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Luciano Pezzano

University of Business and Social Sciences (UCES, Argentina)
National University of Cordoba (UNC, Argentina)
https://orcid.org/0000-0002-6794-7915
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LEGAL CONSEQUENCES OF BREACHES OF PEREMPTORY NORMS IN THE ICJ'S ADVISORY OPINIONS: *JUS COGENS* OR *ERGA OMNES*?*

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Abstract: Article 41 ARSIWA enshrines three duties for all States in case of a serious breach of an obligation arising from a peremptory norm ('*jus cogens* duties'). However, since 2004, the ICJ has ascribed these duties to breaches of obligations *erga omnes*, in its advisory opinions of the *Wall*, *Chagos* and *Palestine*. It seems that the ICJ considers that such duties are consequences of the breaches of obligations *erga omnes*, and not of *jus cogens* norms, which could imply a sort of confusion between both concepts. However, as the ILC stressed, given the significant overlap between *jus cogens* and obligations *erga omnes*, the deduction that the ICJ in these decisions was referring (implicitly) to peremptory norms is not unwarranted. This contribution aims to offer a review of the determination by the ICJ of *jus cogens* duties in its advisory opinions, and the seeming confusion with obligations *erga omnes* – and the criticism regarding it – arguing for a way of interpretation that avoids that confusion. The study allows confirming the ILC's deduction, and it stresses the importance of the 2025 advisory opinion on *Climate Change* to that end.

Keywords: *jus cogens* norms, obligations *erga omnes*, international responsibility, International Court of Justice, advisory opinions

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1. Introduction

Article 41 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) enshrines three duties for all States in case of a serious breach of an obligation arising from a peremptory norm: to cooperate to bring to an end any serious breach; not to recognize as lawful a situation created by a serious breach, and not to render aid or assistance in maintaining that situation. These duties are, in the regime of international responsibility, the particular consequences of serious breaches of *jus cogens* (hereinafter, *jus cogens* duties).

However, since 2004, the International Court of Justice (ICJ) has ascribed these duties to breaches of obligations *erga omnes*, in its advisory opinions on the *Wall*, *Chagos* and *Palestine*. Only in the latter, the Court referred to a peremptory norm: the right to self-determination in cases of foreign occupation, but it also explicitly mentioned the 'serious breaches of obligations *erga omnes*' as the basis for the aforementioned duties.

Therefore, it seems that the ICJ considers that such duties are consequences of the breaches of obligations *erga omnes*, and not of *jus cogens* norms. This conclusion could imply a sort of confusion between both concepts, since not all obligations *erga omnes* arise from peremptory norms. One can argue that all obligations *erga omnes* involved in those advisory proceedings (respect for self-determination, the prohibition of the use of force, and certain obligations under international humanitarian law and international human rights law) arise from peremptory norms and the ICJ had no need for the distinction. As the International Law Commission (ILC) stressed, given the significant overlap between *jus cogens* and obligations *erga omnes*, the deduction that the ICJ in these decisions was referring (implicitly) to peremptory norms is not unwarranted.[1]

In its 2025 advisory opinion on *Obligations of States in respect of Climate Change*, the ICJ identified, for the very first time, obligations *erga omnes* not arising from peremptory norms, without mentioning the *jus cogens* duties amongst the consequences of the breaches of such obligations.

[1] ILC, *Report of the International Law Commission. Seventy-third session*, UN doc. A/77/10, 72, para. 6.

Does this omission imply the confirmation of the ILC's deduction or is it a new chapter in the story of confusion on concepts?

This article aims to offer a review of the determination by the ICJ of *jus cogens* duties in its advisory opinions, and the seeming confusion with obligations *erga omnes* – and the criticism regarding it – arguing for a way of interpretation that avoids that confusion. The article, therefore, has a narrow scope: offering a way to interpret the ICJ's case law on *jus cogens* duties that avoids the confusion or conflation between peremptory norms and obligations *erga omnes*. It does not intend to cover all aspects of the complex relationship between both concepts, and the relationship is briefly explored just in order to provide a theoretical and conceptual framework of the analysis.

With that in mind, the article begins with some general reflections on the relationship between obligations *erga omnes* and *jus cogens* norms (Section 2), followed by a review of the ICJ advisory opinions regarding obligations *erga omnes* (Section 3), highlighting the seeming confusion between consequences of peremptory norms and obligations *erga omnes*. In Section 4, the article addresses the main positions in literature regarding the confusion and it offers a way to solve it, stressing the legal relevance of the ICJ's findings in the *Climate Change* advisory opinion to that end. Section 5 is devoted to the final remarks.

2. The Relationship between Obligations *erga omnes* and *jus cogens* Norms

The debate about the relationship between *jus cogens* norms and obligations *erga omnes* exists since the ICJ coined the latter concept in its famous *obiter dictum* in *Barcelona Traction*:

> … 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*.

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 concerning the basic rights of the human person, including protection from slavery and racial discrimination.[2]

Indeed, the examples provided by the Court as sources of obligations *erga omnes* are often considered examples of *jus cogens* norms:[3] the prohibitions of aggression, genocide, slavery and racial discrimination are in the non-exhaustive list adopted by the ILC in its Draft Conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), adopted in 2022 (hereinafter, the '2022 Draft Conclusions').[4]

Does this mean that *jus cogens* norms and obligations *erga omnes* are two names for the same concept? The answer to this question affects author's views on the issue presented in this article, and therefore, it is important to explore it.

The first answer is an affirmative one. Kadelbach held that the distinction between *jus cogens* and *erga omnes* obligations is not as clear-cut as it appears: 'The equation of both seems to be justified by the observation that the primary rules which belong to *jus cogens* and *erga omnes* norms are basically the same.'[5] The equation, however, is based on the examples in *Barcelona Traction*, but the possible existence of obligations *erga omnes* arising from non-peremptory norms could present an alternative.

The second answer is a negative one. In that sense, Picone offers a singular approach on this issue, since in his view, *jus cogens* norms and obligations *erga omnes* are completely different concepts, the former pertaining to the Law of Treaties, where they were born (in Article 53 of the Vienna Convention), and the latter pertaining to the law of international responsibility. In his view, given that *jus cogens* cannot replace the rules which impose obligations *erga omnes*, the reference in Article 40 ARSIWA to peremptory norms 'should not be considered as decisive, but the mere result of the error frequently mentioned here (concerning the alleged coincidence between the rules of *jus cogens* and those

2 *Barcelona Traction, Light and Power Company, Limited*, Judgment, ICJ judgment of 5 February 1970, I.C.J. Reports 1970, p. 3, para. 33-34.

3 Ragazzi, *Concept of International Obligations*, 194; Tams, *Enforcing Obligations Erga Omnes*, 140; Iovane and Rossi, "International Fundamental Values", 46.

4 ILC, *Report of the International Law Commission. Seventy-third session*, UN doc. A/77/10, 87-88.

5 Kadelbach, "Jus Cogens, Obligations Erga Omnes", 27.

which create obligations *erga omnes*).'[6] For him, therefore, the duties of Article 41 ARSIWA are consequences of the breaches of obligations *erga omnes*. This approach is hard to follow. In the first place, restricting the scope of *jus cogens* to the Law of Treaties does not take into account the important development of the concept in the field of international responsibility, not only in the works by the ILC, but also in the international jurisprudence,[7] even by the ICJ since 2006.[8] In the second place, the ILC confirmed the position forwarded in Article 41 ARSIWA in Conclusion 19 of the 2022 Draft Conclusions, without significant opposition. However, the position is useful in order to underline the differences between both concepts.

That leads to a third possible answer, which starts by acknowledging that *jus cogens* norms and obligations *erga omnes* are different but overlapping concepts. In the words of Gaja:

> there is an overlap between the sub-category of peremptory norms and that of those which set out an obligation *erga omnes*. In both cases the protection of a general interest of the international community is certainly involved. However, neither in the *Barcelona Traction* case nor in later decisions did the International Court of Justice consider that all the norms that set out obligations *erga omnes* are also peremptory norms. […] On the other hand, there is reason to believe that peremptory norms necessarily set out obligations *erga omnes*.[9]

Gaja offers a reason for the overlap: both involve the protection of a general interest of the international community. Indeed, both concepts are strongly linked with the fundamental values of the international community, as Iovane and Rossi comment: 'This correspondence is far from surprising when one considers that the two concepts make

[6] Picone, "Distinction", 420.

[7] See, for example, the advisory opinion OC-26/20 by the Inter-American Court of Human Rights, where it enumerated the *jus cogens* norms it recognized throughout its case law (IACtHR, *The Obligations in Matters of Human Rights of a State that has Denounced the American Convention on Human Rights and the Charter of the Organization of American States, Advisory Opinion OC-26/20*, 9 November 2020, Series A No. 26, para. 106).

[8] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, ICJ judgment of 3 February 2006, I.C.J. Reports 2006, p. 6, para. 64.

[9] Gaja, "Protection of General Interests", 55-56.

reference to the same underlying value system.'[10] The authors recalled that the ILC itself recognized that 'there are certain consequences flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of State responsibility.'[11]

Obligations *erga omnes* are, by definition, obligations towards the international community as a whole, or, in the words of the ILC, *owed* to the international community[12] (Article 48 ARSIWA). *Jus cogens* norms, according to Article 53 of the Vienna Convention on the Law of Treaties, are norms accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted. Conclusion 2 of the 2022 Draft Conclusions completes the definition by indicating that *jus cogens* norms 'reflect and protect fundamental values of the international community. They are universally applicable and are hierarchically superior to other rules of international law.' In both, the presence of the international community is a central feature, but they are different concepts.

As Gaja also implies, many understand that obligations *erga omnes* is a broader category than *jus cogens*. In other words, while all *jus cogens* norms are also obligations *erga omnes*, the opposite may not be true.[13] Before 2025, however, some authors noted that, in practice, the qualification of *erga omnes* obligation had never been expressly endowed by the ICJ upon a norm which was not also, at the same time, one of *jus cogens*.[14] That situation changed with the advisory opinion on *Climate Change*, as I will explore *infra*, but in other contexts, there were efforts in order to provide examples of obligations *erga omnes* not arising from peremptory norms. Professor – now Judge – Dire Tladi, the ILC's Special Rapporteur on *jus cogens* noted:

> Obligations pertaining to common spaces are perhaps the only other example of *erga omnes* obligations under international law not tied to *jus*

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10 Iovane and Rossi, "International Fundamental Values", 55.

11 ILC, *Yearbook of the International Law Commission 2001*, Vol. 2, Part 2, 111, para. 7.

12 A few years before, Simma pointed out that obligations *erga omnes* are 'obligations owed to the collectivity of States' (Simma, "From Bilateralism", 298).

13 Simma, "From Bilateralism", 300; Tams, *Enforcing Obligations Erga Omnes*, 152-156; Iovane and Rossi, "International Fundamental Values", 55; Movilla Pateiro, "Rediscovery of Advisory Opinions", 35-36; Nucera, "Reflections", 204.

14 Iovane and Rossi, "International Fundamental Values", 55.

> *cogens*. The *erga omnes* quality of norms related to common spaces flows from the inherent nature of the obligations imposed by such norms which are, by definition, owed to the international community as a whole.[15]

The ILC followed this approach in its commentary to Conclusion 17 of the 2022 Draft Conclusions:

> Although all peremptory norms of general international law (*jus cogens*) give rise to obligations *erga omnes*, it is widely considered that not all obligations *erga omnes* arise from peremptory norms of general international law (*jus cogens*). 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. The International Tribunal for the Law of the Sea determined that the obligations of States parties relating to preservation of the environment of the high seas and the deep seabed under the 1982 United Nations Convention on the Law of the Sea had an *erga omnes* character.[16]

I think that perhaps there are more obligations *erga omnes* in the field of human rights law. In *Barcelona Traction*, the ICJ mentioned 'the principles and rules concerning the basic rights of the human person.' Although the specific examples provided by the ICJ (the prohibition of slavery and racial discrimination) are *jus cogens* norms, there could be other obligations regarding human rights without peremptory nature yet.[17] For example, both the Human Rights Committee[18] and the Inter-American Court of Human Rights[19] stressed the *erga omnes* character of the obligations to respect and ensure human rights.

Therefore, there are enough elements to conclude that *jus cogens* and *erga omnes* are different but related concepts.[20] Tladi explains this relationship: *jus cogens* norms create *erga omnes* obligations, and that has

[15] Tladi, *Draft Conclusions*, 169-170.

[16] ILC, *Report of the International Law Commission. Seventy-third session*, UN doc. A/77/10, 66, para. 3.

[17] De Wet, "Jus Cogens and Obligations Erga Omnes", 555.

[18] CCPR, General comment no. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 2.

[19] IACtHR, *Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03*, 17 September 2003, Series A No. 18, para. 109.

[20] Tladi, *Draft Conclusions*, 168.

a further implication, namely that all *jus cogens* norms have an *erga omnes* quality.[21] This implication was reinforced by the ILC in Conclusion 17.1 of the 2022 Draft Conclusions: 'Peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*), in relation to which all States have a legal interest.'

The difference, however, was explained by Pellet: 'le caractère *cogens* d'une norme concerne la qualité du contenu même de celle-ci; l'expression *erga omnes* attire plutôt l'attention sur ses destinataires.'[22]

Accepting that difference, it is easier to understand that the *erga omnes* character of an obligation cannot be *per* se the source of substantive duties for States in case of breach, but for the right of those States to invoke the responsibility for that breach. Both ARSIWA and the 2022 Draft Conclusions are drafted on this difference. Article 41(1) and (2) ARSIWA provide:

> 1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
> 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

Article 40 is clear that the source of those duties is 'a serious breach of an obligation arising from a peremptory norm of general international law'. Conclusion 19 of the 2022 Draft Conclusions follows the same approach.

Article 48 ARSIWA recognizes the right of any State to invoke the responsibility of another State if 'the obligation breached is owed to the international community as a whole.' Although the ILC did not use the term 'obligation *erga omnes*', it is clear that it is the same idea, as the commentary explains.[23] Conclusion 17 of the 2022 Draft Conclusions follows the same rule, regarding obligations *erga omnes* arising from *jus cogens* norms. From this point of view, *erga omnes* obligations are not related to new duties for third states, but to standing and invocation

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[21] Tladi, Draft Conclusions, 169.
[22] Pellet, "Conclusions", 418.
[23] ILC, *Yearbook of the International Law Commission 2001*, 127, para. 9.

of responsibility.[24] As Tams explained, concept of obligations *erga omnes* 'first and foremost affects the question of law enforcement.'[25] Malanczuk offered the same view:

> Obligations erga omnes (which are not the same as, albeit connected to, norms of jus cogens) are concerned with the enforceability of norms of international law, the violation of which is deemed to be an offence not only against the state directly affected by the breach, but also against all members of the international community.[26]

In that sense, but only to the extent they overlap, it is possible to see the *erga omnes* character of the obligations and the State duties in case of a serious breach as different but related consequences of *jus cogens*. When a serious breach of an obligation arising from a peremptory norm is committed, all States have simultaneously a right to invoke the responsibility of the responsible State – since the obligation is *erga omnes* – and the obligations under Article 41.

3. The Consequences of Serious Breaches in ICJ Advisory Opinions

In order to address the main issue of this article, I will explore first the considerations by the ICJ and its Judges, and after that the doctrinal comments, offering a classification of the arguments advanced by the authors.

3.1. The Wall Advisory Opinion

In its 2004 advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ identified the character of the obligations violated by Israel:

> The Court would observe that the obligations violated by Israel include certain obligations *erga omnes*. As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature "the concern of all States" and, "In view of the importance of the rights involved, all States

24 Bradley, "Jus Cogens' Preferred Sister", 213.
25 Tams, *Enforcing Obligations Erga Omnes*, 309.
26 Malanczuk, "Note on the Judgement", 239.

> can be held to have a legal interest in their protection" […]. The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.[27]

The ICJ also determined the consequences for all States resulting from the construction of the wall by Israel:

> Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.[28]

The ICJ did not mention peremptory norms, although it determined the *jus cogens* duties for all States, without reference to Article 41 ARSIWA. The Court only identified breaches of obligations *erga omnes*. Judges Higgins and Kooijmans criticized that circumstance.

Judge Higgins insisted on the legal effects of obligations *erga omnes*:

> I do not think that the specified consequence of the identified violations of international law have anything to do with the concept of *erga omnes* […]. As the International Law Commission has correctly put it in the Commentaries to the draft Articles on the Responsibility of States for Internationally Wrongful Acts […], there are certain rights in which, by reason of their importance "all states have a legal interest in their protection". It has nothing to do with imposing substantive obligations on third parties to a case.[29]

[27] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ advisory opinion of 9 July 2004, I.C.J. Reports 2004, p. 136, para. 155.
[28] *Wall*, para. 159.
[29] *Wall*, Separate Opinion of Judge Higgins, para. 38.

On the other hand, Judge Kooijmans recalled Article 41 ARSIWA:

> I have considerable difficulty in understanding why a violation of an obligation *erga omnes* by one State should necessarily lead to an obligation for third States. The nearest I can come to such an explanation is the text of Article 41 of the International Law Commission's Articles on State Responsibility. […] I will not deal with the tricky question whether obligations erga omnes can be equated with obligations arising under a peremptory norm of general international law. In this respect I refer to the useful commentary of the ILC under the heading of Chapter III of its Articles.[30]

3.2. The Chagos Advisory Opinion

In its 2019 advisory opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the ICJ again determined the existence of a violation of an obligation *erga omnes*:

> Since respect for the right to self-determination is an obligation *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 Nations to put those modalities into effect.[31]

Again, the ICJ did not mention peremptory norms, and it only made reference to one of the *jus cogens* duties, the duty to co-operate. Judge Sebutinde criticized this approach:

> The Court makes an oblique reference, as late as paragraph 180, to "the right to self-determination [being] an obligation *erga omnes*". However, the Court fails in the Opinion to recognize that the right to self-determination has evolved into a peremptory norm of international law (*jus cogens*)[32]

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[30] *Wall*, Separate Opinion of Judge Kooijmans, paras. 40-45.

[31] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ advisory opinion of 25 February 2019, I.C.J. Reports 2019, p. 95, para. 180.

[32] *Chagos*, Separate Opinion of Judge Sebutinde, para. 25.

She also offered her view regarding the Court's findings in the *Wall* advisory opinion

> The Court did not expressly hold that the right to self-determination is a peremptory norm. However, again, it implied the elevated status of that right within the hierarchy of international legal norms by venerating its "character and . . . importance". Consequently, the Court held that the breach of the right of the Palestinian people to self-determination entailed the consequences applicable for the breach of a peremptory norm in language strikingly similar to Article 41 of the Articles on State Responsibility[33]

Since the right of self-determination is a peremptory norm, she considered that the Court had failed to properly articulate the consequences of the United Kingdom's internationally wrongful conduct, which, in her opinion, include the *jus cogens* duties,[34] recognizing the customary character of Article 41 ARSIWA.[35]

Judges Robinson[36] and Cançado Trindade[37] also criticize the ICJ for having failed to recognize the peremptory character of the right to self-determination, although they do not dwell on the consequences of breaches of that norm.

3.3. The Palestine Advisory Opinion

In its 2024 advisory opinion on *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, the ICJ, for the very first time, explicitly recognized the peremptory character of the right to self-determination: 'The Court considers that, in cases of foreign occupation such as the present case, the right to self-determination constitutes a peremptory norm of international law.'[38]

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[33] *Chagos*, Separate Opinion of Judge Sebutinde, para. 39.
[34] *Chagos*, Separate Opinion of Judge Sebutinde, para. 45.
[35] *Chagos*, Separate Opinion of Judge Sebutinde, para. 29.
[36] *Chagos*, Separate Opinion of Judge Robinson, paras. 48-89.
[37] *Chagos*, Separate Opinion of Judge Cançado Trindade, paras. 120-150.
[38] *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion, ICJ advisory opinion of 19 July 2024, para. 233.

However, it is not clear in the opinion whether this (limited) recognition had any effect in the Court's reasoning on the consequences of the obligations violated by Israel, since it determined again the *erga omnes* character of those obligations:

> The Court observes that the obligations violated by Israel include certain obligations *erga omnes*. As the Court indicated in the Barcelona Traction case, such obligations are by their very nature "the concern of all States" and "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection" (*Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970,* p. 32, para. 33). Among the obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination and the obligation arising from the prohibition of the use of force to acquire territory as well as certain of its obligations under international humanitarian law and international human rights law.[39]

Regarding the consequences for all States, the Court considered:

> Moreover, the Court considers that, in view of the character and importance of the rights and obligations involved, all States are under an obligation not to recognize as legal the situation arising from the unlawful presence of Israel in the Occupied Palestinian Territory. They are also under an obligation not to render aid or assistance in maintaining the situation created by Israel's illegal presence in the Occupied Palestinian Territory. It is for all States, while respecting the Charter of the United Nations and international law, to ensure that any impediment resulting from the illegal presence of Israel in the Occupied Palestinian Territory to the exercise of the Palestinian people of its right to self-determination is brought to an end.

The duty of non-recognition specified above also applies to international organizations, including the United Nations, in view of the serious breaches of obligations *erga omnes* under international law. […] In view of the character and importance of the obligations *erga omnes*

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[39] *Palestine*, para. 274.

involved in the illegal presence of Israel in the Occupied Palestinian Territory, the obligation not to recognize as legal the situation arising from the unlawful presence of Israel in the Occupied Palestinian Territory and the obligation to distinguish in their dealings with Israel between the territory of Israel and the Occupied Palestinian Territory apply also to the United Nations.[40]

The ICJ made reference to all three *jus cogens* duties, without mentioning explicitly Article 41 ARSIWA, nor the peremptory character of the other norms involved, but it even considered that there were 'serious breaches of obligations *erga omnes*'.

Judge Cleveland and President Salam justified the Court's approach. According to Judge Cleveland,

> in addressing the legal consequences that flow from Israel's violations of international law, the Court draws upon the character and importance of the obligations at issue as "*erga omnes*", not as peremptory norms of international law. It is the *erga omnes* character of the norms as "the concern of all States" that informs the Court's determination of the responsibilities of States and the United Nations (Advisory Opinion, paras. 274 and 280). I believe that this approach is correct and is consistent with the Court's prior case law.[41]

President Salam linked the Court's reasoning with Article 41 ARSIWA, but without mentioning peremptory norms:

> as the Court points out, the obligations that Israel has violated include *erga omnes* obligations (paragraph 274 of the Opinion), which entail "special legal obligations" for other States in accordance with customary international law, as reflected in Article 41 of the Articles on the Responsibility of States for Internationally Wrongful Acts[42]

Judge Tladi, given his vast experience on *jus cogens*, was particularly critical of the Court's findings:

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[40] *Palestine*, paras. 279-280.

[41] *Palestine*, Separate Opinion of Judge Cleveland, para. 34.

[42] *Palestine*, Declaration of President Salam, para. 44.

> If there is one aspect of the Opinion that gives me cause for pause it is that having identified the right of self-determination as a peremptory norm, the Court adopts an ambivalent approach to the consequence of its finding. For instance, in paragraph 274, when preparing to identify the consequences of Israel's presence on the Occupied Palestinian Territory for third States, the Court "observes that the obligations violated by Israel include certain obligations *erga omnes*." This language might suggest that the obligations for third States - what we might refer to as the Article 41 consequences for shorthand - flow not from the peremptory status of the right of self-determination but rather from the *erga omnes* character of the obligations breached.
> Given that States and commentators generally accept that the consequences in Article 41 of the Articles on State Responsibility attach to peremptory norms, the Court cannot put forward an alternative proposition in this Advisory Opinion without offering an explanation. […] Thus, for the Court to suggest that it was in fact not the peremptory status of the norm but the *erga omnes* character of the obligations that forms the basis of these consequences, would be to establish an approach that is unsupported by the views of States, our sister entity the International Law Commission or academic writings.[43]

Tladi thinks that the Court's approach

> would be based on a complete miscomprehension of the relationship between peremptory norms and *erga omnes* obligations. The *erga omnes* character of an obligation is itself a consequence of the nature of the norm from which the obligation arises. Consequent to this, the *erga omnes* character permits all States, even if not directly injured, to invoke the responsibility of another State for a wrongful act.[44]

He recalled the Separate Opinion of Judge Higgins in *Wall*, to stress that the *erga omnes* character of the obligations does not itself create obligation on third States:

[43] *Palestine*, Declaration of Judge Tladi, paras. 28-29.
[44] *Palestine*, Declaration of Judge Tladi, para. 30.

> there is virtually no support for the view that the *erga omnes* character of the obligation also gives rise to the consequences identified in Article 41 of the ILC's Articles on State Responsibility. It should be recalled that not all *erga omnes* obligations derive from peremptory norms. Obligations arising from customary international law norms concerning common spaces, for example, also have an *erga omnes* character whether they flow from peremptory norms or not. Without ruling out the possibility, it is not at all clear to me that all obligations having an *erga omnes* character produce the threefold duties of non-recognition, non-assistance and co-operation as formulated in Article 41 of the Articles on State Responsibility. It is possible that they do, but it is not at all clear that this is the case. What is clear, however, is that peremptory norms do. Accordingly, for the sake of sound and coherent judicial reasoning, the Court ought to have tied explicitly the Article 41 consequences identified for third States in this Opinion to the peremptory status of the right of self-determination (or even better, explicitly reaffirmed the peremptory character of other norms discussed in the Opinion).[45]

Sharing these arguments, Judge Gómez Robledo tried to offer a constructive interpretation of the Court's findings:

> Although, in the past, the Court has not expressly characterized the right to self-determination as *jus cogens*, that characterization could already be inferred from the legal consequences repeatedly identified by the Court as a result of its violation, such as the obligation not to recognize or render aid or assistance in maintaining the illegal situation and to co-operate to bring it to an end […]. The Court has established these consequences in the present proceedings, linking them to the nature and importance of the rights and obligations at issue, […]. It is, however, regrettable that the Court has not directly established the link between the finding that the right to self-determination has the status of a peremptory norm and the consequences of its violation.
>
> In this regard, the consequences identified by the Court arising from violations of the right to self-determination, considered in the light of obligations *erga omnes*, are in line with the provisions of Article 41, paragraphs

[45] *Palestine,* Declaration of Judge Tladi, para. 31.

1 and 2, of the Articles on the Responsibility of States for Internationally Wrongful Acts.[46]

3.4. The Climate Change Advisory Opinion

In its 2025 advisory opinion on *Obligations of States in respect of Climate Change*, the ICJ identified, for the very first time,[47] obligations *erga omnes* in the field of environmental law:

> The Court observes that certain rules of international law relating to global common goods, such as the climate system, may produce *erga omnes* obligations (see Conclusion 17, paragraph 3 of the commentary, ILC Conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), *Yearbook of the International Law Commission, 2022*, Vol. II, Part Two, p. 66). In the present context, the Court considers that all States have a common interest in the protection of global environmental commons like the atmosphere and the high seas. Consequently, States' obligations pertaining to the protection of the climate system and other parts of the environment from anthropogenic GHG emissions, in particular the obligation to prevent significant transboundary harm under customary international law, are obligations *erga omnes*.[48]

Regarding the consequences of this characterization, the ICJ quoted Article 48 ARSIWA –also for the very first time – and considered that 'responsibility for breaches of such obligations, such as climate change mitigation obligations, may be invoked by any State when such obligations arise under customary international law.'[49]

Although the advisory opinion deals with the legal consequences of wrongful acts, there is no mention of *jus cogens* duties, nor other obligations for third States in case of a breach of obligations *erga omnes*. This could be a significant departure from its previous case law on obligations

[46] *Palestine*, Separate Opinion of Judge Gómez Robledo, paras. 22-23.
[47] Urs, "Open the Floodgates".
[48] *Obligations of States in respect of Climate Change*, Advisory Opinion, ICJ advisory opinion of 23 July 2025, para. 440.
[49] *Climate Change*, para. 442.

erga omnes, or, perhaps, a confirmation that when it determined *jus cogens* duties as consequences of breaches of obligations *erga omnes*, it implicitly identified the peremptory nature of the norms underlying them. In this regard, Judge Tladi warned about an incoherence in the Court's jurisprudence. He recalled the *Palestine* advisory opinion and the determinations made by the Court:

> If we take the 2024 Advisory Opinion at face value, then all breaches of *erga omnes* obligations, whether those obligations flow from *jus cogens* norms or not, should attract the consequences of the duty of non-recognition, non-assistance and co-operation. If that is the case, then since the Court in its current Advisory Opinion has identified *erga omnes* obligations, one would expect that the duties of non-recognition, non-assistance and co-operation would also be identified here as legal consequences resulting from the breach. But the Court does not do so. What's more the Court offers no reason whatsoever as to why those consequences do not attach to the breaches (of obligations *erga omnes*) in this case.
> In my declaration appended to the 2024 Advisory Opinion, I warned that the Court, by attaching the duties of non-recognition, non-assistance and co-operation to the *erga omnes* character of obligations was improperly conflating the concepts of obligations *erga omnes* and *jus cogens*, and thus opening a can of worms that would create incoherence in the future. [...] Today, having come face to face with the incoherence in its jurisprudence, the Court has chosen to pour shade over itself, and to proceed as if all was well in the world...[50]

3.5. Some Common Features in ICJ Jurisprudence

The review of the ICJ's advisory opinions shows certain trends for the analysis I propose here. In the first place, the Court seems to ascribe to the breaches of obligations *erga omnes* the consequences provided for in Article 41 ARSIWA for serious breaches of *jus cogens*, at least before 2025. At the same time, the ICJ is very reluctant[51] to identify *jus*

[50] *Climate Change*, Declaration of Judge Tladi, paras. 36-37.
[51] Aguado Silvestre, "La Asamblea General vuelve a la carga", 29.

cogens norms:[52] even the curious finding in the *Palestine* advisory opinion regarding self-determination does not seem to have had any effect in the determination of the consequences for all States.

The *Climate Change* advisory opinion, however, could imply a significant detour in this trend. In its finding of the *erga omnes* character of the obligations in respect of climate change, the Court relied on the ILC's commentary of Conclusion 17 of the 2022 Draft Conclusions, precisely in the paragraph regarding obligations *erga omnes* not arising from peremptory norms, already quoted. Perhaps that was the reason for not ascribing to breaches of those obligations the same consequences the ICJ indicated in its previous advisory opinions. That could imply that, in those previous opinions, the ICJ was dealing with obligations *erga omnes* arising from *jus cogens* norms. This is the hypothesis I want to explore in depth in the following section.

4. Solving the Seeming Confusion between *jus cogens* and *erga omnes*

What is the meaning of the ICJ's findings regarding consequences of obligations *erga omnes* in its advisory opinions? Is the Court conflating the notions of obligations *erga omnes* with *jus cogens* norms? How can this seeming confusion be solved? There are in the literature at least three approaches to this issue.

According to the first, the breaches of obligations *erga omnes* generate consequences for all States, either because obligations *erga omnes* and *jus cogens* norms are identical, or because obligations *erga omnes* are the only relevant concept. In that case, there is no need for clarification, because there is no confusion at all.

For the second approach, since obligations *erga omnes* and *jus cogens* norms are different concepts, the ICJ deserves criticism for the confusion regarding their consequences.

Finally, according to the third approach, obligations *erga omnes* and *jus cogens* norms are different but overlapping concepts. When the ICJ determined the consequences for all states in case of a breach, it implied the peremptory nature of the norms involved.

I will explore the three approaches.

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[52] This is a constant feature in the ICJ's case law, since the first clear identification of a peremptory norm by the ICJ was in 2006, when it determined that the prohibition of genocide is a norm of *jus cogens* in the *Armed Activities* case.

4.1. The Breaches of Obligations erga omnes Entail Consequences for All States

Some authors consider that the ICJ determined the *jus cogens* duties as consequences for the breaches of obligations *erga omnes* because there is no real difference between them for the Court, or because they are actually consequences flowing from *erga omnes* obligations. Scobbie reflected on this issue regarding the *Wall* advisory opinion:

> Article 41 was, however, not mentioned in the Advisory Opinion. What implications should be drawn from this omission? Because Judges Higgins and Kooijmans expressed reservations about the consequences of designating an obligation as having *erga omnes* status, it must be assumed that this issue was discussed during the Court's deliberations. Their views were expressed in opposition to the implications of the Advisory Opinion. Although these are inarticulate, or at least not clearly and unequivocally stated, this judicial interchange indicates that the Court as a whole thought that obligations *erga omnes* do impose substantive obligations on third states.[53]

This was also the position assumed by Judge Cleveland and, to some extent, by President Salam, in the *Palestine* advisory opinion. Regarding that advisory opinion, and referring to Judge Tladi's critical stand, Goldmann recalls that the ICJ's case law seems strikingly consistent – as Judge Cleveland pointed out – although at odds with the view of many voices in literature. In order to offer a solution to this problem, he holds:

> it seems entirely consistent with the rationale behind *erga omnes* duties to base third States' obligations on them. Their very purpose is not just to serve as a cause of action, but also to define the scope of an obligation. […] The essence of this is that *erga omnes* and *ius cogens* are two sides of the same coin, actually two overlapping concepts with only marginal, terminological differences between them. In this sense, it is telling that the ILC 2022 draft conclusion on peremptory norms recognizes that all peremptory norms have *erga omnes* character […], while avoiding the often-heard opposite conclusion that not all *erga omnes* rules had

[53] Scobbie, "Unchart(er)ed Waters?", 951-952.

> peremptory character. I doubt one will find an *erga omnes* rule without peremptory character.[54]

I can see at least three problems with this interpretation. First, the very purpose of obligations *erga omnes* is indeed to serve as a cause of action: since all States have interest in their compliance, they can invoke the responsibility for any breach of such an obligation. It is a very important effect in itself, but it is difficult to see it as a source for obligations for third States. Second, the ILC did deal with the issue that not all obligations *erga omnes* arise from *jus cogens* norms, in its commentary to Draft Conclusion 17 (quoted above). Finally, there could be, as the ILC has explained, obligations *erga omnes* without peremptory character, regarding common spaces, and the ICJ confirmed that in its *Climate Change* advisory opinion. Tanaka summarizes the approach for equation of concepts:

> Given that *jus cogens* can be regarded as a subset of obligations *erga omnes*, there appears to be a basis for arguing that, in appropriate circumstances, the obligation of non-recognition and the obligation of non-assistance arise as the legal consequences of an obligation *erga omnes*. This interpretation is supported by Article 5(b) of the 2005 Resolution of the *Institut*[55]

Tanaka refers to the Kraków Resolution of the *Institut de Droit International* on obligations *erga omnes* in international law. Article 5 of that Resolution provides:

> Should a widely acknowledged grave breach of an *erga omnes* obligation occur, all the States to which the obligation is owed:
> (a) shall endeavour to bring the breach to an end through lawful means in accordance with the Charter of the United Nations;
> (b) shall not recognize as lawful a situation created by the breach;
> (c) are entitled to take non-forcible counter-measures under conditions analogous to those applying to a State specially affected by the breach.[56]

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54 Goldmann, "Non-Recognition and Non-Assistance", 209.

55 Tanaka, "Legal Consequences", 13.

56 IDI, *Resolution. Obligations Erga Omnes in International Law*, 27 August 2005, https://www.idi-iil.org/app/uploads/2017/06/2005_kra_01_en.pdf.

The text shows a certain confusion with Article 41 ARSIWA, without mentioning peremptory norms. It mentions a 'grave breach', but leaves it without definition. Giorgio Gaja served as Rapporteur on the topic, but even his position on the issue is not clear.[57] Commenting on the *Wall* advisory opinion, he considered that its language closely follows Article 41 ARSIWA,[58] but he concludes:

> Both the International Court of Justice and the International Law Commission consider as a consequence of the breach, and thus as part of the law of State responsibility, the duty of a State to bring to an end the infringement of an *erga omnes* obligation on the part of another State.[59]

Picone sees in the *Wall* advisory opinion some degree of support for his position regarding the importance of obligations *erga omnes* as the only source for duties of all States:

> An indirect confirmation of our solution is derived from the Advisory Opinion delivered on 9 July 2004 by the International Court of Justice […], which relates directly to the violation of obligations *erga omnes* the consequences arising for third-party states under Article 41, paras 1 and 2, of the final draft on the responsibility of states, without being distracted by the literal wording of the draft.[60]

I cannot share this position and the whole approach because it forgets the main effect of obligations *erga omnes*: all States are entitled to invoke responsibility in case of a breach. They confer a right, and not duties upon States. So, has the ICJ modified the legal meaning of obligations *erga omnes* by recognizing new additional consequences to their breaches? There is nothing in the opinions that allows to conclude in that way.[61]*Jus cogens* appears as the most plausible explanation, but as we know, the ICJ did not explicitly mention it.

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[57] See also Ruffert, "Special Jurisdiction of the ICJ", 305-306.

[58] Gaja, "Do States Have a Duty", 33.

[59] Gaja, "Do States Have a Duty", 34.

[60] Picone, "Distinction", 420, note 25.

[61] Eggett and Thin, "Clarification and Conflation", although they also deny that the ICJ relied on *jus cogens*, offering other explanation.

4.2. The ICJ Deserves Criticism for Incoherence

Therefore, perhaps the ICJ could deserve criticism for not relying on *jus cogens* when the circumstances allowed it. In this position, it is possible to find the Court's Judges who criticized the approach by the majority, like Higgins and Kooijmans in *Wall*, Robinson and Cançado Trindade in *Chagos*, and Tladi in *Palestine*.

Carli dedicated an in-depth analysis to the *Palestine* advisory opinion and its precedents. He insists on the conflation made by the ICJ between obligations *erga omnes* and *jus cogens* norms, and the sense of confusion that emerges from the opinion. He concludes that the advisory opinion:

> represents a step backwards in the process of clarifying the scope, functioning and interplay of two key concepts of modern international law on responsibility, namely obligations *erga omnes* and norms of *jus cogens*. […] the reasoning behind the finding of the legal consequences of Israel's internationally wrongful acts in the OPT as regards other States raises more than a few questions.

First, obligations *erga omnes* produce effects first and foremost at the procedural level and do not give rise *per se* to new substantive obligations for other States. […] Second, as far as norms of *jus cogens* are concerned, it would be desirable for the Court to better clarify their function in the realm of State responsibility and, to this end and for the sake of legal certainty, refer in a more systematic manner to the ARS; alternatively, it should justify its departure from it. Finally, explicit recognition of the relationship intercurrent between obligations *erga omnes* and norms of *jus cogens* will be also key in future cases.[62]

I can share Carli's concerns, since the ICJ's findings need clarity on these issues. However, the Court's language is open enough to allow an interpretation coherent with the differences between *erga omnes* and *jus cogens*, as other authors have proposed.

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[62] Carli, "Obligations Erga Omnes".

4.3. The ICJ Implied There Were Peremptory Norms Involved

Some authors offer arguments in order to hold that when the ICJ determined *jus cogens* consequences to breaches of obligations *erga omnes*, it implied that those obligations arise from peremptory norms. The ILC itself is aligned with this view. In its commentary to Conclusion 19 of the 2022 Draft Conclusions, it reviewed the ICJ's advisory opinions in *Wall* and *Chagos* and noted:

> the Court does not make an explicit reference to peremptory norms of general international law (*jus cogens*), the norms to which the Court attached the duty to cooperate to bring to an end serious breaches are peremptory in character. [...] there is a significant overlap between peremptory norms of general international law (*jus cogens*) and obligations erga omnes such that the deduction that the Court in these decisions was referring to peremptory norms of general international law (*jus cogens*) is not unwarranted.[63]

Indeed, the deduction is not unwarranted. There are two main arguments in literature regarding this approach, plus the relevance of the *Climate Change* advisory opinion.

4.3.1. First Argument: jus cogens *Duties Arise only from Peremptory Norms*

The first one is one of principle: since the only effect of obligations *erga omnes* in the field of international responsibility is entitling all States to invoke that responsibility, they cannot generate duties by themselves for third States. At the same time, since those duties arise from serious breaches of peremptory norms, when the ICJ determine such duties, it is implying that *jus cogens* is involved.

In that sense, commenting on the *Wall* advisory opinion, James Crawford, who, as Special Rapporteur of the ILC on international responsibility is one of the main authors of ARSIWA in its final form, held:

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[63] ILC, *Report of the International Law Commission. Seventy-third session*, UN doc. A/77/10, 72, para. 6.

> The Court seems to have seen the consequences arising from the breaches of the right to self-determination and international humanitarian law as deriving from the *erga omnes* nature of the norms breached rather than their peremptory character, as is the position expressed under ARSIWA articles 40 and 41. However, the opinion is not entirely clear in this respect; it is also open to the criticism that the *erga omnes* status of an obligation is not as such an indication of its importance justifying the imposition of obligations on other States in case of serious breach (although there appears to be close correlation between the categories of peremptory norms and obligations *erga omnes*). Rather it is a description of the structural character of the norm, indicating that States generally are able to complain of its breach. The better view would appear to be, then, that the Court's reference to the 'character and importance of the rights and obligations involved' was an elliptical reference to the peremptory character of the norms in question.[64]

Crawford concludes: 'while making no express reference to articles 40 and 41, effectively relied on them.'[65] Canizzaro took the same position: 'Although the Court did not mention *jus cogens*, it clearly referred to this notion.'[66]

Orakhelashvili, also commenting on the *Wall* advisory opinion, began with considering that '*jus cogens* and obligations *erga omnes* are but two sides of the same coin: they are virtually coextensive – obligations *erga omnes* follow from peremptory norms and are concerned with their enforcement.'[67] He adds:

> the *erga omnes* nature of an obligation is not a source or determinant of the public order nature of a norm, but merely a consequence of such nature. It is not the *erga omnes* nature of an obligation following from a rule of international law which confers an imperative character on that rule or itself determines any of the consequences of its breaches. On the contrary, the *erga omnes* nature of an obligation merely refers to the invocability of legal consequences of the violation of the rule.[68]

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[64] Crawford, "International Crimes of States", 412.
[65] Crawford, "International Crimes of States", 413.
[66] Cannizzaro, "On the Special Consequences", 135, note 5.
[67] Orakhelashvili, "International Public Order", 252.
[68] Orakhelashvili, "International Public Order", 253.

He also offers a solution for the seeming confusion in the ICJ's opinion:

> one could only defend the Court by assuming that it referred to the *erga omnes* character of the pertinent obligations as the manifestation of the peremptory character of the rules which give them rise. [...] However, if the Court did not refer to peremptory norms by implication, its treatment of the consequential duties on States arising from the construction of the wall in the occupied Palestinian territory can only be justified on the basis that the norms involved in this situation – the principle of self-determination and the basic norms of humanitarian law – anyway form part of *jus cogens* and their breaches generate the legal consequences analogous to those embodied in the Court's Opinion.[69]

Tladi has taken the same stance as Special Rapporteur, but regarding the *Chagos* advisory opinion:

> the consequences that ordinarily flow from the *erga omnes* character of a norm concern the entitlement to invoke responsibility. Yet the Court went further to find that the consequences of self-determination in the context of the Chagos Archipelago include the duty to co-operate to bring to an end the breach. This duty, it will be recalled, is a particular consequence of serious breaches of jus *cogens*. This would seem to affirm that self-determination is not only *erga omnes* but also *jus cogens*, since the particular consequences of serious breaches of *jus cogens* attach also to its breach.[70]

Costelloe considers that the Court's characterization of the legal consequences for other States arising out of the breach of an obligation owed *erga omnes* in the *Wall* advisory opinion were those of Article 41 ARSIWA:

> The Court did not cite Article 41 in its advisory opinion, yet the characterization of these legal consequences in the terms of Article 41 arguably points not only to an association between the concepts of an obligation

[69] Orakhelashvili, "International Public Order", 253-254.
[70] Tladi, *Draft Conclusions*, 236.

> *erga omnes* and an obligation under a peremptory norm but to a unitary concept.[71]

This 'unitary concept' he exposes, is based on the idea that an obligation arising under a peremptory norm is an obligation owed *erga omnes*. In that sense, he adds:

> In that advisory opinion, the problem was a terminological one, because the Court had used the term 'obligation *erga omnes*' where it should simply have used the term 'obligation under a peremptory norm' or even 'multilateral obligation under general international law'. Alternatively, it could have employed no such label at all, and referred simply to the legal consequences as reflected in Article 41(2) of the ILC's Articles.[72]

4.3.2. Second Argument: the 'Character and Importance' of the Obligations Involved

The second argument is related to the language employed by the ICJ. Maia comments on the *Wall* advisory opinion:

> Although the ICJ did not make reference to peremptory law, the terminology that it has chosen to determine the consequences of such violations is similar to that of the ILC Articles adopted three years earlier, relative to "[s]erious breaches of obligations under peremptory norms of general international law". […] Moreover, as in Article 41 of the ILC Articles, the Court also [had in consideration] "the character and the importance of the rights and obligations involved"[73]

Wyler and Castellanos-Jankiewicz also point out that, in the *Wall* advisory opinion, the Court reaffirmed the obligation of non-recognition in light of 'the character and the importance of the rights and obligations involved.'[74]

Indeed, in *Wall*, the ICJ did not draw a direct link between the obligations *erga omnes* and the duties for all States. They are dealt in

[71] Costelloe, *Legal Consequences of Peremptory Norms*, 42-43.
[72] Costelloe, *Legal Consequences of Peremptory Norms*, 223.
[73] Maia, "Jus Cogens and (In)Application", 359-360.
[74] Wyler and Castellanos-Jankiewicz, "Serious Breaches", 302.

different paragraphs, and the ICJ determined the duties as consequences of the breaches by Israel 'given the character and the importance of the rights and obligations involved'. In *Palestine*, it follow the same approach, determining obligations for all States 'in view of the character and importance of the rights and obligations involved'. As Priya Urs rightly noted,

> it might be suggested that the ICJ's repeated reference to 'the importance of the rights' underlying relevant obligations is simply a reference to the peremptory status of the norms from which such obligations derive. [..] Indeed, the 'essential characteristics' of peremptory norms are that they 'reflect and protect fundamental values of the international community'.[75]

It is true that, as Carli pointed out,[76] the language on the importance of the rights is similar to the dictum in *Barcelona Traction*, regarding obligations *erga omnes*. However, in order to be precise, in *Barcelona Traction* the ICJ only referred to 'the importance of the rights involved', while in the advisory opinions it mentioned 'the character and the importance of the rights and obligations involved'. Therefore, one can argue that, by expressly making reference to the *character* of the *obligations*, the ICJ could imply something more than the *erga omnes* effect of those obligations.[77]

In para. 280 of the *Palestine* advisory opinion, the ICJ added references to 'the serious breaches of obligations *erga omnes* under international law' and to 'the character and importance of the obligations *erga omnes* involved', expressly linking the consequences to the *erga omnes* nature of the obligations. However, by employing the term 'serious

[75] Urs, "Articulation of Obligations Erga Omnes", 279.

[76] Carli, "Obligations Erga Omnes".

[77] In this context, it is important to recall the view offered by Arangio-Ruiz regarding the differences between *jus cogens* norms and obligations *erga omnes*: 'the concept of *erga omnes* obligation is not characterized by the importance of the interest protected by the norm (as is typical of *jus cogens*) but rather by the "legal indivisibility" of the content of the obligation, namely by the fact that the rule in question provides for obligations which bind simultaneously each and every State concerned with respect to all the others' (ILC, *Fourth report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur*, UN doc. A/CN.4/444 and Add.1-3, para. 92). Although it is a formalistic view, it is interesting to note that the 'importance' is a feature better suited to the *jus cogens* character of a norm.

breaches', found in Articles 40 and 41 ARSIWA, the Court seems to suggest that there is a close connection with *jus cogens*. Rodríguez-Santiago had considered that, in the *Wall* advisory opinion, 'the whole approach by the Court, and the severity with which it addressed the consequences of the violation of the self-determination right, […] suggests that the Court was under the understanding that it was dealing with a *jus cogens* norm.'[78] The 'severity' identified by the author could have the same meaning as the 'seriousness' mentioned by the ICJ in 2024. Moreover, one could argue that, by insisting in 'the character and importance' of the obligations *erga omnes* involved, the ICJ implied that the source of the duties for all States is not the *erga omnes* effect of the obligations, but its (peremptory) character, and even that not all obligations *erga omnes* have the same importance.

4.3.3. Third Argument: the Legal Relevance of the ICJ's Findings in the Climate Change *Advisory Opinion*

The legal relevance of the *Climate Change* advisory opinion for this debate cannot be overstated. It is clear, from the above analysis, that the ICJ identified obligations *erga omnes* without attaching to their breaches any duty for all States. The Court seems to break the conflation between obligations *erga omnes* and peremptory norms, thus adding new elements for the debate. It is very important to analyze these elements, since the vast majority of the works addressing this aspect of the debate predates the advisory opinion, and the analysis could offer a fresh perspective for a new jurisprudential development.

The ICJ's findings in the advisory opinion allow two possible interpretations: to adopt a critical stand because the ICJ's incoherence,[79] as Judge Tladi pointed out in his Declaration; or to see it as a confirmation of approach proposed here, in the sense that in the other advisory opinions, the ICJ implied that there were peremptory norms involved.

I think there are at least three important elements for the analysis. First, as I have stressed above, in its finding of the *erga omnes* character of the obligations in respect of climate change, the Court relied on the ILC's commentary of Conclusion 17 of the 2022 Draft Conclusions,

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[78] Rodríguez-Santiago, "Evolution of Self-Determination", 230.

[79] Gehring, "When Custom Binds All States", 93.

precisely in the paragraph regarding obligations *erga omnes* arising from non-peremptory norms. Second, there is no mention of the 'character and importance' of the obligations involved, a determinant factor for some authors in order to affirm when the ICJ is implying the existence of *jus cogens* norms. Third, the ICJ did not determine any consequence for third states arising from the breaches of these obligations *erga omnes*, notwithstanding its careful consideration of the consequences in the field of international responsibility. The immediate implication is that the ICJ did not identify any *jus cogens* norm regarding climate change.[80] This is crucial, since in all the other advisory opinions in which the ICJ identified obligations *erga omnes*, those obligations arise from peremptory norms, all included in the ILC's non-exhaustive list:[81] the right to self-determination (mentioned in all three); the basic rules of international humanitarian law (mentioned as 'certain obligations under international humanitarian law' in *Wall* and *Palestine*), the prohibition of the use of force (mentioned in *Palestine*), and the prohibition of racial discrimination (mentioned in *Palestine* as 'certain obligations under international human rights law').

It follows from the analysis that, although in *Climate Change* it dealt with obligations *erga omnes*, the ICJ's omission of any reference to *jus cogens* duties means that there were not peremptory norms involved in its reasoning. As such, this conclusion allows confirming that when the ICJ determined *jus cogens* duties in cases where it identified obligations *erga omnes*, it implied the existence of peremptory norms as the sources of those obligations.[82]

However, Judge Tladi's warning is justified. There are already some authors that maintain that the Court's open-ended language and the characterization of climate change obligations as obligations *erga omnes* 'strongly suggest that non-recognition and cooperative countermeasures remain available'.[83] Since those are duties that arise only in cases of serious breaches of peremptory norms, and there is no evidence that the ICJ referred to them in the opinion, such view cannot be shared, but it is an example of the need for more clarification by the Court.

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80 Foysal, "Quest for Standard of Proof".

81 ILC, *Report of the International Law Commission. Seventy-third session*, UN doc. A/77/10, 86-88.

82 Pezzano, "Obligations Erga Omnes and Climate Change".

83 Wewerinke-Singh and Viñuales, "Great Reset".

5. Final Remarks

The analysis offered in this article allows us to conclude that in the advisory opinions in which the ICJ determined the existence of the duties to cooperate to bring an end, not to recognize and not to render aid or assistance as consequences of breaches of obligations *erga omnes*, it implied the peremptory nature of the norms involved. Three arguments sustain this conclusion.

First, since the main effect of obligations *erga omnes* relates to standing and invocation of responsibility, they cannot *per se* be the source of substantive duties for States. Peremptory norms, on the other hand, do give rise to such duties under Article 41 ARSIWA in cases of serious breaches. Both concepts overlap, since the obligations arising from *jus cogens* are *erga omnes* in character, and all obligations *erga omnes* identified by the ICJ in those advisory opinions arise from accepted and recognized peremptory norms, as identified by the ILC in the 2022 Draft Conclusions.

Second, in order to determine consequences for all States, the ICJ gave weight to 'the character and importance' of the obligations involved. This characterization suggests that the ICJ could take into account the fundamental values of the international community protected by peremptory norms, and their hierarchical position in international law.

Third, the identification of obligations *erga omnes* regarding climate change without ascribing duties for all States in its 2025 advisory opinion on *Climate Change* seems justified, since those obligations do not arise – according to the ICJ and the ILC – from peremptory norms. As such, this finding serves as confirmation that in the other advisory opinions involving obligations *erga omnes*, the ICJ implicitly relied on the *jus cogens* nature of the norms involved.

It is true that the ICJ is far from being clear on this issue. However, it is also true that this conclusion is the more logical assumption to make in order to provide coherence, not only to the ICJ's jurisprudence, as Judge Tladi rightly demands, but also to the unity of the international legal order.

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