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Las obligaciones *erga omnes* como piezas de la construcción de relaciones justas y de comunidad

Erga omnes obligations as key pieces to build community and fair relations

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Resumen

El reconocimiento de las obligaciones *erga omnes* en la jurisprudencia y la doctrina son consideradas como revolucionarias, debido a cuán diferentes resultan ser sus dinámicas en comparación con aquellas de otros deberes basados en la lógica de la reciprocidad. No obstante, la legitimación y autorización que otorgan a terceras partes a exigir el cumplimiento de las mismas son tan sólo una de sus importantes implicaciones, que son tanto jurídicas como no jurídicas. Ambas se fundamentan en cómo aquellos deberes apuntan a la existencia de valores comunitarios internacionales. La dimensión comunitaria jurídica internacional no se limita a autorizar, sino que, en ocasiones, va más allá y exige a los sujetos del derecho internacional a esforzarse con diligencia para garantizar el respeto de los bienes jurídicos que ella protege, revirtiendo ilícitos continuados. Así como se ha considerado que desde un punto de vista ético deberían desobedecerse órdenes jurídicas viciosas, las características de los deberes *erga omnes* y una consideración moral de la "dependencia única" pueden llevar al reconocimiento de cargas jurídicas y no jurídicas de terceros actores de recurrir a las opciones que ellos ofrecen, con tal de proteger a quienes estén en situación de vulnerabilidad.

Palabras clave

obligaciones *erga omnes*, comunidad internacional, moral, derecho internacional, solidaridad

Abstract

Recognition of *erga omnes* obligations in caselaw and legal opinions is considered revolutionary, given how different their dynamics are in comparison to reciprocity-based duties. However, the legitimacy and authority that they provide so that third parties may demand their enforcement are just of of their manyfold significant implications, which may be legal or otherwise. They both are based on how such duties point to the existence of international community values. The international legal community dimension is not limited to granting authorization. Occasionally, it goes even further and requires international law subjects to make diligent efforts to guarantee that any legal assets protected by it be respected, reversing ongoing illegal acts. Just as much as it has been claimed that, from an ethical perspective, vitiated legal rules should not be obeyed, the characteristics of *erga omnes* obligations and a moral consideration of a "single dependence" may lead to the recognition of third parties' legal and non-legal burdens to resort to the optiones offered, in order to protect those who are in vulnerable situations.

Keywords

erga omnes obligations, international comunity, morality, international law, solidarity

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1. Introduction

Underlying the idea of *erga omnes* one can identify the (proto?) aspiration to the *idea* of a community dimension. Even though these obligations do not erode the *sine qua non* condition of consent as necessary for States to be bound by most of the sources of international law one way or the other, they do reveal that reciprocity is neither indispensable nor automatic when it comes to the interplay of international legal relations. Furthermore, these duties serve to remind States that they can legitimately make efforts within the system to bring about and carve a more *just* society. This can be transformative of attitudes and perceptions colored by legal demands and possibilities. If they are internalized, they can pave the way for changes in social attitudes and realities, which are not only impacted by judicial outcomes (Sen, 2004, p. 345).

Justice is not reductionist and, therefore, it is not limited to adjudication, but encompasses other forms of interaction with the law as a tool that can be used to bring about fairer conditions and relationships (McDougal, 1959, pp. 9 and 16). One such way is by *invoking* these duties, either to let offenders know about their need to cease ongoing violations and comply with other consequences of responsibility, or even to bring about claims when a basis of competence and jurisdiction of an international authority so permits it.

There is a catch, though: all of this seems to depend on *will*, which may be missing out of fear of being exposed to similar claims based on allegations of one's own breaches of *erga omnes* duties. This article will therefore examine if there is a responsibility to use the possibilities of action provided by these obligations, if they do actually refer to communitarian dimensions, and how they can and ought to transform the way we think about international legal relations and dynamics.

2. The communitarian dimension of international legality acknowledged by what has been described as *erga omnes* obligations

One can say that, rather than *changing* international law, which would be foreign to its functions given the interpretative rather than creative role that international judicial bodies are formally meant to have −their practical impact on paving the way for dynamic changes notwithstanding (Remiro Brotóns et al., 2010, p. 214), the deservedly famous *obiter dictum* of the International Court of Justice (hereinafter, also the ICJ) in its merits judgment to the *Barcelona Traction* case did something no less remarkable: identifying that international law goes beyond reciprocal interests. It is worth recalling that the Court said in a now classical passage that:

> [A]n 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* [emphasis added].[1]

The ICJ was accurate and brave enough to acknowledge and draw attention to the fact that not all international legal standards follow the logic of reciprocity. Such recognition is, in a way, seismic, because it helps to dispel myths and prejudices in connection to what international law is about and what it can do, command, and recommend.

Interestingly, the fact that many interpreters and operators may instinctively and by default tend to think of international law in terms of a system mostly concerned with reciprocal aspects may have hindered the realization of the full implications of the existence of communitarian obligations, or even of having them in the radar. Furthermore, it may be the case that non-legal normativities can help to identify and nudge towards the full potential of those obligations. To examine the preceding considerations, it is useful to look at what a

[1] International Court of Justice, Case concerning the Barcelona Traction, Light and Power Company, Limited, Judgment, 5 February 1970, para. 33.

different legal development teaches us about how developments impact the way we think of and thus use international law.

Such an example comes from the defunct Permanent Court of International Justice (also, the PCIJ), the lessons of which have important parallels to those of our analysis. I refer to the PCIJ's decision in the Courts of Danzig case, which authors such as Parlett have explored, and in the judgment of which the Court acknowledged that individuals and private parties may very well be subjects of sources of international law, such as agreements –something that certain persons were reluctant to fully admit! (2011, pp. 206, 218-219, 266, 338, 347, 349 and 351). While nothing in international law prevented its treaty or other processes of normative creation from addressing non-State entities and their conduct, thereby making them their subjects (Higgins, 1995, p. 48; Carrillo-Santarelli, 2017, pp. 240, 251, 275), prior lack of sufficient developments in that sense may have habituated people in ways that shaped their perceptions and explained possible hesitations on the possibilities in the matter. Later developments in international human rights law, international humanitarian law (also known as IHL), international criminal law, and even environmental law with novel subjects such as future generations (Wewerinke-Singh et al., 2023, p. 659), among others, were always possible, but today build on the recognition of possibilities that others made before.

Similarly, I contend that international law has always had the possibility of protecting common interests that are not guided by reciprocal considerations but rather by communitarian ones –a term that I prefer to that of collective when it comes to *erga omnes* obligations, given the centrality of rights (Chang, 2022, pp. 118-119, 128, 131, 134, 137). Some of the possible consequences of this recognition have been identified already, including the perhaps most salient feature of *providing standing* or legal interests to be invoked even by non-victims. But it may well be the case that we, as internationalists, have not come up with realizations of other possible implications of such duties that may be both developed and identified in the future.

It is worth taking an in-depth look at the feature of *erga omnes* obligations I just pointed out. As has been mentioned by such authors as Bruno Simma and in the Islamic legal tradition, legal dynamics encompass much more than a mere prohibition and permission binary –they sometimes, for instance, merely *tolerate* some conduct as well (El Fadl, 2013, p. 304).[2] *Erga omnes* obligations themselves can likewise bring about effects that are not limited to one or the other of those possibilities. They certainly can *authorize* and even *encourage* the invocation of responsibility by entities that are not themselves hurt by wrongful acts that amount to breaches of those obligations and demand reparations on behalf of victims (Remiro Brotóns et al., 2010, p. 440).[3] And they likewise *forbid* their violations by all of those actors participating in a given communal normative setting –which is the case with *erga omnes partes* obligations–[4] and even by all of those that are members of a given normative social sphere, as happens with all subjects of international law in the world, when it comes to the duty they have not to breach those *erga omnes* obligations that arising from *jus cogens* or peremptory law –the latter always brings about these obligations (Remiro Brotóns et al., 2010, pp. 230-231).

In the latter case, all members are likewise under an *obligation* to peacefully cooperate so as to bring ongoing violations of such duties to an end and ensure the effectiveness of the consequences of responsibility, including reparations. This is indicated in article 41 of the International Law Commission's (hereinafter, also the ILC) articles on the Responsibility of States for Internationally Wrongful Acts (which I will also refer to as

[2] Declaration of Judge Simma to: International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, 22 July 2010, pars. 8-10.

[3] International Law Commission (2001). Articles on Responsibility of States for Internationally Wrongful Acts, Article 48.

[4] International Law Commission (2001). Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, pp. 320-321, paras. 6 and 8 of the commentary to article 48.

ARSIWA). In addition to this, it is also forbidden for all States different from the offender's and the victim's to render aid or assistance to said violations or to recognize and support, thus maintaining or consolidating their consequences and effects.[5]

But *erga omnes* obligations not only impose prohibitions –not to recognize, not to render aid or assistance– and other duties –to cooperate for the sake of the integrity of the interests protected by them– and authorizations –to invoke responsibilities of offenders and, according to some, to resort to countermeasures for the sake of the effectiveness of the consequences of their responsibility, an issue that the ILC dared not give a final opinion on,[6] but which is nevertheless quite important given the decentralized framework of international legal societies and seemingly supported by some practice and considerations (Remiro Brotóns et al., 2010, pp. 452-453). *Erga omnes* obligations also *encourage* acting decisively –even when non-peremptory-based *erga omnes* obligations are at stake.

The vagueness of how the cooperation for the sake of the defense of *erga omnes* obligations is to take place does provide flexibility, so as to permit anyone bound by the duty in question to decide how to fulfil it. But at the same time, this dilution gives maneuvering room for States to shirk away from meaningful endeavors and simply engage in platitudes, thus failing to do what could prevent those affected by the violations of *erga omnes* obligations from being defenseless. Subjects could just say they engage in backstage initiatives doomed to ineffectiveness.

From a systemic point of view,[7] the fact that the most basic initiative consisting in the *invocation* of the responsibility of *erga omnes* offenders is *facultative*[8] suggests that States cannot be compelled to engage in it. But at the same time, one could say, the enhanced duty to cooperate when peremptory law is violated, coupled with the principle of *effet utile*, could also suggest that in such extreme cases that invocation is no longer facultative but instead required or, at the very least, strongly encouraged –another possible dynamic of the law aside from the usual prohibited-permitted binary commented above. As I will argue in the third section of this text, non-legal normativities, such as prudence and morals or ethics, can be valuable and provide guidelines in this regard.

Interestingly, given the importance of the legally protected interests at stake when peremptory-based *erga omnes* duties are at stake, as is the case with the *jus cogens* prohibition of the use or the threat of the use of force, the ICJ has said that the obligation not to recognize the legality of consequences of situations "arising" from the breaches of the obligations under examination is also applicable to international organizations as the United Nations.[9] We come full circle and identify that different subjects that participate in international society, by no means limited to States (Carrillo-Santarelli, 2017, p. 235), are also legitimized and called to act and abide by *erga omnes* obligations. All of those subjects are actors that can be, in addition to law-makers and law-takers (Noortmann y Ryngaert, 2010, p. 196), law-guarantors or law-defenders. And one must never lose sight of the fact that defending the interests protected by those duties is for the sake of others, who are sometimes quite vulnerable when certain *erga omnes* violations occur, given their nature and that of

[5] International Law Commission (2001). Articles on Responsibility of States for Internationally Wrongful Acts, Article 41.

[6] Ibid., Article 54.

[7] Ibid., p. 391; Vienna Convention on the Law of Treaties (1969), Article 31.

[8] International Law Commission (2001). Articles on Responsibility of States for Internationally Wrongful Acts, Article 48, saying that "Invocation of responsibility by a State other than an injured State", applicable among others when erga omnes obligations are breached, is something that States are "entitled" to do, rather than being required to.

[9] International Court of Justice, Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Advisory Opinion, 19 July 2024, para. 280.

protected legal interests or goods (Carrillo-Santarelli, 2017, p. 410) and the possibility that they have neither been sufficiently defended domestically nor effectively protected.[10]

The consideration that non-State entities may also be bound by *erga omnes* effects and, one can surmise, be entitled to invoke them –if they, given their role or functions are required or implicitly entitled[11] to defend their integrity somehow— implies that one can expect them to also be allowed to, at the very least, raise them in their dealings with others –*alongside* all participants in a given community regime or of the world society.

This sheds light on an additional and most important underlying aspect of *erga omnes* obligations: the fact that they are not based on the defense of reciprocal interests but instead protect commonly endorsed values, rights, and interests. This is confirmed not only because of the nature and dynamics of the legal goods or legal interests they protect, and on behalf of whom they do so –e.g. human beings, the environment, all of those concerned with and affected by threats against peace–; but also because of who is deemed to have genuine (moral and legal) *reasons* (Parfitt, 2011, pp. 37-38) to consider them and their safeguard when acting on the international plane or with international reach.

Altogether, all of this not only shows that *erga omnes* obligations are based but also predicated on the *idea* of an international community (dimension). The features of those obligations also suggest that they are community-building. If, as Shapiro and Hathaway have suggested alongside others, international norms can help to shape up attitudes and perceptions of what is possible in the conduct and strategies of international *participants and actors* –o use expressions used by such authors as Rosalyn Higgins– (1995, pp. 39, 48); and if perceptions shape up and mold what one sees as reality, the possibilities of action and interaction or thought one perceives and is consciously or unconsciously aware of –in the case of States and other groups, one must examine this from a disaggregated perspective of the motivations and influences on their agents–, as phenomenology can shed light on (Campbell, 2012, pp. 29-31); then one can conclude that merely identifying the *existence and possibility* of *erga omnes* obligations –i.e., that (some of the possible ones) exist already, and that others and other implications can be inferred and generated in the future– can also trigger dynamics of community formation, especially insofar as more awareness of them exists and more initiatives based on them take place, with some sort of snowball effect.

This could help to counter and make up for the cynicism, double standards, and strategic selectivity of States and other actors in their international dealings when witnessing catastrophic violations of *erga omnes* violations and for the correlated deaf tone attitudes towards and ignorance of the suffering of those affected by their breach. Some others have well quipped that there is not currently a fully-formed international *community* as such but, rather, one that operates in practice mostly an international society, considering how there are not truly actions on behalf of the furtherance of common values that are truly embraced for the sake of others (Cepillo Galvín, 2021, pp. 15-16). Selfish calculations often and most regretfully take precedence for some, and oftentimes a different mentality and attitude of individual agents, along with joint efforts of actors with shared agendas, can help to change the institutional culture of collective bodies in that society (Becker Lorca, 2014, p. 350; Slaughter y Hale, s.f.). Maybe awareness of the possibilities and demands of *erga omnes* duties, if internalized by such agents, can play a more or less decisive role in the transformation of political realities.

Little by little, *erga omnes* dynamics can show that things can be different; empowering the discourses of citizens and civil society actors demanding their being heeded, and having internalizing effects –apart from socialization and acculturation-related ones– (Carrillo-Santarelli, 2017, pp. 18, 49, 95-97, 119, 188, 218-219, 287, 320) that allow for the possibility to identify problematic (mis)interpretations and to build and strengthen community positions. Krieger (2024) has persuasively argued that "the increase in mega-political cases based

[10] Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Case of Castillo-Petruzzi et al. v. Peru, Judgment, 4 September 1998, para. 35.

[11] International Court of Justice, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 11 April 1949, pp. 10, 12; Carrillo-Santarelli, 2017, pp. 97, 284-295, 318.

on *erga omnes partes* obligations and third-party interventions before the ICJ might reflect the willingness of states to engage with a plea for a negotiated rather than a hegemonic order", more pluralistic and inclusive than alternative possibilities or pretensions.

In this regard, one can confirm that if States were in the past generally shy or somewhat reluctant to resort to *erga omnes* contentious proceedings, we are witnessing an increased willingness to resort to their procedural invocation when compromisory clauses allow for it, as seen in the cases claiming the perpetration of genocide by Israeli forces brought about by South Africa before the ICJ; the one on German assistance to the same alleged and most serious abuse and failure to comply with obligations under IHL and genocide prohibition standards initiated by Nicaragua (Longobardo, 2024);[12] or the case on "gender apartheid" brought against Afghanistan as a respondent (Wigard, 2024), all before the same Court. Whatever the formal outcome of the proceedings ends up being, the humanitarian catastrophe and intense suffering are undeniable and unacceptable.

It is true that the international *society* has its own dynamics and features, which differ from those found in domestic ones, as Virally (1998) and Kant y Kleingeld (2008, pp. 78, 206, 232) have pointed out,[13] among others. But that it can be transformed is as true as with all societies, especially if the potential to care for others in terms of 'altruistic kindness' –even towards those with whom there "low levels of relatedness", i.e., towards "strangers", which scholars have underscored as present in human societies but not in other primate or mammalian groups to the same extent—, is realized and embraced (Silk y House, 2016; Silk y House, 2011). I say *potential,* because it has been recognized and can be further strengthened in the international legal system. Etymologically, *erga omnes* implies that such obligations are relevant towards all, without distinctions or discrimination. Everyone is concerned with them, appealed to heed and defend them, and unable to genuinely divert its gaze from its abuses; and everyone ought to be *truly and effectively* protected from breaches against them. Their respect and safeguard are in the interest of all. And everyone must thus heed the double call to refrain from violating them and to strive to ensure that they are honored, among others and importantly for the sake of those who cannot. The very words of the duties indicate their functionality and rationale. And they present us with a picture of what the international community can be and *must* already be.

How *erga omnes* obligations point to comprehensiveness is confirmed by a particular usage of the term in the Inter-American human rights system, which points to the *erga omnes* dimension of human rights responsibilities as including the need to protect from *all* abuses, both State and non-state ones included.[14] One could add another dimension: how different actors may be legitimized to invoke the protection of those whose rights are endangered as a result of existing or potential breaches of *erga omnes* duties. Apart from the strengthening of the claims of such activists, in judicial, other formal, or even interacting with informal fora –through naming and shaming or otherwise—, innovative legal dynamics and activism permit, for instance, civil society and others to claim on behalf of new subjects such as future generations or the environment.

It is convenient to look at what other –non-legal– normativities can contribute or say on this matter, shedding light on possibilities and demands without and within the international legal framework itself that we may have been overlooking the whole time, due to how our gaze has been clouded by perceptions based on different logics and intra-systemic biases and habits, ignoring the full implications and demands that *erga omnes* obligations draw attention to.

[12] International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Order, 24 May 2024.

[13] On the difference between "a federation of peoples, which would not, however, necessarily be a state of peoples […] not to be fused together into one state".

[14] Inter-American Court of Human Rights, Juridical Condition and Human Rights of the Child, Advisory Opinion, OC-17/2002, 28 August 2002, paras. 63-64.

3. Human solidarity and responsibilities through the catalyst of *erga omnes* attitudes

The analysis of the Danzig case has made it clear that it is possible to deduce logics of international law applicable across different subjects that are applicable in different components of the system. Indeed, I have explored how identifying the way in which international law may start treating as subjects entities that it had not so treated before, insofar as the sources of international law make room for creating standards addressing them if there are no normative and factual impossibilities, teaches us about a fundamental aspect of international law: that one must be open to admitting the recognition of something hitherto unidentified as to what international law can do –or implicitly governs somehow already. Therefore, the first time *erga omnes* obligations were mentioned by the ICJ is not necessarily the moment when those obligations acquired all of a sudden that character or emerged. The decision may have simply –as I argue it did– recognized an existing reality. The Court in fact referred to the dynamic and content of norms that *were present* in the system and *already* had the features of what it simply went on to describe with the new *nomenclature*.

In this section, I will at the outset start by looking at another argument that sheds light on a logic that is applicable elsewhere. Specifically, at how availing oneself or not of the possibilities *permitted* by the law –which is not a binary of prohibiting and requiring, I insist— may end up being *tolerated* by the legal system while being required under other normativities, such as morals, ethics, or prudence.

Discussions of how obeying legal commands can end up being immoral have long been commented, as both the arts –e.g., in the Antigone play— and civil disobedience discussions make clear (Carrillo-Santarelli, 2023, pp. 14, 20, 37). But the latter is just one of the types of warranted defiance against the law that is pertinent under some circumstances. Hershovitz argues, for instance, that some laws can be morally evil, either warranting urgent reform and resistance; or civil disobedience –accepting the legal consequences of infringement when the regulations do both good and bad, with this type of disobedience "reconciling that tension" (2023, p. 141).

Additionally, apart from cases in which legal obligations contradict other normativities, there are, firstly, circumstances in which doing what it *permits* is wrong under them. Think of IHL, which permits certain lethal conduct to have some deleterious effects on civilians *if* stringent conditions are satisfied –which is not to say that they will always be met, and what one often sees as 'justifications' are simple ploys or misinterpretations that try to provide legal cover to blatant breaches of the law (I refer to this as scenario number one).

Furthermore, apart from the possibility of there being a direct contradiction between law and ethics −or law and prudence−, it is also possible to identify a second scenario with circumstances under which *failing to do* something that the law *permits* the moral agent to do will be wrong from the perspective of other normativities. This is a third and different hypothesis from the ones in which it is *required* to engage in a problematic conduct or in which doing something it permits is reprehensible-.

Altogether, doing what the law *permits* is not always the *right* thing to do from the perspective of prudential judgments −e.g., considering the importance of not sowing the seeds of future conflict or of not affecting peace talks−, virtues −e.g., having solidarity towards all, not engaging in cruelty, acting otherwise in ways that are required by social beings with empathy who witness tremendous suffering of others or the obliteration of populations or ecosystems−, or deontological considerations as to universalizable maxims. It may well be that doing that and taking advantage of the permit will seriously affect and hurt innocents, children included. Hence, engaging in the questionable but legally authorized conduct will be immoral and/or otherwise inappropriate. Legal positivism supports this contention, considering how it acknowledges that the law and morality, along with other normativities, are different and autonomous orders and systems (Kelsen, 1982, pp. 71, 131-132, 243, 331).

The preceding considerations have been presented one way or the other by authors such as Schwarz and Renic (2024), who have argued –when it comes to the first type of scenario– that:

> Analysis of this acceleration of violence has mostly oscillated between two poles of instrumentalism: the strategic utility of Israel's moves and countermoves, and the legality of the attacks under international law. While both have their place and importance, neither are sufficient for the present moment. Prudential and legal-based analysis has occluded the significance and urgency of grappling with the *basic morality* of this crisis…Strip away enough morality and the law collapses, no longer able to hold and sustain its shape on account of its technicity, or instrumentality alone…the law can never be, and must never become, a stand in for moral reasoning.

This confirms that not only doing what the law commands, but also doing what the law permits, can be immoral and inappropriate. Now, this being so, it stands to reason that with omissions being legally and morally relevant conduct capable of engaging responsibility just as actions are (Clarke, 2002, pp. 96-108),[15] and with legal content being able to be morally adequate and praiseworthy when it coincides with that of other normativities –which remain independent–, it can also be the case that *failing* to do what the law *permits* is morally reproachable or contrary to prudential considerations. This is what the second scenario I mentioned above refers to.

Bearing in mind both contingencies is relevant when it comes to the analysis of *erga omnes* obligations and reactions by third parties that are different from the victim(s) and the wrongdoer(s) –from the perspective of its breaches. Let us look, for instance, at some of the obligations of this type identified by the ICJ. They include self-determination, the prohibition to use force "to acquire territory", IHL obligations, duties found in the Convention on the Prevention and Punishment of the Crime of Genocide, the prohibition of aggression, and demands pertaining to protection from slavery and racial discrimination.[16] In its commentary to the ARSIWA, the ILC mentioned that it recognized all of those as *erga omnes* obligations, which are both owed to the international community as a whole and which give each State "a legal interest in their protection". This body of the United Nations further clarified that making a list of those duties would go beyond its task of codifying secondary rules of responsibility in those articles[17] –which is a fortunate and welcome move, given the risk of stagnation and the impossibility of coming up with instruments subject to negotiation dynamics with the recognition of new or already existing *erga omnes* standards in correspondence with the evolution of international (legal) life and awareness or conscience. Something similar has been commented upon when explaining the reluctance that existed to codify a list of peremptory legal standards, to avoid their being considered as exhaustive and stagnant (Gómez Robledo, 2003, pp. 28, 172-173).

Given the importance of obligations as the ones mentioned in the preceding paragraph, and the serious consequences their breach has towards present victims, plus the encouragement of imitation and repetition by offenders or others if nothing is done against their violations,[18] one may well consider that failing to comply with the conduct required by the aforementioned examples of *erga omnes* duties amounts both to an illegal and an immoral and prudential act. When it comes to members of the international community, including third State parties, their providing assistance to or recognition in support of the effects of violations of *erga omnes* violations also deserves this same reproach assessment. Such conduct is properly deemed as wrongful in terms of the State aid or non-State complicity this presupposes (Clapham y Jerbi, 2001)[19] –we acknowledge

[15] International Law Commission (2001). Articles on Responsibility of States for Internationally Wrongful Acts, Articles 2, 15, 39; Inter-American Court of Human Rights, Case of Velásquez-Rodríguez v. Honduras, Judgment, 29 July 1988, paras. 167, 170.

[16] International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, pp. 111, 112; International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, para. 157; International Court of Justice, Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Advisory Opinion, 19 July 2024, para. 274.

[17] Ibid., at 127.

[18] Inter-American Court of Human Rights, Case of Bámaca-Velásquez v. Guatemala, Judgment, 25 November 2000, para. 211.

[19] International Law Commission (2001). Articles on Responsibility of States for Internationally Wrongful Acts, Article 16.

that the term 'State crimes' was not adopted by the ILC,[20] but State agents can certainly be internationally criminally responsible as individuals, i.e., non-States, and also engage the responsibility of their States, even when they act *ultra vires*, in connection with extremely serious misdeeds, which have additional consequences.[21]

We also contend that using institutionally granted powers, such as a veto, in ways that perpetuate and shield serious abuses, leaving victims *de facto* undefended, is contrary to the *telos* of the norms. In light of systemic considerations pertaining all applicable norms and how this infringes peremptory demands of absolute primacy and safeguard when *jus cogens* standards are affected, one can consider that such powers can amount to an exercise of an *abuse of right* under those circumstances (Trahan, 2023, pp. 131-134; Peters, 2023; Kiss, s.f.), especially when they are used in ways that shield offenders and make sure that the abuses remain in impunity and consolidated.

Once again, it is important to recall that doing what the law permits may nevertheless be immoral when it comes to the examination of third parties' conduct, as is when it differs from the provision of aid or assistance to violations of the duties under examination.

But additionally, silence or failure to *react* and avail oneself of the possibility of at the very least *denouncing* –i.e., invoking responsibility for serious violations of *erga omnes* obligations; or going beyond this when circumstances call for greater diligence, such as when there is an extreme suffering and vulnerability of those who have received no protection and fully depend on reaction by third parties– would be immoral and contrary to prudence. Because as priorities go, the defense of the lives of the vulnerable and innocent goes beyond pragmatic calculations that end up being obnoxious, such as for example the desire not to disturb an offender and risk ties with it. This is pertinent also towards allies, for all that matters, because a friend is not one who condones any grievous thing their 'friends' do –this is encouraging irresponsible and evil behavior and thus not a display of genuine uncorrupted affection.

In relation to these considerations, Douglas Guilfoyle has for instance considered that "failure to say" that something is a clear violation of "jus ad bellum […] is, frankly, tantamount to complicity".[22] I fully agree. In a given context, such a failure can be construed as a nod, as encouragement, as excusing, justifying, agreeing with, permitting, acquiescing, or condoning an egregious violation. And this message, plus the impunity that it encourages –and which can embolden offenders to keep on abusing–, can further encourage the offender and make it persist in its misdeeds and think that their conduct is allowed or endorsed by powerful or relevant 'players', which in a sense contributes to consolidating the effects of serious abuses. Acquiescing to the wrongful conduct of others can also be grounds for attributing their conduct to the acquiescing agent, given the consent "when the individual acts, whether through deliberate inaction or through […] action by having generated the conditions that allow the act to be executed by [other] parties", as human rights case law has indicated.[23] But even if this legal interpretation were not accepted, from a moral and prudential point of view the same arguments against that attitude stand.

Altogether, just as doing what the law permits is, in some circumstances, contrary to the standards, reasons, and criteria found in other normativities; likewise *not* doing what the law permits to do is sometimes contrary

[20] International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, p. 111, paras. 5-7 of the commentary to Chapter III.

[21] Ibid.; Inter-American Court of Human Rights, International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention, Advisory Opinion, OC-14/94, 9 December 1994, para. 56; International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, pp. 42, 45, paras. 13 and 1 of commentaries to articles 4 and 7, respectively.

[22] Source from what he wrote on Twitter/X: <https://x.com/djag2/status/1843954420524241320> (last checked, 14/10/2024).

[23] Inter-American Commission on Human Rights, Business and Human Rights: Inter-American Standards, OEA/Ser.L/V/II, CIDH/REDESCA/INF.1/19, 1 November 2019, para. 75.

to morals and prudence, such as when such failure cannot be expected to become a universal maxim of conduct; and/or when it fails to take into account virtues such as solidarity –which can connect "compassion and justice"— in contexts that call for it, from a virtue ethics perspective (Garlington et al., 2019, pp. 3, 5, 7; Galang et al., 2021). Responsibility is not only legal and, as Bin Cheng once wrote, one must respond for one's conduct in light of the different standards one is beholden to, including those found in non-legal systems (Mantovani, 2022, pp. 30-32, 41).

One must thus *use* what the law allows. The law is, after all, *instrumental*, and sometimes the possibilities it offers can be the only lifeline for those whose lives and essential wellbeing depend on at least a third party acting on their behalf, interacting with the law by invoking it or otherwise –which is not limited to adjudication, but also includes it (McDougal y Lasswell, 1959); which is why using compromissory clauses might also be called for sometimes. When the only way to save someone is by doing what the law permits to do, and there is *urgency and dependence* on that action, then such an action is required, as good Samaritan considerations suggest on the basis of the 'unique dependence' criteria for determining moral duties to assist –i.e., someone will not greatly suffer if a moral agent helps them, giving the latter a moral duty of care (James, 2007, pp. 238, 240, 247-248, 251). I contend that *erga omnes* obligations not only say that the subjects of international law have an interest in their respect in the sense interest as only a possible 'appeal to' feeling like helping bring about the respect of a norm, but rather that they all have a *stake* in the integrity of those obligations, that they are of their true concern. Article 41 of ARSIWA helps bring that point home.

Moreover, philosophical studies show that intuitive considerations about something being wrong can point to moral reasons that have not been hitherto consciously rationalized and observed and that may nevertheless exist despite full awareness or explanation, including those applicable in cases in which complying with laws seems wrong when seen from a non-legal perspective (Arpaly, 2015, pp. 142-143). The uneasiness of many citizens condemning the silence of their States of citizenship when they act with double standards and selectivity, remaining unacceptably silent in the face of some abuses while decrying others that are less intense –which nevertheless also have to be denounced, given the importance of all human beings and all victims, I desire to stress— also provides arguments in favor of the consideration that failure to resort to all of the actions and options permitted to third parties to uphold and defend *erga omnes* obligations on behalf of victims is, at the very least, perceived or 'felt' as morally wrong; and it is important to consider what those emotions say in and about international (legal) life (Carrillo-Santarelli, 2018). It is, therefore, pressing to fully examine the different implications and effects of *erga omnes* obligations and also their unexplored potential.

4. Conclusions

It is possible to consider that, among others, law is or works as a language (a "vernacular"), providing us with terms and conventions (Klabbers, 2021, p. 347). These, along with others, at least partly shape our perceptions of realities –including the ones we want to change or get rid of–; and therefore establish boundaries of what we deem as possible and how we may react. Those conventions are subject to evolution and change, which can take place by means of their appropriation by others, including those found in the 'peripheries' of exclusions –a dynamic that has its own limits in the realm of the politically and linguistically possible and can yet be conducive to some change (Becker Lorca, 2014, pp. 168, 152, 203, 231, 236, 265, 275, 303). *Erga omnes* obligations, by being expressly named, convey something about international law that some ignored or did not fully acknowledge until then. It is a most important consideration: that there are *common* values in which all members of the international society have a stake and thus must strive to respect and contribute alongside the others to making sure that they are honored.

Admittedly, this is partly aspirational and one will soon realize that some components of the legal system itself erect hurdles and hindrances to those aspirations. Readings that inflexibly and somewhat artificially make an absolute distinction between procedural and substantive matters are contentious and especially conspicuous in this regard (Remiro Brotóns et al., 2010, p. 646; Carrillo-Santarelli, 2008, pp. 72-76). The role

of consent in the contingent construction of international law we have nowadays and have had for a while rears its head again, by means of *permitting* the invocation of responsibility on behalf of victims of *erga omnes* violations, without requiring it; and certain procedural elements set some (not necessarily insurmountable) barriers to their use in contentious cases (McGarry, 2023; Longobardo, 2024). But the promise of *erga omnes* violations also challenges us to see if some of those obstacles are imagined or not absolute and merely based on *some* of the possible alternative interpretations, there being others to choose from that may and should gain prominence later on.

As debated in the South Africa versus Israel case, for instance, can the Court handle information and evidence that was not submitted by the parties, such as reports by human rights experts from the United Nations, an organization that the ICJ is a body of? Judge Barak was skeptical,[24] but the Inter-American Court of Human Rights has conversely accepted that publicly-known information can be considered by international judicial bodies,[25] and the reports of those experts are public and deal with *erga omnes* obligations, which should not be subject to the play and dynamics of reciprocal mentality that some procedural interpretations actually in the end fully embrace.

Erga omnes obligations show that there is a communitarian dimension in international legality, which is by no means irrelevant. As the late and great judge Cançado argued, the idea of a law of peoples that transcends inter-State considerations and sees States and laws as instrumental and having the burden of respecting and serving human beings.[26] Considerations echoing or resembling some of the aspects of contemporary *erga omnes* obligations may be deemed as incipiently present in some theories and positions found throughout the history of international legal thinking and its *jus gentium* potential.[27] Many innocents whose suffering is unacceptable deserve protection by others when their own States or the States or actors under the power of whom they are disregard their dignity and rights; and it is a travesty and it is unjust to simply fold one's arms and say that this is the way international law is. If action by third parties is the only means to give protection and hope to victims of serious violations, then there are strong, moral, prudential, and even legal reasons to consider it as required. We may have long suffered too limited an imagination, perhaps influenced by dogmatic transmissions (Bianchi, 2016, pp. 12, 30, 139, 219) of what the law supposedly is. *Erga omnes* duties show, as other milestones also do, that we often fail to see all of the possibilities in international law.

Some will argue that appealing to injustice is problematic, but one can respond that debating what justice is in no way lessens the tears of those being killed or seeing their loved ones obliterated, and that rhetoric should not serve as fallacies to deviate attention from how this cannot be permitted; that there are intuitive considerations regarding justice (Arpaly, 2015); constructions of what is right and wrong that deserve attention being paid to, and that empathy and some other emotions can and ought to influence our considerations of what the *instrumental* law is to do and permit (Carrillo-Santarelli, 2018).

Stubbornness and reluctance to fully embrace *erga omnes* dimensions may amount to ensuring the perpetuation of suffering and wanton destruction. In this sense, it is worth noting what the Israeli NGO B'Tselem has said that in dire humanitarian crises as the one in Gaza: "the continuation of the "wait and see" approach will

[24] Separate Opinion of Judge ad hoc Barak to: International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Order, 28 March 2024, paras. 26, 29.

[25] Inter-American Court of Human Rights, Case of Velásquez-Rodríguez v. Honduras, Judgment, 29 July 1988, para. 146.

[26] Concurring Opinion of Judge A. A. Cançado Trindado to: Inter-American Court of Human Rights, Juridical Condition and Human Rights of the Child, Advisory Opinion, OC-17/2002, 28 August 2002, para. 19.

[27] Ibid., para. 10.

enable" further actions against human beings, amounting to complicity by the passive States and actors.[28] Such complicity can legally engage responsibility sometimes, if the interpretation provided for in section 3 is accepted; and in any case will be moral and exist from the perspective of unmet strong social and other demands and expectations, which are relevant when it comes to the examination of the conduct of actors with the capacity to exert negative impacts on the enjoyment of fundamental rights (Clapham y Jerbi, 2001, pp. 339, 341, 347-349).

Talks about the responsibility to protect should not be mere platitudes. This must certainly be pacifically pursued, addressing both effects and causes of conflict.[29] And sometimes raising a voice decrying and condemning injustice, or bringing alleged wrongdoers to Court or other fora, can be meaningful for the voiceless, trigger imitations and awareness with socialization, acculturation, or example effects, and be the right thing to do. Sometimes it is an obligatory one, both per law and per other normativities. Some cling to inflexible institutions, as the veto. We had better cling to embracing the possibilities that *erga omnes* obligations provide for a more just future in international life, identifying *lex lata* options and *lex ferenda* needs of reform and denunciation of unacceptable shortcomings. Lives are at stake and theoretical discussions should not serve as fallacies to leave them unresolved and make the abusers maintain an insufferable status quo.

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