CONCEPTUALIZING INTERNATIONAL CLIMATE OBLIGATIONS *ERGA OMNES*

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Summary

- Certain climate obligations under international law are *erga omnes*. The enforcement of these international climate obligations *erga omnes* has the potential of shifting the paradigm for future (international) climate litigation from notions of corrective justice to distributive justice. Some potential candidates for establishing international climate obligations *erga omnes* can be found in unilateral climate-related commitment declarations, such as States' Independent Nationally Determined Contributions (INDCs) and international organizations' unilateral climate commitments (e.g., International Maritime Organization 2018 Strategy). These *erga omnes* obligations may arise from both climate-specific international legal instruments and non-climate-specific legal instruments.
- While the identification of certain international (climate) obligations as erga omnes is not exactly controversial, the discussion concerning their enforcement remains obscure, if not mysterious. The recognition of some international obligations as *erga omnes* does not necessarily follow, as a corollary, that any State may seize the jurisdiction of the ICJ to seek the enforcement of those obligations by way of *actio popularis*. I argue that while the notion of *actio popularis* enforcement of *erga omnes* obligations may be controversial as a matter of general public international law, there is a possibility to argue for the possibility of *actio popularis* as a general principle of law at least in the international environmental-climate law regime.
- By granting a prospective litigant State with an *actio popularis* standing, the structure of future international climate litigation will not be confined in the bilateralist logic of international responsibility between an injured State and the State committing the wrongful act guided by corrective justice to a non-bilateral international responsibility guided by the communitarian logic of distributive justice.

Outline of the Presentation

What is International Obligations Erga Omnes?

Are There International Climate Obligations which are Erga Omnes?

Enforcement of International Obligations *Erga Omnes* and *Actio Popularis*: Prospects and Challenges

The Structure of International Climate Litigation and the Enforcement of International Climate Obligations Erga Omnes: From Corrective Justice to Distributive Justice (?)

Closing Remarks

I. What is Obligations Erga Omnes?

- Certain international obligations are owed to the international community as a whole. In international law, these obligations are called obligations *erga omnes*, which were first introduced as an *obiter dictum* in the *Barcelona Traction* (1970) case. They are characterized as obligations with universal and solidarity features. Obligations *erga omnes* are universal because they bind all States without exception. They are also concerned with the solidarity of nations, given that every State is assumed to have a legal interest in protecting those obligations, which will further relate to issues regarding enforcement and legal standing in international law (Ragazzi, 1997: 17).

The History and Development of the Concept of Obligations *Erga Omnes* in International Law (1): ICJ's Jurisprudence (**in IHL-related context*)

Period	Case/Opinion	Contribution
1970	*Barcelona Traction*	First articulation of *erga omnes* obligations
1971	*Namibia Advisory Opinion*	*Erga omnes* status of self-determination
1995	*East Timor*	Self-determination as *erga omnes*, but standing to bring claims dismissed
2004	*Wall Advisory Opinion*	*Erga omnes* reaffirmed in self-determination context
2007	*Bosnian Genocide*	Genocide prohibition as *erga omnes*
2019	*Chagos Advisory Opinion*	Reaffirmed self-determination as *erga omnes*
2020	*Gambia v. Myanmar*	*Erga omnes partes*, standing to bring claims

The History and Development of the Concept of Obligations *Erga Omnes* in International Law (2): PCIJ/ICJ's Jurisprudence

- *S.S. Wimbledon* (1923)
  - ❖ Permanent dedication of the Kiel Canal based on Germany's unilateral act of opening it for passage by merchant ships of all nations.
  - ❖ With respect to all ships alike (including warships), Article 380 of the Peace Treaty of Versailles of 28 June 1919 provided that the Kiel Canal would remain "free and open to the vessels of commerce and war of all nations at peace with Germany on terms of entire equality."
- *Nuclear Tests* (*Australia v. France*, 1974)
  - ❖ Certain statements of the President of France and members of the French Government, which were not made before the International Court but were in the public domain, constituted a unilateral undertaking *erga omnes* by France not to conduct further atmospheric nuclear tests

Elements of International Obligations *Erga Omnes*

The following elements are meant to be only descriptive. There is no presumption that they should be regarded as prescriptive criteria that an international obligation must satisfy to be an obligation *erga omnes*. It does not follow that they must invariably apply to all obligations *erga omnes:*

1. Narrowly defined obligations.
2. Prohibitory (negative) content.
3. Strict, obligatory nature (not mere principles or aspirations).
4. Foundation in general international law, often jus cogens, and widely codified.
5. Instrumental to the protection of fundamental international values (e.g., life, dignity).

(Ragazzi, 1997: 133-134).

Peremptory norms (*Jus Cogens*) and International Obligations *Erga Omnes*

- *Many* (if not *most*) peremptory norms of international law are *also* endowed with *erga omnes* character.; but the contrary is not necessarily true. Not all *erga omnes* obligations derive from (the breach of) *jus cogens*. There is a difference in the type and scale of the violations of both norms (Kadelbach, 2006: 38-39).
- Separating the essence (and to a certain extent, the genesis) of *erga omnes* obligations from jus cogens is important, especially to debunk on of the three myths of *erga omnes* obligations, namely that it is usually wholly new and unprecedented (Tams, 308-309).

II. Are there International Climate Obligations which are *Erga Omnes*?

- In the context of international climate law, climate mitigation obligations may arise not only from treaties specifically concerning climate change but also from non-climate-specific treaties—such as human rights treaties—as well as customary international law.
- Among the various climate mitigation obligations identifiable under international law, Mayer argued that unilateral declarations by States on their climate mitigation commitment—i.e., Independent Nationally Determined Contributions (INDCs)—may well be regarded as an international obligation *erga omnes*. (Mayer, 2022: 6-7). Other scholars have also argued similar opinions on the potential of creating international climate obligation(s) *erga omnes* through a unilateral declaration by international organizations, even in non-climate-specific legal regimes—e.g., the International Maritime Organization 2018 Strategy—but with consequences for climate mitigation. (Kerr, 2021: 119). Treating unilateral declarations as capable of creating an international obligation *erga omnes* is consistent with the ruling of the *Nuclear Tests* case.

IV. Enforcing International (Climate) Obligations *Erga Omnes*: Responsibility Non-Bilateral Obligations and the Prospects for *Actio Popularis* (?)

- The traditional understanding of international responsibility is underpinned on a bilateralist logic. State responsibility is premised upon the rights of the injured State—State A, but for its wrongful act, is held liable for the injury sustained by State B. There is neither a framework at a theoretical nor practical level to understand state responsibility for non-bilateral obligations (Thin, 2024: 5-7). Yet we can see that many treaty frameworks on environmental issues reflect obligations that are not strictly bilateral in nature, some does not even reflect upon the prospects of injury should the said obligation(s) be breached.
- On the other hand, despite recognizing some international obligations as *erga omnes*, it does not follow, as a corollary, that any State may seize the jurisdiction of the ICJ to seek the enforcement of those norms. "The *erga omnes* character of a norms and the rule of consent to jurisdiction are two different things." (East Timor, para. 29; see also Gaja, 2011: 110-111).

The Controversial Nature of *Actio Popularis* (with reference to *Erga Omnes*) in International Law

- There are nuances in the ICJ's position regarding State's legal standing arising from *erga omnes (partes)* obligations. In *East Timor*, the Court refrained from expressly conferring a right of standing for the enforcement of collective interests; but it did so unequivocally in *Obligation to Extradite* and most recently in its order for provisional measures in the *Rohingya Genocide*. The same position has arguably been taken in *Whaling*. (Urs, 2021: 524)
- Such nuance casts doubt on the exact nature and scope of legal standing arising from *erga omnes* obligations. As Tams argued, "if violations of obligations *erga omnes* did not trigger any special rights of response, the concept… would be of rhetorical value only." (Tams, 2005: 158).
- It is also important to note that while the ICJ seems to accept legal standing on violations of treaty-based *erga omnes partes* obligations—e.g., Genocide Convention—there remains doubt, if not ambiguity, whether legal standing can be established under customary international law. (Urs, 2021: 517-518).

Actio Popularis as a General Principle of Law in International Environmental-Climate Law

- While the notion of *actio popularis* enforcement of *erga omnes* obligations may be controversial as a matter of general public international law, there is a possibility to argue for the possibility of *actio popularis* as a general principle of law at least in the international environmental-climate law regime.
- Article 38(1) of the ICJ Charter includes general principles of law as one of the sources of international law. General principles of law are usually thought of as having the function of gap-filling in addressing the potential *lacunae* in international law. (Saunders, 2021: 17-18).
- Hypothesis:
  - As of 2012, 110 out of 193 UN Member States had constitutional provisions that explicitly recognize the right to a healthy environment. About 92 countries include the substantive right in their constitutions. (Boyd: 2012). There are strong reasons to assume the possibility that at least 92-110 States may have also regulated *actio popularis* standing in their national legislation.
  - The said *actio popularis* provision may have, at least, two permutations: i.) citizen lawsuit; and ii.) public trust standing.

Future International (Inter-State) Climate Litigation: From Corrective Justice to Distributive Justice (?)

- It is generally held that in the context of litigation, including climate litigation, the relationship between the claimant and respondent is guided by the notion of corrective justice. Based on this view, the relationship between a claimant and respondent is viewed bipolarly in that the injury or harm suffered by the claimant is the result of the wrongful act of the respondent, hence, the remedy sought should be one that can restore the claimant's integrity *ex ante* before the occurrence of the injury. (Weinrib, 2012a: 9-37; Weinrib, 2012b: 63-66; Weinrib, 2022-1-22; see also: Adler, 2007: 1859).
- Upon identifying certain climate obligations as international obligations *erga omnes*, I advance the argument that prospective international climate litigation will be one guided by the notion of distributive justice as opposed to corrective justice. First, since the nature of an obligation *erga omnes* is an obligation concerning the solidarity of nations, the fulfilment of such an obligation is oriented to the benefit of all nations and not a particular nation. Second, by treating the atmosphere and climate system as a global commons, the remedy sought need not be confined only to remedying or restoring harm but also to preventing it.

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