violations taking place in Sudan and called for their cessation.[155] Notwithstanding its repeated condemnations, it would take Sudan's involvement in the assassination attempt on the then President of Egypt, Hosni Mubarak, while in Ethiopia 'to propel the Security Council into action against Sudan'.[156] It was on this breath that the UNSC adopted a resolution strongly deploring Sudan's conspicuous violations of international law, including posing a threat to the peace and security of Ethiopia.[157]

In view of Sudan's support to terrorist activities in the neighbouring States which had, by then, caused acts of cross-border violence,[158] the UNSC called on Sudan to desist

[152] See Tams (n 3 above) 210-211; see also Dawidowicz (n 71 above) 123.
[153] For a similar conclusion see Dawidowicz (n 71 above) 125 - 126, also Proukaki (n 104) 132 - 133. Here, the same conclusion would apply for French's withdrawal of the obligations it owed to the Central African Republic under a bilateral agreement, the 1960 Agreement Concerning Technical Military Assistance.
[154] Dawidowicz (n 71 above) 176
[155] UNGA Resolution 48/147 Situation of human rights in the Sudan (1993) available at: https://www.refworld.org/docid/3b00f30218.html [accessed 30 July 2021]. The UNGA continued to condemn Sudan in other resolutions, see for example UNGA Res 51/112 of December 1993 where the UNGA not only condemns Sudan for the grave violations of human rights, but also calls for Sudan's compliance with its human rights obligations under numerous human rights treaties.
[156] Dawidowicz (n 71 above) 177.
[157] UNSC Resolution 1044 Condemning assassination attempt against President Mubarak of Egypt and calling upon the Government of Sudan to comply with OAU requests (1996) S/RES/1044 (1996), available online at: https://www.refworld.org/docid/3b00f15a44.html [accessed 30 July 2021]
[158] Sudan was deemed to have been responsible for the breach of the principles of non-use of force as well as non-intervention.

from aiding and abetting terrorist activities.[159] Sudan did not comply, leading to further action by the UNSC and warnings to take even further measures against Sudan should the violations be sustained.[160] Notwithstanding these measures and warnings, Sudan's non-compliance continued. In 1997, the US adopted a number of coercive measures against Sudan, including a trade embargo and freezing all Sudanese government assets within its jurisdiction.[161] On one hand, since Sudan was not a member State to the GATT or the World Trade Organisation, the trade embargo could be categorised as an act of retorsion, while on the other hand, the asset freeze required some legal justification. The conclusion here, has been that the actions of the US in relations to the asset freeze must be understood as a third-party countermeasure.[162]

With all this in mind, the question that arises is whether third-party countermeasures are in fact permissible under international law. This begs the question as to whether there is *sufficient* State practice on the subject to develop a rule of customary international law which entitles States to take third-party countermeasures in defence of obligations *erga omnes*. The independent studies undertaken by Tams and Dawidowicz favour the conclusion that third-party countermeasures have evolved into a customary rule of international law.[163] Indeed this is an apt conclusion as both the elements of State practice and *opinio juris* appear to be fulfilled when properly examining the question at hand. However, before venturing into a succinct assessment of these elements, it is worth noting the existing debates regarding the 'instant' formation of customary international law. This conception stems from the fact that no particular duration is required for the formation of customary international law. However, while this is correct, it is suggested that some time must always pass, and that assertions of a rapid emergence of customary international law rules are to be treated with caution.[164]

[159] UNSC Resolution 1044 (n 157 above).
[160] UNSC Res 1054 On sanctions against Sudan (1996) S/RES/1054 (1996), available online at https://www.refworld.org/docid/3b00f15334.html [accessed 30 July 2021] see also UNSC Res 1070 On imposing of air sanctions against the Sudan (1996) S/RES/1070 (1996), available online at https://www.refworld.org/docid/3b00f20b8.html [accessed 30 July 2021]
[161] See Dawidowicz (n 71 above) 179.
[162] Dawidowicz (n 71 above) 179.
[163] See Tams (n 3 above) 198 – 251; see also Dawidowicz (n 71 above) 239 - 255
[164] O Sender and SM Woods Between '"Time Immemorial" and "Instant Custom": The Time Element in Customary International Law' (2021) 42 (2) *Grotiana* 229-251.

Although the assertation regarding the instant formation of custom has been debated for over 50 years now,[165] scholarly option vastly differs on the subject. For example on one hand, Scharf and Mejía-Lemos are of the opinion that certain factors may accelerate the development of customary international law rules and thus support the idea of instant formation of custom.[166] On the other hand, other scholars argue that the term 'instant' is actually only a technical term used to draw attention to those customary rules of law that have emerged very quickly, but not instantaneously. These scholars, deny the possibility of customary law rules forming virtually immediately.[167]

However, whatever the import of the discussions surrounding the instant formation of custom may be, what is clear is that the conclusion regarding whether third-party countermeasures are custom is not prejudiced as the assessment relied upon below satisfies both the heavier test (which requires an established state practice and *opinio juris*) as well as the weaker test which relies on the instant formation of custom without an extensive evaluation of State practice.[168]

(a) Sufficiently Widespread and Representative State Practice

The purpose of this chapter, and in particular, this section is not to - in and of itself - attempt to determine the existence of a right to third-party countermeasures under customary international law by assessing individual State practice on the subject, but rather to highlight the vast number of States that have supported the idea of third-party countermeasures and show examples where appropriate, which have been investigated in previous studies. The ICJ made it clear in its 1969 *North Sea Continental Shelf* case, that the existence of a rule of customary international law requires that there be a settled practice together with *opinio juris*.[169]

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[165] B Cheng 'United Nations Resolutions on Outer Space: Instant International Customary Law' 5 (2005) *Indian Journal of International Law* 23–48.

[166] MP Scharf 'Accelerated Formation of Customary International Law' (2014) *Case Western Reserve University School of Law Scholarly Commons* 310; DG Mejía-Lemos 'Some considerations regarding "Instant" International Customary Law, fifty years later" (2015) 55 *Indian Journal of International Law* 85–108

[167] See for example B Krivokapic 'On the issue of so-called "Instant" Customs in International Law' *Danubius Universitas Acta, Administratio* 310.

[168] Cheng (n 165 above).

[169] *North Sea Continental Shelf* cases (n 8 above); see also M Wood, Fifth report of the Special Rapporteur on identification of customary international law, 70th session of the ILC (2018) available online at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/043/79/PDF/N1804379.pdf?OpenElement.

At the beginning of this section, the study noted that the ILC's consideration as to whether the principle of third-party countermeasures was equivalent to a rule of customary international law resulted in a negative conclusion. The ILC, after considering just six examples of State practice, concluded that there was rather limited and embryonic State practice on the matter to assess whether there is a rule of customary international law in favour of third-party countermeasures. However, this conclusion cannot be confirmed as apt, especially today. Tams and Dawidowicz, have conducted extensive assessments of a wide range of examples of State practice which strongly suggest that there is sufficient State practice in favour of third-party countermeasures.[170] The preliminary observation made in this study is that third-party countermeasures have been taken in response to various breaches, most which amounted to breaches of *jus cogens*, and by effect, clearly identifiable obligations *erga omnes*.[171]

From the studies conducted by Tams and Dawidowicz's, we learn that States such as Albania, Bahrain, Bosnia, Botswana, Brazil, Bulgaria, Chile, China, Costa Rica, Croatia, Czech Republic, Democratic Republic of Congo, Egypt, Estonia, Gabon, Gambia, Georgia, Ghana, Guinea-Bissau, Herzegovina, Honduras, Hungary, Iceland, India, Indonesia, Kenya, Kuwait, Latvia, Lichtenstein, Lithuania, Macedonia, Malaysia, Malta, Moldova, Montenegro, Nigeria, Norway, Pakistan, Poland, Romania, Russia, Rwanda, Serbia, Sierra Leonne, Slovakia, Slovenia, South Africa, South Korea, Tanzania, Turkey, Uganda, Ukraine, Zambia and amongst others, Zimbabwe, adopted third-party countermeasures or at least strongly supported their adoption when they were imposed in the form of trade embargoes against delinquent States that had violated *important* obligations owed to the international community.[172] The same can be said for the United States, the United Kingdom, the European Community member States and the Arab League member States.[173]

The preceding paragraph confirms to us that not only is State practice on this matter sufficiently widespread, but it also representative. Although Western States still

[170] Tams (n 3 above) 198 – 251; see also Dawidowicz (n 71 above) 111 – 238.
[171] See Bills (100 above), who lists examples of situations including apartheid, acts of genocide, self-determination claims, use of force and even the practice of torture.
[172] For detailed discussions on the conduct taken by each of these states, see Tams (n 3 above) 204 – 225 and Dawidowicz (n 71 above) 242
[173] See above.

dominate practice on the matter, Dawidowicz's survey on the practice of the States regarding third-party countermeasures shows that the practice is sufficiently diverse and representative.[174] In his words 'the sheer volume and diversity of practice is striking'.[175] As such, to conclude this section, State practice appears more widespread and representative than the ILC had assumed. To that end, it seems safe to conclude that the threshold laid down by the ICJ in *North Sea Continental Shelf* cases for State practice has been met as there is a substantial body of State practice on third-party countermeasures, one that appears to be accompanied by the appropriate elements of *opinion juris* for that matter.[176]

Notwithstanding this conclusion, there has been arguments that State practice must also be consistent. The ILC justifies the position it took in relations to third-party countermeasures based of the conclusion that practice on the matter was too selective and inconsistent.[177] Even Sir Michael Wood suggests that State practice must be virtually uniform.[178] However, State practice is 'rarely (if ever) uniform in any absolute sense'.[179] Accordingly, practice relating to third-party countermeasures is not deviant from this assessment.[180] In other words, it is not required that practice on the matter be wholly uniform, minor deviations are acceptable.[181] Indeed, practice on the issue of third-party countermeasures reveals some divergent opinions, however, these divergent opinions are largely inconsequential as actual practice is 'far more nuanced than the debate in the Sixth Committee taken in isolation would otherwise suggest'.[182]

For example, although States such as Argentina and Costa Rica were against the adoption of third-party countermeasures in relation to the Falklands crisis situation because they thought of them as an instrument of abuse for powerful States which undermine the authority of the Security Council under Chapter VII of the UN Charter,

[174] Dawidowicz (n 71 above) 243.
[175] As above.
[176] See Tams (n 4 above) 198 - 251; Dawidowicz (n 71 above) 382 – 385.
[177] See J Crawford, Third Report of Special Rapporteur on State Responsibility, A/CN.4/507 para 396(b) available online at https://legal.un.org/ilc/documentation/english/a_cn4_507.pdf. See also Dawidowicz (n 71 above) 245.
[178] Crawford (n 177 above).
[179] Dawidowicz (n 71 above) 248.
[180] As above.
[181] See Dawidowicz (n 71 above) 248; see also Fisheries Case (*United Kingdom v. Norway*) Judgment, ICJ Reports (1951) 138; see further Nicaragua (n 55 above) 98.
[182] Dawidowicz (n 71 above) 248.

they still found the concept acceptable during the Sixth Committee.[183] In fact, notwithstanding its stance regarding the Falklands crisis, Costa Rica later expressed its support towards the adoption of third-party countermeasures against the Federal Republic of Yugoslavia[184] and Burma.[185] Similarly, States like Botswana, Cameron and Tanzania were against the idea of third-party countermeasures in the Sixth Committee, but still supported the idea that they be adopted against Nigeria, Burundi and Zimbabwe.[186] In fact, Tanzania went on to adopt third-party countermeasures itself against South Africa and Burundi.[187] There are more examples of situations which show conflicting practice relating to the issue of third-party countermeasures, however, when properly scrutinised, the plausible conclusion to flow is that there is 'a "virtually uniform" practice in support of a permissive rule of third-party countermeasures' in circumstances where States react against breaches of important obligations or norms of international law owed to all States.[188]

(b) The Existence of *Opinio Juris* in Support of Third-Party Countermeasures

It should be recalled that at the beginning of this section it was noted that the ILC, during the adoption of the saving clause, Article 54, had indicated that it was unclear whether third-party countermeasures were accepted as law in practice. Indeed, the concept of *opinio juris* is very difficult to establish, especially 'in view of the manner in which international relations are conducted'.[189] It is extremely difficult to get clear evidence of *opinio juris* because practice reveals itself in a manner that is too close to

[183] See statements made by States during the Sixth Committee: UN Docs A/C.6/55/SR.15, 10 para 66 (Argentina); A/C.6/55/SR.17, 11, para 63 (Costa Rica); A/C.6/56/SR.15, 8 para 53 (Argentina); see also Dawidowicz (n 71 above) 248 – 249.

[184] Dawidowicz (n 71 above) 249; UNSC Resolution 1199, The situation in Kosovo (1998) S/RES/1199 (1998) available online at https://www.refworld.org/docid/3b00f14f40.html [accessed 4 August 2021];

UNSC Resolution 1203, Kosovo (1998) S/RES/1203, available online at https://www.refworld.org/docid/58207bc87.html [accessed 4 August 2021]; UN Doc. S/PV.3930 (1998) available online at https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Kos%20SPV%203930.pdf.

[185] See Dawidowicz (n 71 above) 201, 249; see also UN Doc. S/PV. 6161 (2009) 17 (Costa Rica), available online at https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Myan%20SPV%206161.pdf.

[186] See Dawidowicz (n 71 above) 249

[187] See UN Doc. A/C/55/SR.14 (2001) 9 paras 46-47 (Tanzania), available online at https://digitallibrary.un.org/record/439878?ln=en#record-files-collapse-header.

[188] Dawidowicz (n 71 above) 250.

[189] See Dawidowicz (n 71 above) 252.

politics than it is to the law.[190] According to Lauterpacht,[191] a politically motivated practice is nevertheless open to legal scrutiny and assessment, and can therefore, still amount to 'valuable evidence of a rule of custom'.[192] As such, the overlap between the law and politics in so far as third-party countermeasures are concerned, does not impair the creation of a rule of custom.

Sir Michael Wood highlights that in so far as practice is not solely motivated by extra-legal considerations, then the creation of custom is not vitiated by the fact that State practice is not wholly based of on legal grounds.[193] In other words, it is a difficult task to gather explicit evidence of *opinio juris* since States hardly explicitly refer to the concept of third-party countermeasures as a basis for their conduct. Notwithstanding these considerations, Dawidowicz is of the view that 'States have adopted *prima facie* unlawful unilateral coercive measures based on an explicit legal rationale; namely, the enforcement of obligations *erga omnes*' and this 'neatly corresponds to third-party countermeasures as a legal category'.[194] Although there is a dearth of explicit statements expressing *opinio juris* on third-party countermeasures, such statements nevertheless do exist.[195] There appears to be considerable support towards the conclusion that the right to third-party countermeasures has over time, crystalised into a norm of customary international law.[196]

5. Conclusion

This chapter set out to review the contribution of the ICJ towards the development of, and conflation between the notions of *erga omnes* and *jus cogens*. This chapter concludes that although often conflated, the concepts of *jus cogens* and *erga omnes*

[190] ILC Yearbook (2000) *Summary records of the meetings of the fifty-second session 1 May–9 June and 10 July–18 August 2000* vol 1, 333 at para 20 (Mr. Cedeno Rodriguez), available online at https://legal.un.org/ilc/publications/yearbooks/english/ilc_2000_v1.pdf.
[191] L Lauterpacht *The development of international law by the International Court* (1958) 380.
[192] Dawidowicz (n 71 above) 252.
[193] M Wood, Second Report of the Special Rapporteur on identification of customary international law, 70th session of the ILC (2014) 46-47, 56 at para 61 available online at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/407/74/PDF/N1440774.pdf?OpenElement.
[194] See Dawidowicz (n 71 above) 252
[195] See Dawidowicz (n 71 above) 254. See also for example, the European Union's Statement to impose third-party countermeasures as autonomous sanctions, released by the Council of the European Union '*Basic Principles on the Use of Restrictive Measures (Sanctions)*' (2004) paras 3, 6, available online at https://data.consilium.europa.eu/doc/document/ST-10198-2004-REV-1/en/pdf.
[196] See Dawidowicz (n 71 above) 255.

are distinct.[197] The chapter set out to assess whether obligations *erga omnes* can be synthesized through the lens of the Articles on State Responsibility. In particular, the chapter considers that Article 48 establishes a regime of State responsibility for serious violations of international obligations towards the international community as a whole (*erga omnes*) and implies that third States may invoke the responsibility of a State in breach of an obligation *erga omnes*. The assessment of obligations *erga omnes* through the Articles of State Responsibility invited questions regarding the invocation of responsibility for breaches of communitarian norms, which in turn, allowed the chapter to set out what, and whether States are allowed to take third-party countermeasures to ensure compliance with obligations *erga omnes*, during that assessment, the chapter uncovered that the quest to identifying obligations *erga omnes* requires an assessment of obligations which may be considered 'important' in international law. Of course, this will be discussed in much detail in the next chapter as it identifies the modality to be used in identifying *erga omnes* without relying on *jus cogens*, hence very minimal attention was paid to the proposed 'importance requirement' in this chapter.

Towards the end, this chapter concludes by accepting the position advanced by Tams and Dawidowicz, that third States have the right to take third-party countermeasures under customary international law. Be as it may, this conclusion, although being more elaborative of the contextual scope of *erga omnes*, does not get rid of the confusion between *erga omnes* and *jus cogens*. Still, various inevitable uncertainties of *jus cogens* hinder on the attempt to clarify *erga omnes*. For example, *erga omnes* is conceived on the basis of the importance of a right being protected by and within the international community of States as a whole. However, *jus cogens* is also conceived on the idea that norms endowed with this status are important. The degree of importance to each of these, remains to be assessed in the following chapter. What is clear so far however, is that there is great overlap between the two notions – causing various grounds for the conflation between the concepts.

[197] See S Kadelbach '*Jus Cogens*, Obligations *Erga Omnes* and other Rules: The Identification of Fundamental Norms' in C Tomuschat and J-M Thouvenin (eds.) The Fundamental Rules of the International Legal Order (2005) 28 as well as De Wet (n 14 above) 555, see also De Wet (n 5 above) 9.

Chapter 4: Establishing *Erga Omnes* Against and Beyond *Jus Cogens*

1. Introduction

The concept of obligations *erga omnes* remains somewhat mysterious,[1] 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*.[2] To that extent, as to which specific obligations have an *erga omnes* but not a *jus cogens* character remains largely unclear.[3]

In view of this paucity, this chapter will consider the notion of *erga omnes* beyond *jus cogens*. In section 2 the chapter will assess the partial identity and the general relationship between *erga omnes* and *jus cogens*. This section will consider the extent to which these two concepts overlap. Section 3 will specifically be aimed at answering the question whether *erga omnes* can exist without *jus cogens*. In effect, the section will establish a method by which to identify *erga omnes* without *jus cogens* and provide tentative examples of such independent *erga omnes* obligations.

2. The Shared Identity Between *Erga Omnes* and *Jus Cogens*

The starting point in comparing *jus cogens* and *erga omnes* is an obvious consideration, 'so obvious that it runs the risk of being overlooked':[4] *jus cogens* refers to norms whereas *erga omnes* refers to obligations.[5] Effectively, *jus cogens* must be understood as referring to the legal status that certain norms of international law reach

[1] See for example CJ Tams and A Tzanakopoulos 'Barcelona Traction at 40: The ICJ as an Agent of Legal Development' (2010) *Leiden Journal of International law* 791.
[2] Some scholars argue that the nature of *jus cogens* norms emanate an *erga omnes* effect, however, 'not all obligations *erga omnes* are to be found in the flipside of *jus cogens*'. See for example, J Vidmar 'International Community and Abuses of Sovereign Powers' (2014) *UP Space Repository* 13 – 14 also available online at https://repository.up.ac.za/bitstream/handle/2263/50450/Vidmar_International_2014.pdf?sequence=1&isAllowed=y [accessed on 03 September 2021); see also E de Wet 'The international constitutional order' (2006) 55 *International and Comparative Law Quarterly* 61.
[3] See C Tams *Enforcing obligations erga omnes in international law* (2005) 175, where he concludes that '[*e*]*rga omnes* outside *jus cogens* is likely to remain [an] uncharted territory until States begin to invoke the concept more commonly in formalised proceedings'.
[4] M Ragazzi *The concept of international obligations erga omnes* (1997) 190.
[5] As above.

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*.[6]

This section questions if and to what extent *jus cogens* and *erga omnes* obligations overlap. In the first chapter, the study specifically noted that the *Barcelona Traction* decision supports the conclusion that *jus cogens* norms have *erga omnes* effect.[7] Although the International Court of Justice did not expressly refer to *jus cogens*, the Court implied *jus cogens* status when it referred to the types of obligations it gave as examples of *erga omnes*.[8] These were, namely: the out-lawing of the unilateral use of force, genocide and the prohibition of slavery and racial discrimination.[9] Each of these examples (which were identified by the Court as having *erga omnes* character), derive from *jus cogens*.[10] This fact is important and it confirms the overlap between the two concepts. Nonetheless, this list by the ICJ is not enough by itself to allow us the conclusion that all *erga omnes* are invariably *jus cogens*.

In Draft Conclusion 17 on Peremptory norms of general international law (*jus cogens*), the International Law Commission provides us with the starting point for understanding the shared identity between *erga omnes* and *jus cogens*.[11] Draft Conclusion 17 provides that these two notions share an identity as far as *jus cogens* give rise to obligations *erga omnes*.[12] 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.[13] In support of its conclusion, numerous examples are made.[14] Indeed, the

[6] The conclusion here is that *jus cogens* and *erga omnes* are distinct. Although this position is accepted (see for example the Report of the International Law Commission ('ILC') *Seventy-first session* (2019) 190-193 available online at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/243/93/PDF/G1924393.pdf?OpenElement [accessed 04 September 2021]), it is also accepted that there exist a substantial overlap between the concepts. See MC Bassiouni 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59 *Law and Contemporary Problems* 63 also available online at: https://scholarship.law.duke.edu/lcp/vol59/iss4/6 [accessed 07 September 2021].

[7] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain),* Judgment, ICJ Reports (1970) 32 paras. 33-34.

[8] E de Wet '*Jus Cogens* and Obligations *Erga Omnes'* in D Shelton (ed.) *The Oxford Handbook of International Human Rights Law* (2013) 554-555.

[9] As above; see also *Barcelona Traction* (n 7 above).

[10] See Ragazzi (n 4 above) 194.

[11] See Report of the ILC *Seventy-first session* (n 6 above) 190.

[12] As above.

[13] As above.

[14] Quoted verbatim, the ILC's commentary to Draft Conclusion 17 in its 2019 Report (n 6 above) 190 - 191, notes that: The Democratic Republic of the Congo (formerly known as Zaire), for example, in a statement in the Sixth Committee of the General Assembly, proposed a treaty on the prohibition of the use of force and stated that the proposed treaty should have an erga omnes effect in view of the fact that the prohibition of the use of force was a peremptory norm of general international law (*jus cogens*). Similarly,

conclusion that both concepts are somewhat related is also supported by a considerable amount of circumstantial evidence and scholarly writings.[15] Similar considerations to those developed at the beginning of section 3 in chapter 3 merit recollection here.

On one hand, Article 53 of the VCLT describes *jus cogens* as 'a norm accepted and recognized by the international community of States as a whole, and as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[16] On the other hand the Courts' 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*.[17] In light of these considerations, it seems beyond doubt that there is, at the very least, a considerable overlap between obligations *erga omnes* and norms of *jus cogens*.

It was noted earlier that certain debates in literature suggest that *erga omnes* is defined by reference to *jus cogens*. This suggestion is 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'.[18] This suggestion fails to acknowledge that conceptually, the concept of *jus cogens* is itself not more clearly defined than *erga omnes*.[19] Second, this conception fails to acknowledge that *erga omnes* may exist outside the scope of *jus cogens*.

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the Czech Republic stated that "*jus cogens* obligations were *erga omnes* obligations, which did not allow for any derogation, including by means of an agreement". The Federal Court of Australia, in *Nulyarimma and Others v. Thompson*, also accepted the contention of the parties that "the prohibition of genocide is a peremptory norm of customary international law (*jus cogens*) giving rise to non derogable obligations *erga omnes* that is, enforcement obligations owed by each nation State to the international community as a whole". Similarly, in *Kane v. Winn*, the United States District Court of Massachusetts determined that "the prohibition against torture" is an obligation *erga omnes* that, "as [a] *jus cogens* norm[s] ... [is] 'non- derogable and peremptory'"… [footnotes omitted].

[15] See Tams (n 3 above) 139-140; De Wet (n 8 above) 554-555; PM Dupuy 'L'unité de l'ordre juridique international' (2002) 297 *Recueil des Cours de L'académie de Droit International* 385.

[16] Article 53, *Vienna Convention on the Law of Treaties*, 1969.

[17] Tams (n 3 above) 140; see also A de Hoogh 'The Relationship between *Jus Cogens*, Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective' (1991) 42 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 193; ID Seiderman *Hierarchy in International Law: The Human Rights Dimension* (2001) 124.

[18] Tams (n 3 above) 141.

[19] See Tams (n 3 above) 141, who recalls the comment made by Krystyna Marek to 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'.

A close assessment of the debates surrounding the relationship between *erga omnes* and *jus cogens* reveals multiple views, ranging between mere overlap, partial identity and complete identity or 'identicality'.[20] Before elaborating on the favoured view in the literature, perhaps it is befitting to explain what each of these views entail. First, a mere overlap between the two concepts means that each of the concepts, individually extend over to cover a part of the other concept.[21] On the other hand, partial identity can be seen as more than a mere overlap, it is a subset of the characteristics of an entity that make up its identity in a particular domain. In other words, key characteristics of one concept, are found in the make-up of another concept.[22] In this case, the main and substantial characteristics of *erga omnes* are found in *jus cogens*, leading to the generally accepted conclusion that all *jus cogens* have *erga omnes* status. Finally, complete identity or identicality means that the concepts would be similar in every detail, in other words, they would be exactly alike (identical). This would mean that *jus cogens* and *erga omnes* would be synonymous and could be used interchangeably.[23]

The leading view remains in support of partial identity, that is, many scholars argue that *jus cogens* produces *erga omnes* obligations, but not all *erga omnes* arise from *jus cogens*.[24] This dissertation supports this view because if *jus cogens* did not create *erga omnes*, but merely protected the legal interests of certain States, then third States would not be prohibited from disapplying the rule by concluding a treaty against a norm

[20] See Tams (n 3 above) 146.

[21] Report of the International Law Commission on the work of its fifty-third session, *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* 2001 p. 111 para 7. If we were to apply the provisions of Article 31 of the 1969 Vienna Convention on the Law of Treaties regarding treaty interpretation we would learn that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Although this part of the study is not aimed at interpreting this word for treaty purposes, the ordinary meaning of 'overlap' as per Article 31 of the VCLT would be a fitting interpretation here. See how the word 'overlap' is defined in the Merriam Webster Dictionary, available online at https://www.merriam-webster.com/dictionary/overlap [accessed 2 November 2021].

[22] See how this word is used in a document produced by M Rundle *et al* under the Organisation for Economic Co-operation and Development 'At a crossroads: "Personhood" and Digital Identity in the information society: STI working paper' (2007) (7) *Information and Communication Technologies*; see also JI Agbinya *et al* 'Development of Digital Environment Identity (DEITY) System for Online Access' (2008) available online at https://www.researchgate.net/publication/224355203_Development_of_Digital_Environment_IdentiTY_DEITY_System_for_Online_Access [accessed 5 November 2021].

[23] See the discussion of 'identity' (2018) on the Stanford Encyclopaedia of Philosophy blog online at https://plato.stanford.edu/entries/identity/ [accessed 5 November 2021]; see also the Cambridge dictionary https://dictionary.cambridge.org/dictionary/english/identical [accessed 5 November 2021].

[24] De Wet (n 8 above) 555.

jus cogens.[25] Moreover, third States would have no right of standing to invoke the responsibility of a State in breach of a *jus cogens* norm if *jus cogens* did not create *erga omnes* obligations.[26]

The substantive understanding of norms of *jus cogens* 'presuppose[s] the existence of a general legal interest typical of *erga omnes* status'.[27] Tams acknowledges that on the one hand, States have hardly raised any opinions on the relationship between the concept of *jus cogens* norms and obligations *erga omnes*.[28] On the other hand, he acknowledges that in cases where States have relayed their comments on the said relationship, they seemed to support the view that *jus cogens* norms impose obligations *erga omnes*. For example, the comments made by States to the ILC's work on State responsibility supports the view that all States have a legal interest in the protection of *jus cogens* norms.[29] In particular, the comments made by Germany[30] and Italy[31] during the first reading of the ILC's Articles on State Responsibility seems to accept *jus cogens* and *erga omnes* as distinct concepts that seek to protect the fundamental values of the international community.[32] The ILC's report on the work of its seventy-first session illustrated the extensively welcomed view that all *jus cogens* norms were by definition *erga omnes*, albeit, the reverse cannot be said to be correct.[33]

An assessment of the negative inverse, that is, *erga omnes* beyond *jus cogens*, has remained a virgin ground for long.[34] Although, there are multiple claims supporting the view that certain obligations, irrespective of their peremptory or dispositive status, are

[25] Tams (n 3 above) 148.
[26] As above.
[27] See Tams (n 3 above) 149.
[28] As above.
[29] See for example comments made by Germany during the first reading of the ILC's Articles on State Responsibility reproduced in UN Doc. A/CN.4/488, 165 paras 4-5.
[30] As above.
[31] See comments made by Germany during the first reading of the ILC's Articles on State Responsibility reproduced in UN Doc. A/CN.4/488, 119 paras 3 – 5.
[32] As above.
[33] See volume II part 2 of the *International Law Commission's Yearbook* (1998) p. 69 para 279; A Kaczorowska *Public International Law* (2010) 48; see also for example Switzerland's comment on Article 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 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 M Koskenniemi, *Report of the International Law Commission*, Fifty-eighth session, General Assembly Official Records, (A/CN.4/L.682) (2006).
[34] See Tams (n 3 above) 151.

indeed *erga omnes*,[35] there is very little literature concerning how an obligation would reach *erga omnes* status without first being *jus cogens*.[36] The subsequent section will illuminate the process by indicating which obligations *erga omnes* can be identified without depending on *jus cogens*.

3. The Analysis Regarding the Identification of *Erga Omnes* Beyond *Jus Cogens*

Although the ICJ has itself 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, the Court 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, in its own words, the Court 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 considers the importance by which the international community views the right of a peoples 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 the Court's jurisprudence.[42] In fact, the thread relating to the 'importance requirement' can also be seen in the discussion regarding third-party countermeasures above. However, this is not to say that this requirement (of importance), is the only consideration in the

[35] As above; see also the volume II part 2 of the *International Law Commission's Yearbook* (n 33 above) p. 69 para 279, 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]'.
[36] Tams (n 3 above) 151.
[37] Tams (n 3 above) 117.
[38] Tams (n 3 above) 156.
[39] *Barcelona Traction* (n 7 above) para 33.
[40] *Case Concerning East Timor (Portugal v Australia)* Judgment, ICJ Reports (1995) 102.
[41] Tams (n 3 above) 129, 156.
[42] See *Barcelona Traction* (n 7 above) para 33; see also Tams (n 3 above) 156. One must also admit, that the more troublesome question is the degree of evidence required to prove that a particular obligation qualifies as an obligation *erga omnes*.

determination of *erga omnes* status.[43] 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.[44]

This study 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.[45] Rather, the study 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 answers to the question tasked at hand.

From the start, one must understand that obligations *erga omnes* are derived from a pool of general international law rules.[46] This is even 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.[47] With this in mind, two approaches can be identified to dominate the debate on the identification of obligations *erga omnes*,[48] the material and the structural approaches.[49]

On the one hand, the material approach is found in the Court's reference to 'the importance of rights involved',[50] and is based on the simple proposition that in order

[43] Despite decades of discussions around the concept of *erga omnes*, the question regarding how such obligations are to be identified has not been answered satisfactorily, largely because of the ICJ's inconclusive jurisprudence on the matter.
[44] Ragazzi (n 4 above) 185-186.
[45] Tams (n 3 above) 119.
[46] However, it must be noted that general international law cannot be interpreted in isolation. Just as general international law can influence treaty interpretation, so can treaties help to identify rules of general international law; see discussions made by Tams (n 3 above) 124.
[47] *Barcelona Traction* (n 7 above) paras 33-34; see also discussions made by Tams (n 3 above) 122 - 123.
[48] These approaches are specifically used in the identification of obligations *erga omnes* without placing reliance on *jus cogens*. They must not be confused with the concepts of 'overlap, partial identity and complete identity or identicality'. The latter concepts speak of how *erga omnes* and *jus cogens* are related, whereas the former speaks of how *erga omnes* may be identified without depending on the concept of *jus cogens*.
[49] Of course, these two approaches are not the only existing theories in the literature. For example Ragazzi (n 4 above) has sought to highlight common elements of obligations *erga omnes* expressly recognised by the ICJ. In his view, the assessment of the four examples of obligations erga omnes given in the *Barcelona Traction* case reveals the existence of five common elements. These are (i) narrowly defined obligations, (ii) prohibitions as opposed to positive obligations, (iii) obligations *strictu sensu*, (iv) obligations derived from norms *jus cogens* and (v) obligations protecting fundamental human rights. Nonetheless, Ragazzi underpins that these five common elements are merely descriptive and not prescriptive in nature. Futhermore, since the elements are inferred from the specific four obligations listed in *Barcelona Traction* to the exclusion of other obligations (noting that the list of *erga omnes* obligations given by the ICJ in *Barcelona Traction* is non-exhaustive), this does not mean that all other obligations *erga omnes* must invariably present these common elements.
[50] *Barcelona Traction* (n 7 above) para 33.

to be *erga omnes*, an obligation has to protect important values.[51] This approach has been affirmed in the jurisprudence of the ICJ, examples from both the *Barcelona Traction* as well as the *East Timor* decision have been quoted and cited in support of this conclusion.[52] Nonetheless, it is very difficult to apply the approach in practice as it depends on the inherently vague and indeterminate notion of 'importance'.[53] 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.[54] 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.[55] Some scholars argue that the *erga omnes* status of an obligation is the consequence of the obligation's non-reciprocal structure of performance.[56] In other words, an obligation acquires *erga omnes* status because it has to be performed in relation to all States.[57] These two approaches are addressed in turn, starting with the structural.

3.1. Structural Approach

Adherents of the structural approach form 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*.[58] 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.[59] This study finds the latter view more convincing than the former particularly because the former ignores the one recurring theme in the ICJ's jurisprudence on the pronouncement of obligations with *erga omnes* status, namely, the importance requirement.

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[51] Tams (n 3 above) 129.
[52] See for example the *Case Concerning East Timor (Portugal v. Australia)*, Judgment ICJ Reports (1995) 102 para 29.
[53] Tams (n 3 above) 129.
[54] As above.
[55] As above.
[56] As above.
[57] As above.
[58] Tams (n 3 above) 130-131, see ID Seiderman *Hierarchy in International Law. The Human Rights Dimension* (2001) 129.
[59] Tams (n 3 above) 131; see F Biermann '"Common Concern of Humankind": the Emergence of a New Concept in International Environmental Law', 34 *Archiv des Völkerrechts* (1996) 426.

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*.[60] 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.[61] In his argument, he gives an example, alleging that the prohibition against aggression is reciprocal in nature. Since aggression involves the use of force against another State, every breach of the rule carries with it an injury suffered by the victim State in its *individual* capacity,[62] so his argument goes.[63]

Although the breach of the obligation indeed results in the direct injury of 'one (victim) State in its individual capacity',[64] such consequence must not be conflated with the nature of the primary obligation itself.[65] 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

[60] See Tams (n 3 above) 133.
[61] See Tams (n 3 above) 134-135 who discusses this in detail.
[62] As above.
[63] See his arguments throughout Tams (n 3 above) 134 – 135. In his words: 'the moderate structural approach is not supported by the Court's jurisprudence and is ultimately unconvincing. A quick glance at the list of examples expressly recognised by the Court refutes the idea that in order to be valid *erga omnes*, an obligation had to be non-reciprocal (or non-bilateralisable/integral). Out of the five examples of obligations *erga omnes* expressly recognised by the Court, one is perfectly bilateralisable, while breaches of all others can at least give rise to (bilateral) responsibility between pairs of States.'
Tams continues to make an almost convincing argument on the reciprocal nature of the *erga omnes* obligation regarding aggression. However, this argument fails to acknowledge that although aggression, by definition directly affects one individual State, it contains a non-bilateralisable component. In the words of C Annacker in 'The Legal Regime of *Erga Omnes* Obligations Under International Law' (1994) 46 *Austrian Journal of Public International Law* 149: 'If non-compliance with an *erga omnes* obligation impairs the objective interests of all parties bound by the norm, and in addition the subjective interests of certain parties, then all States are affected directly, but in different interests'. This is so because all these States would have a general interest in seeing the obligation being protected and respected. Much like any State party to a treaty would have an interest in the protection of obligations enlisted in a treaty they are party to.
[64] Tams (n 3 above) 134.
[65] The same rationale goes in response to the example Tams makes in respect of the prohibition against genocide. The consequence of a reciprocal relation between an injured State and the perpetrating State must not be confused with the nature of the obligation breached. The obligation in question remains one that is not reciprocal in nature and even though its breach may specifically or directly affect one victim State and the perpetrating State, all other States are not ceased of their legal interest in the observance of that same obligation. Should any other state, other than the injured State raise the responsibility of the perpetrating State, it does so as a third State vested with the requisite standing to ensure the observance of said norm in question, not because the State has itself directly suffered the actual injury.

erga omnes. In other words, the obligation is *erga omnes* precisely because it is not applied in a reciprocal manner.[66] 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.[67] 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,[68] but is also sustainable.

3.2. 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.[69] This is firmly rooted in the jurisprudence of the ICJ.[70] While enjoying much support, the importance requirement is quite ambiguous and must be given some practical meaning.[71] To do this, one must ask, how important an obligation must be in order to be elevated to *erga omnes* status.[72] 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'.[73] This means the importance of the obligation is analysed in comparison to the quality of a specific right.[74] 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 has been argued by various scholars.[75] On the contrary, the severity of these violations would remain useful when assessing

[66] See Tams (n 3 above) 134.
[67] See MM Bradely '*Jus Cogens'* Preferred Sister: Obligations *Erga Omnes* and the International Court of Justice – Fifty Years after the Barcelona Traction Case' (2021) 199, who provides that the literal interpretation of *erga omnes* is 'applicable to all'. See how A Memeti & B 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.
[68] As above.
[69] Tams (n 3 above) 136.
[70] As above.
[71] As above.
[72] As above.
[73] Barcelona Traction (n 7 above) para 33.
[74] Tams (n 3 above) 136.
[75] See Tams (n 3 above) 137; see also K Oellers-Frahm 'Comment: The *erga omnes* Applicability of Human Rights' (1992) 30 *Archiv des Volkerrechts* 35 who argues that the extent and seriousness of a particular breach is relevant in the determination of whether such an obligation is *erga omnes*; see also PN Okowa *State Responsibility for Transboundary Air Pollution in International Law* (2000) 215 – 216 who suggests that 'only gross violations on a widespread scale' will meet the threshold of erga omnes breaches.

how States can react to such violations or to determine whether States should make use of possible rights of protection.[76]

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.[77] In addition to that, the Court does not define what it means by 'important', leaving the determination of the threshold even more difficult to decipher. Of course 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.[78] In instances where a concept is rather vague, it would be wise to turn to practice in order to decipher its meaning, alas, the *erga omnes* concept has not been regularly invoked in formalised proceedings.[79]

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:

> 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.[80]

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, State responses against breaches of an obligation may be examined in determining the status of an

[76] Tams (n 3 above) 137.
[77] Tams (n 3 above) 137, who notes that at least, in respect of human rights obligations, the court has clarified that such obligations, if they seek to protect 'basic human rights', they are to be understood as applicable *erga omnes*. This provides some guidance and suggests a cautious approach to the classification of obligations as erga omnes. However, beyond human rights, it is difficult to draw any firm conclusions from the court's use of the term.
[78] Tams (n 3 above) 137.
[79] Tams (n 3 above) 137.
[80] Tams (n 3 above) 153, [references omitted].

obligation.[81] These considerations imply that the 'identification of *erga omnes* status is more than a simple application of [a] predetermined criteria',[82] in contrast, it may be a complex exercise that necessitates a comprehensive examination of international practice.[83]

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.[84] Although this study 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.[85]

4. Tentative Examples of Obligation *Erga Omnes* not flowing from Norms *Jus Cogens,* or at least, the Identification of such Obligations without relying on *Jus Cogens*

It was indicated in the first chapter that certain rules relating to common spaces, in particular common heritage regimes, may produce *erga omnes* obligations independent of peremptory status. This section seeks to test this tentative conclusion. Over the years, the notion of the common heritage of mankind has received a

[81] In response to the argument that a right of reaction is a consequence and not a condition of *erga omnes* status, Tams (n 3 above) 154, states that one must note that such a conception is rather narrow: For example, when assessing *jus cogens*, the drafters of the VCLT examined how the international community had responded to particular troublesome treaties or, more generally, to grave breaches of international law and used this evidence to support the inclusion of Articles 53 and 64 in the VCLT. It follows then, that the identification of obligations *erga omnes* cannot be isolated from an analysis of responses against international wrongs. Tams accurately points out that: [much like] any other [analysis] of international practice, the strength [attached] to the indirect evidence gained from such an analysis depends on a number of factors, notably the number of States involved, and the formality of the response. Ideally, applicant States seeking to establish the *erga omnes* status of a particular obligation would thus be able to show that breaches of the obligation in question had previously prompted responses by a large number of States. As regards the forms of response, coercive measures or claims before international tribunals would provide particularly strong evidence.

[82] Tams (n 3 above) 155.

[83] Tams (n 3 above) 156.

[84] As above.

[85] One would recall the definition partial identity used to describe the relationship between *erga omnes* and *jus cogens*. Similarly, the material and structural approaches may be described as sharing a partial identity, in that, the structural approach has key characteristics of the material approach. In other words, any obligation meeting the requirements for the structural approach will meet the requirements for the material approach, however, the inverse cannot be said to be true.

considerable amount of attention and encouraged international discussions around the concept.[86] Some of the most common features of such spaces include that these spaces are not subject to any claim of sovereignty and any State that exploits any natural resources from such spaces must share the (economic) benefits with all other States.[87] Or simply, that the all States have a common interest in the protection of such spaces.[88] This section will be divided in two parts, section 4.1 and section 4.2, which are aimed at accessing whether obligations *erga omnes* can be identified independent of *jus cogens* norms using the structural approach identified above.

4.1. The Non-Appropriation Principle

Outer Space may be regarded a common heritage of mankind,[89] an area falling within the regime of common spaces.[90] The Outer Space Treaty[91] sets out in Articles I and II that:

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

[86] CC Joyner 'Legal Implications of the Concept of the Common Heritage of Mankind' (1986) *The International and Comparative Law Quarterly* 190.
[87] Joyner (n 86 above) 191-192.
[88] Joyner (n 86 above) 190-199.
[89] Although the discussion herewith below shows how and why it considers the non-appropriation principle, a principle conceived to protect interests of states under the umbrella of common heritage of mankind and the regime of common spaces, some scholars argue that the concept of common heritage of mankind is not clearly defined in international law and its status as a binding legal norm is questionable. For example, see CC Joyner 'Legal Implications of the Concept of the Common Heritage of Mankind' (1986) *The International and Comparative Law Quarterly* 197-198 who concludes that the concept of common heritage of mankind may be indicative of an emergent principle of international law, but it is not yet (at least then), *erga omnes*.
[90] As above.
[91] *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.[92] Recent developments in customary international law shows that the scope of the principle allows for the ownership of *extracted* space resources,[93] and prohibits *in situ* claims of ownership by any actor in international law.[94] This study 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*, this study proposes that 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.

(i) 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'.[95] The principle

[92] This study argues that the non-appropriation principle is *erga omnes* in nature. Of course, a mere treaty provision is not sufficient by itself to show that an obligation has *erga omnes* character. However, it may serve as evidence of *opinio juris* when assessing whether a rule qualifies as custom under international law, which in turn may allow us to make inferences as regards the importance of the rights the obligation seeks to protect.

[93] 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 AD 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 A Ferreira-Snyman 'Challenges to the Prohibition on Sovereignty in Outer Space - A New Frontier for Space Governance' (2021) *Potchefstroom Electronic Law Journal* 1-36.

[94] See Pershing (n 93 above) who also correctly notes the leading arguments in the legal scholarship that the Treaty precludes all sovereignty and ownership in space and over its celestial bodies, regardless of whether 'the claim comes from nation-states, natural persons, or juridical persons,' indicating a complete moratorium on *in situ* property rights in space; see also United Nations General Assembly ('UNGA') Resolution 1721 (XVI) *International co-operation in the peaceful uses of outer space*, 1961; see also UNGA Resolution 1962 (XVIII) *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*, 1963.

[95] See the discussion on Tams (n 3 above); See the application of this theory in *East Timor (Portugal v. Australia),* Judgment, ICJ Reports (1995) p. 102 para. 29; see also the Dissenting Opinion of Judge Skubiszewski (1995) p. 266 para. 136; as well as the Dissenting Opinion of Judge Weeramantry (1995) at 194-195 and 213–216; see also Draft Conclusion 7 on the *Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur,* ILC (2020) UN Doc A/CN.4/741 also available

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.[96] Same principle is evidenced in Article 11 of the Moon Agreement:[97]

> 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.[98] In *North Sea Continental Shelf*,[99] 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 they have not encouraged nor permitted individuals' claims to *in situ* property in space (as opposed from allowing property rights to resources after

online at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/093/44/PDF/N2009344.pdf?OpenElement [accessed 27 September 2021]. The provision provides that to determine the existence and content of a general principle of law formed within the international legal system, it is necessary to ascertain that:
(a) a principle is widely recognized in treaties and other international instruments;
(b) a principle underlies general rules of conventional or customary international law; or
(c) a principle is inherent in the basic features and fundamental requirements of the international legal system.

[96] J Stuart 'The Outer Space Treaty Has Been Remarkably Successful—But Is It Fit for the Modern Age?' *The Conversation* (2017) available online at https://theconversation.com/the-outer-space-treaty-has-been-remarkably-successful-but-is-it-fit-for-the-modern-age-71381 [accessed 18 October 2021].

[97] *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, 1979. Although an argument can be made out that this agreement has very little practical effect due to the fact that it has been ratified by a very 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, it is referred to in support of the Outer Space Treaty which is ratified by over 110 state parties including all the major space fairing states.

[98] See Draft Conclusion 7 (n 95 above).

[99] *North Sea Continental Shelf (Federal Republic of Germany v. Netherlands; Federal Republic of Germany v. Denmark), Judgment* ICJ Reports (1969); see also M Wood, Fifth report of the Special Rapporteur on identification of customary international law, 70th session of the ILC (2018) available online at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/043/79/PDF/N1804379.pdf?OpenElement [accessed 7 July 2021].

extraction).[100] For example, in the case of *Nemitz v United States*,[101] Gregory Nemitz had 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,[102] Eros. He made submissions that claimed ownership over Eros, effectively asserting *in situ* property rights over the asteroid.[103] The United States (referred to also as NASA in these facts) 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.[104] Indeed, the Court found in favour of NASA on the basis that international law does not allow for *in situ* claims of ownership in space.[105]

Another example rises in context of the Bogotá Declaration wherein representatives of Colombia, Congo, Ecuador, Indonesia, Kenya, Uganda and Zaire (subsequently renamed to the Democratic Republic of the Congo) with Brazil as an observer State met in 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 corresponding to each country.[106] However, 'the Bogotá Declaration's attempted appropriation of geostationary orbits was rejected internationally as inconsistent with Article II of the Outer Space Treaty.'[107] Subsequently, claims concerning the appropriation of *in situ* space property have been largely abandoned.[108]

In respect of the second requirement of *opinio juris*, this study 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

[100] Pershing (n 93 above).
[101] *Nemitz v. United States*, No. CV-N030599-HDM (RAM), 2004 WL 3167042; for a comprehensive discussion on Nemitz's legal arguments and their rejection, see generally R 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) 30 *Journal of Space Law* 297.
[102] National Aeronautics and Space Administration ('NASA') *Flashback: NEAR on Eros* (2008) available online at https://www.nasa.gov/multimedia/imagegallery/image_feature_265.html [accessed 02 October 2021].
[103] See letter from Gregory Nemitz, Chief Executive Officer of Orbital Development, to Dan Goldin, NASA Administrator (2001), http://www.orbdev.com/010216.html [accessed 03 October 2021].
[104] 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 03 October 2021].
[105] *Nemitz v. United* States (n 101 above).
[106] DS John 'The Bogotá Declaration and the Curious Case of Geostationary Orbit' (2013) *Denver Journal of International Law & Policy* available online at http://djilp.org/the-bogota-declaration-and-the-curious-case-of-geostationary-orbit/ [accessed 08 October 2021].
[107] Pershing (n 93 above).
[108] As above.

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.'[109] In Luxembourg, a similar Act, the Law on Use of Resources in Space has been enacted.[110] 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.'[111]

Moreover, as of February 2021, the Outer Space Treaty has 111 States Parties, indicating the States acceptance to be bound by such principle and the 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,[112] this section concludes that this obligation seeks to protect important rights and this is evidenced by the substantial acceptance of this obligation as 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.[113] In short, this analysis reveals that the non-appropriation principle is an important rule of international law. The next section examines whether the principles applies beyond reciprocity.

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[109] See Section 403 of the *United States Spurring Private Aerospace Competitiveness and Entrepreneurship Act,* 2015 available online on https://www.govinfo.gov/content/pkg/PLAW-114publ90/html/PLAW-114publ90.htm [accessed 10 October 2021].

[110] Luxembourg: Law on Use of Resources in Space (2017); see also discussion by L Thailly 'Luxembourg set to become Europe's commercial space exploration hub with new Space Law' (2017) *Ogier*, available online at shorturl.at/lJLO3 [accessed 18 October 2021].

[111] 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.

[112] UNGA Resolution 1962 (n 94 above). For example, see E Rathore & 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".

[113] Pershing (n 93 above) 164.

(ii) 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 forms an obligation to which all States in the international community have a legal interest in its protection. In order 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.[114] 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.[115]

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 study makes the conclusion that the obligations derived from the principle are *erga omnes* without flowing from a norm *jus cogens* on the following reasons. 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.[116] The likelihood of this shift emerges from 'the sheer magnitude of the economic incentives private corporations will have to urge such a recognition'.[117] 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 State action, the

[114] See C Cepelka JHC Gilmour 'The Application of General International Law in Outer Space' (1970) *Journal of Air Law and Commerce* 40 available online at https://core.ac.uk/download/pdf/147639066.pdf [accessed on 15 October 2021].
[115] Y Oralova '*Jus Cogens* Norms in International Space Law' (2015) *Mediterranean Journal of Social Sciences* 426-427.
[116] Pershing (n 93 above) 165-166.
[117] Pershing (n 93 above) 166.

> increasing momentum of these theories portend a second shift in customary international law to allow for *in situ* ownership of space property.[118]

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.[119] 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 hypothetic 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.[120]

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'.[121]

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[118] As above.

[119] See S Freeland & R Jakhu 'Article II' in S Hobe *et al* (*eds*) *Cologne Commentary on Space Law* (2009) 44-63; see also for example M Manoli 'Mining Outer Space: Overcoming Legal Barriers to a Well-Promising Future' (2015) *International Institute of Space Law* 746; and Ferreira-Snyman (n 93 above) 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 F Tronchetti 'The non-appropriation principle under attack: using Article II of the Outer Space Treaty in its defence' *International Astronautical Congress E6.5.13* (2007) 2 who 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'.

[120] Tronchetti (n 119 above) 4.

[121] MA Xinmin 'The Development of Space Law: Framework, Objectives and Orientation' (2014) *United Nations Asia Pacific Space Cooperation Organization Workshop on Space Law* 3 available online at https://www.unoosa.org/documents/pdf/spacelaw/activities/2014/splaw2014-keynote.pdf [accessed 17 October 2021].

4.2. The Obligation to Protect the Environment

In recent years, the duty of States and their people to care for and protect the environment has become a common concern of mankind.[122] Although environmental law is now accepted into the corpus of international law, it is still largely fragmented.[123] Nonetheless, this section will assess whether the broad obligation to protect the environment is *erga omnes*. To do this, the same structural test applied in assessing the non-appropriation principle shall be applied below:

(i) Importance Requirement

Having discussed the factors that one must consider to decide whether an obligation has some heightened level of importance, I shall not repeat that discussion but merely move to apply it. The importance given to environmental considerations is reflected in the status of 'essential interest'[124] that the ICJ has recognised to the protection of the environment.[125] In addition, the Court in *Gabcikovo-Nagymaros* recognises the link between the obligation to protect the environment and its emergence in customary international law.[126] The Court makes references to its *Nuclear Weapons* Advisory Opinion to recognise the importance that it attaches to the obligations to respect and protect the environment.[127] 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 concern of the global community and requires of all governments to act with a duty of care towards the environment.[128] Oral indicates that the Stockholm Conference culminated in many other consensus-based global declarations that 'demonstrate the

[122] NA Robinson 'Environmental Law: Is an Obligation *Erga Omnes* Emerging?' (2018) *Permanent Mission of Colombia to the United Nations Panel Discussion at The United Nations* 2, available online at https://www.iucn.org/sites/dev/files/content/documents/2018/environmental_law_is_an_obligation_erga_omnes_emerging_interamcthradvisoryopinionjune2018.pdf [accessed 6 November 2021].

[123] PM Dupuy & JE Viñuales *International environmental law* (2018) at 52, available online at https://ereader.cambridge.org/wr/viewer.html?skipLastRead=true#book/3ff0c1d8-84f0-464f-88ef-1102395dfb58/doc13 [accessed 29 October 2021]; there is a substantial number of treaties regulating different parts of environmental law within the corpus of international law.

[124] See *Gabcikovo-Nagymaros Project (HungarylSlovakia),* Judgment, ICJ Reports (1997), p. 7 para 53; see also *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay),* Judgment, ICJ Reports (2010) p. 14 para 72.

[125] Dupuy & Viñuales (n 123 above) 53.

[126] See *Gabcikovo-Nagymaros Project* (n 124 above); see also JE Viñuales 'The Contribrution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment' (2008) (32) *Fordham International Law Journal* 232.

[127] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports (1996) p. 226 para 29

[128] See Report of the United Nations Conference on the Human Environment Stockholm, (A/Conf.48/14/Rev.1) (1972) paras. 2 and 7.

extent of the recognition by the international community as a whole of the importance and need to protect the environment'.[129] I now access whether the obligation is applied beyond an *inter-partes* relationship.

(ii) The Applicability of the Obligation Beyond Reciprocity

The obligation to protect the environment is applicable beyond reciprocal relations.[130] 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 considered to have *erga omnes* status in that they apply beyond inter-state relations.[131] However, they don't stop there, they further indicate 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.[132] Indeed this view is supported by a substantial number of other commentators.[133] 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 elevated to *jus cogens* status, namely, obligations to climate change.[134] This study is of the view that whatever the import of the literature is in respect of the status of the obligation to protect the environment, what is clear is 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*.

5. Concluding Remarks

[129] See N Oral 'Environmental Protection as a Peremptory Norm of General International Law' in Tladi *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (2021) 592.

[130] 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.

[131] Dupuy & Viñuales (n 123 above) 53; see also J Brunnée 'International Environmental Law: Rising to the Challenge of Common Concern?' (2006) 100 *American Society of International Law* 307 who agrees with them.

[132] Dupuy & Viñuales (n 123 above) 52.

[133] See U Beyerlin & T Marauhn *International environmental law* (2011) 287; LJ Kotzé 'Constitutional Conversations in the Anthropocene: In Search of Environmental *Jus Cogens* Norms' (2016) *Netherlands Yearbook of International Law* 249.

[134] For a detailed discussion see Oral (n 129 above) 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.

The above analysis clarifies the relationship between norms *jus cogens* and obligations *erga omnes*, in particular, it attempts to clarify two critical issues (i) at what point an obligation reaches *erga omnes* status without reaching *jus cogens* and (ii) how to identify an *erga omnes* obligation without placing reliance on *jus cogens*. This study finds that in order to identify *erga omnes* obligations without placing reliance on *jus cogens*, a two legged approach in terms of the structural approach must be ventured into, by assessing first, the importance of the obligation in question, then the applicability of the said obligation beyond reciprocal relations.

Chapter 5: Conclusion

The present study set out to investigate the extent to which norms *jus cogens* and obligations *erga omnes* relate. Throughout the study, strong points were made in favour of the commonly accepted proposition that from *jus cogens* flows obligations *erga omnes*, however, not all obligations *erga omnes* invariably flow from *jus cogens*.[1] This frustates 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 norms 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 aquiring *jus cogens*. This is by no means an easy assessment as there is not enough authoratative literature on the method by which to make this assessment. Even the International Court of Justice's landmark decision regarding *erga omnes*, the *Barcelona Traction* case, does not address the process by which we can identify obligations *erga omnes* that 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 *Barcelona Traction*, the Court has had the opportunity to clarify this process when it recognised new chategories 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*.[2] This *lacuna* has formed the larger subject of inquiry in

[1] M Byers 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 *Nordic Journal of International Law* 211-239.

[2] For a further discussion of this, see C Tams *Enforcing obligations erga omnes in international law* (2005) 118 who discusses how the Court recognised new obligations *erga omnes* post the *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)* Judgment, ICJ Reports (1970); see also *Case Concerning East Timor (Portugal v Australia)* Judgment, ICJ Reports (1995) para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports (2004) p. 136 para. 88; *Military and Paramilitary Activities in and against Nicaragua*

chapter 4 of this study and the assessment in the chapter reveals that there isn't a uniformly or single accepted conclusive test for the determination of obligations *erga omnes*. Nonetheless, the study proposes a working test - 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. Although the importance requirement is inherently vague and the identification of obligations *erga omnes* outside *jus cogens* generates some hurdles, the ICJ's jurisprudence and international practice lay out a number of factors by which the importance of an obligation can be determined. This is a fruitful exercise, albeit not always satisfactory.

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 study cannot claim to have fully resolved the mysteries surrounding the concept of *erga omnes* altogether, such a conclusion, would be overly ambitious. However, it hopefully has succeeded in shaping the manner in which the concept may be understood without placing reliance on *jus cogens*. In order words, the study has hopefully 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* irrespective of whether of not the norm has *erga omnes* status.

Of course other subsidiary conclusions that merit mention have been drawn throughout this study. In summation, that is, first, although often conflated, *jus cogens* and *erga omnes* are distinct concepts. Second, all States have standing to institute ICJ proceedings in response to *erga omnes* breaches. Third, States have the right to take (third-party) countermeasures against violations of obligations *erga omnes* under customary international law. Here, the study reflected on a number of instances where States have asserted a right to respond against breaches of obligations *erga omnes* even though such breaches did not directly affect the State's individual interests. In

(Nicaragua v. United States of America), Provisional Measures, (Order of 10 May 1984) ICJ Reports, (Separate Opinion of Judge Schwebel) 196.

addition, the study responded to the 'how' question regarding the identification of obligations *erga omnes* without placing reliance on *jus cogens*.

6. Concluding Remarks

The above analysis clarifies the relationship between norms *jus cogens* and obligations *erga omnes*, in particular, it attempts to clarify the particular point at which an obligation reaches *erga omnes* status without reaching *jus cogens* and clarify the process by which to identify an *erga omnes* obligation without placing dependence on *jus cogens*. This is done via the structural approach test. In conclusion, this study would recommend, that the work of the ILC be extended to cover the specific questions arising from the relationship between these two concepts in order to create a comprehensive international codification, which would seemingly obviate numerous problems arising from the ambiguities created by the relationship between the *erga omnes* and *jus cogens* concepts.

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