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BEYOND STATE SOVEREIGNTY: RETHINKING THE LIMITS AND ENFORCEMENT OF IUS COGENS AND ERGA OMNES OBLIGATIONS IN INTERNATIONAL LAW

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Abstract

This article examines the legal limits and enforcement of *ius cogens* and *erga omnes* obligations – focusing on their relationship, State sovereignty, and implications for Indonesia. It asks how peremptory norms are identified, how their breach generates obligations owed to the international community, and why those obligations remain difficult to enforce. The study utilizes doctrinal legal research, analyzing the 1969 Vienna Convention on the Law of Treaties, the International Law Commission's Articles on State Responsibility, International Court of Justice jurisprudence, and Indonesian legislation and practice. The findings indicate that *ius cogens* and *erga omnes* are related but distinct concepts. *Ius cogens* concerns the superior and non-derogable status of a norm, whereas *erga omnes* concerns obligations owed to the international community as a whole and states' legal interest in their observance. Thus, each *ius cogens* norm gives rise to *erga omnes* obligations, but not every *erga omnes* obligation has peremptory status. Identification of *ius cogens* remains uncertain because no exhaustive authoritative list exists and recognition requires assessment of State practice, international instruments, judicial decisions, and fundamental moral values. Enforcement is constrained by the absence of a general *actio popularis,* the consent-based jurisdiction of international courts, uncertainty of third-state duties to cooperate, inconsistent State practice, and geopolitical selectivity. These obstacles expose the tension between collective responsibility and State sovereignty. In Indonesia, relevant principles are indirectly reflected in human rights legislation and treaty law, while their explicit incorporation and judicial application remain limited. The article argues that effective protection requires combining positive-law criteria with principled moral reasoning – clarifying the identification and implementation of these norms, and strengthening international and regional institutions. Reform of United Nations enforcement mechanisms and greater regional judicial cooperation, drawing on the African Union, could improve accountability while balancing sovereignty with the protection of fundamental international values.

Keywords: *Ius Cogens*; *Erga Omnes* Obligations; State Sovereignty; International Responsibility; Indonesia.

A. Introduction

Ius cogens, known as peremptory norms, are fundamental principles of international law recognized by the international community as norms that must not be violated under any circumstances (Gaja, 1982; Kolb, 2015; Nieto-Navia, 2003). There is no official consensus on which norms constitute *ius cogens* or how a norm attains this status. However, norms referred to *ius cogens* can be found in several acts strongly condemned by the international community – such

as crimes against humanity, slavery, genocide, and torture (Bassiouni, 1996; Guan, 2017; Hyun, 2015).

Based on a historical perspective, the concept of *ius cogens* originates from Roman law, beginning with the principle of *ius publicum privatorum pactis mutari non potest*, as well as the distinction between *ius strictum* (mandatory law) and *ius dispositivum* (voluntary law subject to the will of the parties involved) (Shelton, 2016, 2021; Tella, 2010). However, the term *"ius cogens"* itself appeared in a different private law context. In the late 19th century, some scholars argued that a treaty that conflicted with the imperative norms was invalid, although they could not clearly demonstrate these specific norms (Costelloe, 2017; Dajani, 2012).

The concept of *ius cogens* has been discussed in the modern international law era after World War II (Alexidze, 2017; Kadelbach, 2016; Mik, 2013; Whiteman, 1977). The establishment of the International Military Tribunal at Nuremberg confirmed that there were certain crimes prohibited by the law of nations, irrespective of individual states' agreement. This underscored fundamental values that transcend the will of the state. In the 1960s, the UN International Law Commission addressed this topic during the drafting convention on the law of treaties. As a result, the ILC codified the Vienna Convention on the Law of Treaties in 1969, which gives a formal definition of "ius cogens" in Article 53 as imperative peremptory norms accepted and recognized by the international community of states as a whole (Kurnia, 2016). A treaty is void if it conflicts with *ius cogens* (peremptory norms) (Linderfalk, 2011; Suy, 2011). Article 64 reinforces: if a new peremptory norm emerges, any existing treaty that conflicts with it becomes void and terminated. Based on the VCLT, the meaning of *ius cogens* norms is specifically aimed at treaties (bilateral and multilateral) that conflict with peremptory norms. In discussing the hierarchy of international human rights, Meron (1986) argues that "quality labels are a useful indication of the importance attached to particular rights." They strengthen the case against the violation of these rights. Hierarchical terms constitute a warning sign that the international community will not accept any breach of those rights. Both discussions specifically address the application of *ius cogens* and *erga omnes* obligations to human rights crimes regarding non-derogable rights.

Theoretically, debate of *ius cogens* norms is still ongoing regarding the source of validity and its evidence. Classical (positivist) international legal theory emphasizes that international legal obligations arise from State consent, either through agreements or customs based on State practice. However, *ius cogens* actually binds the State even without agreement and cannot be violated by mutual agreement. This creates a theoretical paradox: norms regarded as the most fundamental in international law do not necessarily derive their authority from the established legal sources. In this context, several theorists have proposed an alternative approach that moves beyond an exclusive reliance on State consensus and established patterns of state practice. They argue that the binding force of the *ius cogens* comes from deep moral judgments about what is fundamentally wrong or right. In this perspective, *ius cogens* norms are not "discovered" through a survey of state practices; rather, they are recognized based on moral reasoning that binds humanity. This also touches on methodological aspects. Identifying *ius cogens* is highly demanding because it cannot simply "count" State practices or legal documents the way one can identify ordinary customary law. The evidence involves complex interpretation, in which evidence (UN resolutions, court rulings, scholarly writings) gradually "accumulates" to build awareness of the imperative nature of a norm. However, this accumulation process is not strictly "scientific" as it involves subjective judgments about which evidence is relevant. This debate extends beyond academic matters, as the conceptual ambiguity surrounding the identification and evidentiary requirements of *ius cogens* renders it a potentially "double-edged sword." On the one hand, it becomes a powerful tool for demanding accountability for serious human rights violations. On the other hand, it can be misused to impose a certain political agenda by wrapping it as an "imperative norm" that seems undeniable (Bianchi, 2008; Dubois, 2009; Hameed, 2014; Linderfalk, 2013; O'Connell, 2011; Saul, 2015).

Despite *ius cogens* norms, which focus on the status of the norm, *erga omnes* obligations focus on the obligation's reach and who has the right to demand fulfillment. This concept emerged from the practice of addressing the issue of standing (the right to claim) before the International Court of Justice. It started with controversy surrounding the South West Africa Cases (Pollock, 1969). In its ruling of 1962, the ICJ initially accepted that Ethiopia and Liberia had the right to claim against South Africa relating to the mandate violation in Namibia on the ground that the League of Nations had a legal interest in performing obligations (Almeida, 2025). However, the ICJ ruling of 1966 reversed its position and declared that the petitioner (applicant) had no legal standing because they could not demonstrate special material interest distinguishing them from other states. This ruling was quite controversial and was considered as a setback to upholding international law.

The *erga omnes* concept then explicitly emerged in the 1970 ICJ ruling on the Barcelona Traction Case (Allain, 2017; Christianti, 2018; Urs, 2021, 2025). In paragraphs 33-34, the ICJ distinguished between obligations owed by a State to other states on a bilateral basis and obligations owed by a State to the international community as a whole. The ICJ argued that these obligations are, by their nature, the concern of all states, and they have a legal interest in their protection. As examples of *erga omnes* obligations, the ICJ cited the prohibition of aggression, genocide, and the principles and rules of human rights – including protection from slavery and racial discrimination (Jackson & Paddeu, 2026; Violeta et al., 2025). Although this statement was an *obiter dictum* (not directly determining the outcome of the case), it was the main doctrinal foundation of the *erga omnes* concept and is often regarded as the Court's attempt to correct the error of the South West Africa Judgment of 1966 (Fasia, 2021; McGarry, 2023).

However, the relationship between *ius cogens* and *erga omnes* obligations is not reciprocal. This means that not all *erga omnes* obligations derive from *ius cogens* (Manitra et al., 2025; Trindade, 2020). On the contrary, imperative norms *(ius cogens)* increase to *erga omnes* obligations. These obligations to protect the environment at the high seas, seabed, and subsoil have an *erga omnes* character but not as *ius cogens.* Thus, it can be stated that the *erga omnes* category is wider than *ius cogens*, although all *ius cogens* have the effect of *erga omnes*. In this occasion, the primary distinction lies in legal consequences. *Ius cogens* concerns the validity of a treaty or act, while *erga omnes* obligations are related to the legitimacy of bringing a claim–any state, even one not directly injured, may claim due to the obligation breach. Article 41 on State Responsibility for Internationally Wrongful Acts provides the legal consequences of a serious breach from an *ius cogens* norm: 1) States must not recognize as lawful a situation created by the breach, nor render aid or assistance in maintaining that situation; and 2) These additional consequences do not preclude the normal rules of reparation (compensation, restitution, satisfaction) that the responsible State must provide. Further consequences under international law are also possible in this regard. Although the ARSIWA remains a draft, it has crystallized into customary international law as one of the sources of international law under Article 38 of the ICJ Statute. Then, Article 48 stipulates that the non-victim State may demand the cessation of the breach and assurances of non-repetition, even though it can't claim reparation for itself. Resistance to cooperation becomes a barrier for the Security Council on the grounds of national sovereignty and geopolitical bias (Anisah et al., 2025).

In other instances, *ius cogens* norms have also been found to be pitted against procedural norms, such as in the 2008 case between Germany and Italy concerning the jurisdictional immunities of the state. Germany sued Italy because Italian courts had allowed civil claims against Germany concerning violations of International Humanitarian Law committed by Nazi Germany during World War II. Germany argued that this violated its right to jurisdictional immunity. Conversely, Italy contended that Germany could not claim immunity in this case, as *ius cogens* norms override all other norms, including immunity. In 2012, the ICJ rejected Italy's argument, ruling that *ius cogens* constitutes a substantive norm, whereas State immunity is a

procedural norm; therefore, there is no conflict between them (Boudreault, 2012; Shah, 2012; Talmon, 2012; Trapp & Mills, 2012).

The uncertainty of collective obligation *(erga omnes)* asks who must act when *ius cogens* is violated. Do all states have an obligation to take action? Or does the *erga omnes* obligation create legal obligations to cooperate in terminating the breach? Or does it simply raise legal standing (locus standi)? Political practice often impedes collective action or is merely rhetoric to implement – not legal obligations. We may imagine how *erga omnes* is not applied to collective obligations when Israel, backed by the US, commits genocide in Palestine. Is it real or rhetoric? Is there discrimination in the world that breaks the *ius cogens* norms? (Christianti, 2018).

The subsequent development of the *ius cogens* concept and *erga omnes* obligations reflects a fundamental transformation in the structure of international law. Both concepts acknowledge that the international community holds collective interests that transcend bilateral interests between states. The *ius cogens* concept and *erga omnes* obligations have several problems and challenges. The primary problems of *ius cogens* concern the certainty of identifying the methodology and the obscurity of how a norm reaches *ius cogens* status. Moreover, *Erga omnes* obligations raise the question of the extent to which a State has an obligation (not only a right) to act when fundamental norms are breached. Even the implementation of *erga omnes* obligations is heavily influenced by geopolitical bias or the limits of international law.

B. Discussion

1. The Philosophical and Normative Foundations of *Ius Cogens*: Between Legal Positivism and Natural Law

Ius cogens are principles of international law recognized by the global community as non-derogable norms binding all states, regardless of individual states' consent to the binding obligation (Gastorn, 2017; Hameed, 2014; Hossain, 2005; Johnston, 2021; Yarwood, 2010). These norms are universal and hierarchically superior to ordinary international law – including treaties and customary international law. The concept of *ius cogens* has been dynamically debated in international law, particularly post-World War II – evolving from a non-legal concept to soft law and eventually to binding norms. As is well known, *ius cogens*—a principle of international law—has been established in Article 38(1) of the International Court of Justice Statute as a formal source of international law, alongside international conventions, customary international law, judicial decisions, and the teachings of the most highly qualified publicists of the various nations. The phrase in that article refers to "general principles of law recognized by civilized nations." Interpreted a *contrario*, this formulation suggests that legal principles not recognized by civilized nations or states are not acknowledged. Such language may be constructed as discriminatory, insofar as it privileges democratic states committed to human rights, particularly those governed by the rule of law, as the principal arbiters of legal legitimacy. This interpretation risks establishing a hierarchical distinction between states based on contested notions of civilization and political governance, thereby marginalizing legal principles and normative contributions originating from states that fall outside this implicitly privileged category.

In contemporary international law, the term "civilized nations" has become less relevant as the number of sovereign states (193 countries) has increased, with increasingly diverse legal systems. Meanwhile, states based on democracy and the rule of law have systematically committed acts that violate sovereignty, human rights, and constitute crimes against humanity—such as those committed by the United States and Israel against Palestine and Iran, as well as Russia against Ukraine. It is a paradox that states that consider themselves civilized have clearly violated the principles of *ius cogens.* In legal theory, legal principles are conceived as a "spirit" that serves to resolve legal issues where no applicable written law exists or where no relevant customary law recognized and practiced by the State can be identified. To fill this gap, adjudicators must apply

the "non-liquet" principle. This principle essentially states that judges cannot dismiss a case when adjudicating it because there is no applicable provision. The fundamental distinction between legal principles and international conventions and international customary law is that the latter two are formed through State practice and consent and therefore possess legal force (Shaw, 2003), whereas legal principles are primarily developed by lawyers and adjudicators. Consequently, some international law experts question the existence of the legal principles in Article 38(1) of the ICJ Statute, which are not formed based on the will of states but rather derived from the national legal systems of states. Moreover, these are subsequently developed in judicial decisions, both national and international. This concern is based on a formalistic approach, even though legal principles have been implicitly recognized by states (Shao, 2021). They further argue that legal principles exist within international customary law, which is constructed and developed through natural law based on rational needs and the values that prevail in the international community.

As Riphagen (1987) noted in his work "From Soft Law to *Ius Cogens* and Back," the issue of *ius cogens* norms must be viewed through the relativity of "should" and "is". These two words are crucial – especially in jurisprudence, for distinguishing between the law as it ought to be (moral values) and the law as it exists in written form (positivism). Studying law reveals several perspectives on the subject. First, law is what is written, created by authorities, and accompanied by punishment. This view equates the law *(recht)* with statutes *(wet).* Second, law encompasses not only concrete law *(in concreto),* such as statutes and court decisions, but also abstract law *(in abstracto),* such as the values of justice, customary law, and legal principles. Riphagen's analysis highlights the relativity of "should" and "is" in international law and the need for a fair balance of interests, a hierarchy of values, and consideration of rights and duties as *erga omnes.* Soft law (e.g., UN resolutions or declarations) can evolve into *ius cogens* if it is recognized as a fundamental norm. Conversely, *ius cogens* that are no longer universally accepted can "descend" to soft law status. *Ius cogens* is not a static norm but the result of a continuously evolving political-legal process. For example, the prohibition of slavery began as soft law (Brussels Declaration 1890) and then changed into *ius cogens* through conventions and State practice.

Law and morality are inextricably linked in the United States. A law that does not reflect morality and justice is not a law and must be declared null and void. The dynamics of the debate on the relationship between law and morality are heavily influenced by the historical context of legal philosophers –such as Jeremy Bentham, John Austin, Hans Kelsen, H.L.A. Hart, Ronald Dworkin, Lon L. Fuller, and other legal scholars—an issue of great interest to both academics and legal practitioners. This relationship between law and morality concerns the interplay between legal positivism and moral value. According to legal positivism, law is a command from the sovereign to compel citizens to fulfill their obligations, accompanied by sanctions. In addition, Hart (1979) argues that international law not only lacks secondary rules (the rule of change and the rule of adjudication) that govern legislative bodies and courts, but also lacks a rule of recognition that establishes the sources of law and provides general criteria for identifying other rules. Therefore, according to him, international law cannot be categorized as "law", even though it is acknowledged that no set of rules will ever be perfect or possess an "open texture" characterized by ambiguity and linguistic uncertainty. The positivist view of international law is overly pragmatic and narrow in scope (Giudice, 2013; Payandeh, 2010).

Dworkin (1986), an advocate of "inclusive legal positivism," disagrees with Hart. He considered that law cannot be separated from morality. Moral considerations are central when rules are unclear or subject to multiple interpretations. Indeed, moral values can serve as the basis for legal validity to achieve justice. Therefore, Dworkin argues that *ius cogens,* as a peremptory norm, is not a positive rule derived from consensus or the history of inter-state agreements but rather forms part of moral principles and a coherent and constructive interpretation within the global community (Palombella, 2015; Roth, 2021; Tasioulas, 2021). Positivism cannot explain why *ius cogens* exists independently of the will of the State as a peremptory norm. Dworkin further

employs an approach grounded in political morality and a constructive interpretation of international law. Through the principles of mitigation and shared obligations among states, the *ius cogens* norms can be enforced to protect human dignity and justice. The principles of rationality and moral coherence constitute the binding force of *ius cogens* norms rather than formal sources of law itself.

Furthermore, a critique of *ius cogens* lies in the identification of its status. There are no objective criteria for determining what constitutes *ius cogens.* Powerful states often disregard *ius cogens,* as seen in the U.S. incursion into Venezuela to capture President Maduro for trial in a U.S. court and Russia's attack on Ukraine. Without a robust sanctioning mechanism, the *ius cogens* remains largely symbolic. The prohibition of torture, enshrined in the 1948 UN Universal Declaration of Human Rights, was initially soft law before becoming an *ius cogens* through the 1984 Convention Against Torture. However, practices such as torture by the U.S. at Guantanamo Bay reveal the gap between the norm and reality. Therefore, international law is dynamic and not rigidly hierarchical. Soft law and *ius cogens* influence each other in shaping global norms and require stronger enforcement mechanisms for *ius cogens*.

Brownlie (2003) states that the principle of *ius cogens* is such an empty box whose existence is acknowledged, yet there is no universal agreement on its scope or contents. In practical terms of its early stages of development, *ius cogens* was likened to a car that never left the garage because it was rarely invoked in international disputes. Since *ius cogens* was codified in the Vienna Convention, its substantive interpretation has faced criticism and confusion – ranging from its definition and scope to classification issues. For example, Brownlie notes that although there is international consensus on certain norms, the category of *ius cogens* has a stronger legal foundation than its specific content, and customary law has not developed rules that directly correspond to these new categories. The classic response to Brownlie's argument is that, even if the concept of *ius cogens* is merely an empty box, the category remains useful; without that box, its contents cannot be filled.

2. The Normative Foundations and Interrelationship of Ius Cogens and Erga Omnes Obligations in International Law

One reason for this uncertainty is that the Vienna Convention does not formally contain a list of such norms. Crawford (2019), as Special Rapporteur at the International Law Commission, takes a pragmatic and structural approach to *ius cogens* that emphasizes how peremptory norms interact with the secondary rules of State responsibility rather than getting bogged down in abstract definitions. The legal positivist approach to identifying the characteristics of *ius cogens* norms offers limited analytical value in addressing cases involving human rights violations, such as genocide, war crimes, and crimes against humanity, insofar as it privileges formal sources and criteria of legal validity over the substantive principles underpinning fundamental human rights (*i.e.,* legal certainty). The fact that *ius cogens* norms are not rigidly defined cannot be invoked to justify grave rights violations. Therefore, the problem of defining *ius cogens* and its scope can be addressed through a natural law approach. In such cases, the adjudicator's role is crucial in applying *ius cogens* norms to legal cases. Brownlie rightly observes that *ius cogens* norms are like an "empty box" whose contents are determined by adjudicators and legal practitioners – taking moral values and justice into account.

Both the legal positivist and natural law approaches offer important insights into the understanding of *ius cogens*, albeit from different perspectives. They are like two sides of the same coin: one provides formal legitimacy, and the other, its moral foundation. If presenting in a table, each has the following benefits as follows.

Table 1.
A Comparative Analysis of Natural Law and Legal Positivism in Identifying *Ius Cogens* Norms

Aspect	Natural Law Approach	Legal Positivism Approach
Source & Foundation	Derived from morality, ethics, and universal human values inherent in human nature. These norms inherently exist and do not depend on State recognition.	It is derived from the consent and practices of states, as embodied in the instruments of positive law, such as treaties and international customs.
Benefits	This provides moral legitimacy and a strong ethical foundation for this study. It establishes *ius cogens* as a "regulatory standard" for critiquing and amending unjust laws.	It provides certainty, stability, and clear identification. It establishes *ius cogens* as part of a formally identifiable system of positive law, as in the 1969 Vienna Convention.
Main Focus	The content (substance) of the law: whether a rule is just and protects fundamental human values.	The form (formality) of the law: whether a rule has been legally recognized and accepted by the international community.

Source: author's analysis results

The debate between these two approaches reveals fundamental tensions in the literature. Some argue that this debate is, in fact, "intranscendent" because, in practice, both positivists and natural law theorists often reach the same conclusions regarding the norms that constitute *ius cogens*. They differ only in their explanations of why these norms exist and are legally binding. In fact, there is a perspective that *ius cogens* is "natural law cloaked in positivism." This is evident in the International Law Commission's (ILC) efforts to "positivize" *ius cogens* through its draft conclusions, which, on the one hand, provide certainty, but on the other hand, are seen as an attempt to "strip away" its naturalistic elements that positivists consider too abstract.

The next question is whether the relationship between *ius cogens* and *erga omnes* obligations is integrated, separate, or overlapping. This relationship in international law is not a simple one of being "separate" or fully "integrated." Both of them are more accurately described as an overlap, in which most *ius cogens* norms give rise to *erga omnes* obligations, but not all *erga omnes* obligations stem from *ius cogens* norms (Byers, 2017). The fundamental difference lies in the focus of each of these concepts, with a comparison as follows:

Table 2.
Distinguishing *Ius Cogens* Norms from *Erga Omnes* Obligations in International Law

Aspect	*Ius Cogens* (Imperative Norm)	*Erga Omnes* (Obligation toward All)
Main Focus	The content or substance of legal norms.	The nature of the obligation and the parties entitled to demand its enforcement.
Core Definition	A mandatory and fundamental legal norm that no State may set aside.	An obligation that a State owes to the international community as a whole, such that every other State has a legal interest in demanding its fulfillment.
Consequences of a Violation	Any treaty that conflicts with it is void (Article 53, 1969 Vienna Convention).	Any State (not just the State directly harmed) can hold the violator accountable.

Source: author's analysis results

The relationship between *ius cogens* and *erga omnes* obligations is best understood through their intersecting characteristics. *Ius cogens* refers to fundamental and non-derogable norms of international law that possess the highest normative authority, whereas *erga omnes* refers to obligations owed to the international community as a whole – granting all states a legal interest in ensuring their observance. Although conceptually distinct, these two principles are closely interconnected, as violations of *ius cogens* norms generally entail the emergence of *erga omnes* obligations. Fundamental prohibitions, including genocide, slavery, torture, and aggression, exemplify this intersection. A violation of the prohibition of genocide, for instance, constitutes a breach of a peremptory norm and a violation of an obligation owed to the international community as a whole – thereby allowing states other than the directly injured State to invoke the responsibility of the perpetrating State and seek the cessation of the wrongful conduct, subject to applicable procedural and jurisdictional requirements.

These principles' connection can be examined through various historical instances of mass atrocities and serious violations of fundamental humanitarian values – particularly those involving genocide and crimes against humanity. Historical episodes frequently discussed in genocide scholarship include the genocide of the Herero and Nama peoples (1904–1908), the Armenian genocide (1915–1923), the Holodomor (1932–1933), the Holocaust (1941–1945), the Rwandan genocide (1994), the Bosnian genocide (1992–1995). More recent cases include allegations of genocide arising from the Darfur conflict in Sudan (beginning in 2003), and those concerning the persecution of the Rohingya population in Myanmar, particularly following the 2017 military operations. These episodes demonstrate the significance of international legal norms in addressing mass atrocities and protecting populations against systematic violence.

The prohibition of slavery also extends to contemporary forms of exploitation, including forced labor, debt bondage, forced marriage, sexual exploitation, child exploitation through child labor and child soldier recruitment, as well as other slavery-like practices associated with human trafficking. Human trafficking frequently involves deceptive recruitment through promises of employment, followed by coercion, violence, threats, or other forms of control over victims. Its underlying causes include poverty, economic inequality, armed conflict, and forced migration, which expose vulnerable populations, particularly refugees and displaced persons, to exploitation. Furthermore, corruption, weak law enforcement, impunity, and the demand for inexpensive labor and sexual services enable criminal networks to perpetuate these practices across national borders.

Similarly, the prohibition of torture and other cruel, inhuman, or degrading treatment constitutes a fundamental and non-derogable principle of international human rights law. The 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) requires State parties to take effective measures to prevent torture within their jurisdictions and prohibits the expulsion, return, or extradition of individuals to another State where substantial grounds exist for believing that they would be in danger of being subjected to torture. This protection applies universally, regardless of whether individuals are political prisoners, criminal detainees, or persons accused of serious offences. Accordingly, states cannot invoke domestic legislation, political circumstances, or emergencies to justify torture or evade their international responsibilities.

Another fundamental norm includes the prohibition of aggression, which is recognized as a peremptory principle of international law. Its normative foundation is reflected in the prohibition of the use of force under Article 2(4) of the United Nations Charter, the definition of aggression under United Nations General Assembly Resolution 3314 (XXIX) of 1974, and the provisions of the Rome Statute of the International Criminal Court concerning the crime of aggression. The prohibition of aggression, alongside the prohibitions of genocide and crimes against humanity, reflects the international community's recognition that certain violations threaten international peace, security, and fundamental humanitarian values.

For the aforementioned crimes, which constitute violations *of ius cogens* norms, *erga omnes* obligations are established. This means that if such crimes occur in any country, all states have an obligation to prosecute the perpetrators based on universal jurisdiction, in addition to imposing sanctions or granting their extradition to the ICC. No immunity is granted to perpetrators, and State officials, including heads of state, can be tried before international courts. However, there is also a Special "Erga Omnes" Area Outside of "Ius Cogens." Therefore, not all obligations that must be respected by all states *(erga omnes)* have the status of peremptory norms *(ius cogens)*. A classic example can be found in the provisions of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Although states have an obligation to respect the rights contained therein for all parties *(erga omnes),* not every article in these two covenants is automatically considered *ius cogens.* Thus, the existence of both concepts indicates that their relationship overlaps. *Ius cogens* norms always give rise to *erga omnes* obligations*,* but other *erga omnes* obligations do not have the same imperative nature as *ius cogens*.

Therefore, the status of *ius cogens* is not achieved through a single format, such as by making a treaty, because there are no authoritative organizations, a kind of legislative body, to determine the status of *ius cogens.* Rather, it evolves from State practices, International Court verdicts, and prominent scholars. Moreover, it sometimes integrates the concept of *ius cogens* with *erga omnes* obligations. As already accepted, all *ius cogens* norms give rise to *erga omnes* obligations; yet, the reverse does not apply. The ILC sometimes relies on sources that refer to a norm as *erga omnes* to infer its *ius cogens* status, which is methodologically invalid. Another ambiguity lies in when specific consequences apply. Additional consequences for *ius cogens* violations—such as obligations of non-recognition and cooperation to cease—apply only to violations that are "serious," those that "demonstrate flagrant or systematic failure" of the responsible State. This creates ambiguity because there is no clear operational definition of what is meant by "salient or systematic."

3. The Development and Judicial Application of Erga Omnes Obligations: International Jurisprudence, the Relationship with Ius Cogens, and State Responsibility

The term of *erga omnes* is derived from Latin and means "for all" or "for everyone" (Lepard, 2010). In legal terminology, there are *erga omnes* rights and obligations that apply to all parties. Property rights include *erga omnes* rights that can be enforced if violated by another party. However, this differs from rights based on contracts, which cannot be enforced except by contracting parties. In the context of international law, *erga omnes* is a principle that there are obligations and rights applying "to everyone" or "toward all" (Ragazzi, 2000). *Erga omnes* obligations (toward all) are noble and value-laden legal concepts that place human dignity and worth at the forefront of the pursuit of universal justice. It also aims to create a just world order in which states are bound not only by bilateral obligations but also by collective responsibilities toward the international community as a whole. In summary, it bridges individual justice with collective interests at both the international and national levels by affirming that certain values and norms give rise to a shared responsibility for their protection.

Erga omnes obligations were first recognized in the jurisprudence of the International Court of Justice (ICJ) in the Barcelona Traction case (1970), which distinguished *erga omnes* obligations (obligations owed to all states) related to *ius cogens* (Urs, 2025). Barcelona Traction, Light and Power Company, Limited (Belgium v. Canada, Spain, 1970) was a dispute at the ICJ concerning diplomatic protection for the shareholders of a foreign company. In its decision, the ICJ did not explicitly apply *ius cogens,* as the case focused more on diplomatic protection issues. However, it distinguished between a state's obligations towards another State (*erga omnes partes* obligations), such as treaty-based obligations, and obligations towards the entire international community (obligations erga omnes), encompassing *ius cogens* norms such as the

prohibition of aggression and gross human rights violations. The ICJ stated that certain obligations (such as combating apartheid or genocide) are *erga omnes,* meaning that all states have a legal interest in their enforcement. The ICJ judgment marks a shift from narrow legal logic to a more communal one. It is expected that every State has the right to hold another State accountable for violations of fundamental human values, such as genocide or war crimes, even if that State is not a direct victim of the violations. *Erga omnes* obligations are expected to serve as powerful tools in the fight against impunity. Any country should be able to bring a case before an international court or take collective action to stop serious human rights violations or environmental crimes with a global impact.

In the case of Gambia v. Myanmar (2020), the ICJ explicitly recognized the *erga omnes partes* obligation under the 1948 Genocide Convention, expanding State *locus standi* to bring claims. This case is significant as it is the first time a State has filed a genocide lawsuit on behalf of the international community (not as a direct victim) and tested the concept of *erga omnes partes* under the Genocide Convention. On this occasion, Myanmar cannot use "domestic sovereignty" as a justification for its actions. All states are obligated to prevent and punish genocide, regardless of whether they are party to the conflict. In this matter, the ICJ avoids philosophical debate and focuses on clear jurisdiction (the Genocide Convention) and affirms that all State parties to the Genocide Convention have the right to demand Myanmar's compliance; Myanmar is also obligated to prevent and punish genocide. The Gambia was recognized as a proper claimant despite not being a direct victim because genocide is a crime against humanity. This case falls under the category of genocide as *ius cogens* and applies *erga omnes* obligations in the Myanmar Genocide case, with a universal character applicable to all states – including non-parties to the convention (as genocide is *ius cogens*) (Mennecke, 2021). However, the ICJ preferred the *erga omnes partes* approach to avoid jurisdictional disputes. In January 2020, the ICJ ordered Myanmar to implement provisional measures in taking urgent steps to prevent genocide, protect evidence of crimes, and report to the ICJ on preventive measures.

In the Case Concerning East Timor (Portugal v. Australia, 1995), the concepts of *ius cogens* and *erga omnes* obligations emerged in Portugal's arguments. Australia was considered to have violated its *erga omnes* obligation by recognizing the Indonesian occupation and making a treaty beneficial to itself while ignoring the rights of the East Timorese people. For technical reasons (the Monetary Gold Principle) (Toh, 2025), the ICJ ultimately declined jurisdiction because its decision would indirectly judge the legality of Indonesia's actions (which was not a party to the case). Thus, the *erga omnes* principle was not tested in depth. However, in dissenting opinions, some judges (such as Judge Weeramantry) stated that the right to self-determination is indeed *erga omnes* and must be respected. Portugal failed to prove that the Timor Gap Treaty directly violated *ius cogens* norms, although arguments about self-determination as an imperative norm grew stronger post-case. The ICJ did not provide a firm ruling, but this case strengthened the discussion that violations of the right to self-determination can become the responsibility of all states. The ICJ decision did not stop East Timor's struggle, which gained independence in 2002 after UN-held referendum (1999). This case also influenced the development of *erga omnes* and *ius cogens* norms in international law. This case shows the complexity of applying *ius cogens* and *erga omnes* in territorial disputes but also reinforces the principle that fundamental rights, such as self-determination, must be respected by all states.

In the Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal, 2012) (Ventura & Băieşu, 2020), Belgium sued Senegal for failing to fulfill its obligation to prosecute or extradite former Chadian President Hissène Habré, accused of torture, crimes against humanity, and gross human rights violations during his rule (1982–1990). Belgium claimed that Senegal violated the UN Convention Against Torture 1984, which obligates states to prosecute or extradite alleged perpetrators of torture in accordance with the principle of *aut dedere aut judicare*, as well as its obligations under customary international law, which recognize the

prohibition of torture as a fundamental norm giving rise to *erga omnes* obligations. The ICJ stated that the prohibition of torture has become an *ius cogens* norm in international law (based on the 1984 Torture Convention, customary international law, and ICJ jurisprudence). This indicates that no State may condone torture, even if there is no treaty explicitly regulating it. Senegal could not argue that it lacked adequate domestic law to try Habré, as *ius cogens* norms bind all states. The ICJ affirmed that Senegal must fulfill its obligations under UNCAT, including the *aut dedere aut judicare* principle. The ICJ recognized that the prohibition of torture binds not only states that ratified UNCAT but is also an *erga omnes* obligation. This means that all states (including Belgium) have a legal interest in ensuring that torture perpetrators are prosecuted. Belgium, although not a direct victim of Habré's crimes, had legal standing *(locus standi)* because the UNCAT grants all State parties the right to demand accountability (Article 30, UNCAT). *Erga omnes* norms allow any State to demand that other states enforce the law in cases of gross human rights violations. The ICJ ruled that Senegal had violated its obligations under UNCAT by failing to prosecute or extradite Habré. Senegal must immediately take measures to try Habré or extradite him to Belgium.

Following the ICJ's decision, Senegal established a special court (the Extraordinary African Chambers) in cooperation with the African Union (AU). In 2016, Habré was sentenced to life imprisonment for committing crimes against humanity and torture of his political opponents. This case strengthened the idea that torture is *ius cogens* and there is no justification for it. *Erga omnes* obligations allow states to act even if they are not directly victimized by a given violation. This paves the way for the prosecution of leaders who commit international crimes in domestic and regional courts. Belgium v. Senegal (2012) becomes an important milestone in enforcing *ius cogens* and *erga omnes*, particularly concerning the crime of torture. The ICJ affirmed that torture is a violation of *ius cogens* without exception. The obligation to prosecute or extradite torture perpetrators is *erga omnes,* and all states are entitled to demand law enforcement action. States cannot evade their international obligations by citing domestic legal constraints. This case further identifies how the ICJ's role is significant in ensuring human rights accountability, even against former heads of state.

Upon closer examination, the cases adjudicated by the ICJ indicate that *ius cogens* has not been fully recognized by the ICJ. The boundaries of *ius cogens* and customary international law categorization remain fluid. Judges express uncertainty both in determining *ius cogens* and *erga omnes* obligations, as well as in distinguishing between customary international law and *erga omnes* obligations. To further elaborate, the relationship between *ius cogens* and customary international law lies in their sources of formation and their binding force. All *ius cogens* norms constitute customary international law, but not all customary international law is considered as *ius cogens.* Both of them are closely and dynamically interrelated. A norm does not emerge directly as *ius cogens* but must first undergo a lengthy process as a customary international law rule. A norm acquires the status of *ius cogens* only upon satisfying the requisite criteria and securing recognition by the international community of State as a whole. In international judicial practice, the boundaries between the two are often tested. A rule of custom can become *ius cogens* if the judge finds that the rule protects the interests of the international community *(erga omnes),* not merely the bilateral interests of specific states.

The legal consequences of both violations are distinct. A violation of customary international law gives rise to State responsibility and an obligation to provide reparations to the aggrieved state. Meanwhile, a violation of *ius cogens,* in addition to giving rise to State responsibility, creates an obligation of *erga omnes,* meaning that every country in the world has the legal right and obligation to hold the perpetrator accountable, not just the victim state. Furthermore, the State (perpetrator) cannot avoid responsibility by invoking an "emergency" because *ius cogens* takes precedence over State sovereignty. At the normative level, the scope issue of *ius cogens* remains, which in practice is still limited to crimes against humanity, genocide, torture, and aggression—all of which give

rise to *erga omnes* obligations. Beyond that, there remains a dynamic interplay between *ius cogens* and customary international law, such as the principle of non-intervention and the prohibition on the use of force, which, for the time being, do not give rise to *erga omnes* obligations. In conclusion, *ius cogens* and *erga omnes* norms are often indirectly acknowledged by the ICJ, but their enforcement still depends on State compliance and global political dynamics.

4. The Enforcement Gap of Ius Cogens and Erga Omnes: Between International Obligations and State Compliance

The main problem in enforcing *ius cogens* and *erga omnes* obligations lies in a state's willingness to comply (Christianti, 2018; Lim & Mitchell, 2023; Longobardo, 2015; Weatherall, 2015). International law has its limits; in certain cases, it cannot encroach on a state's political interests. In the interests of the State or the people, a State may unilaterally refuse to fulfill its *erga omnes* obligations. International law is powerless and remains silent. In cases of crimes against humanity, the effectiveness of international law depends heavily on superpowers and the UN Security Council. The issue defines how these obligations can be enforced outside the ICJ context. Nonetheless, while the ICJ has played a crucial role in developing the concepts of *erga omnes* and *erga omnes partes*, their application remains uncertain. There is a need to strengthen the legal framework so that these obligations can become effective tools for protecting global interests, such as human rights and collective security. Meanwhile, the facts show that superpowers have committed serious violations of crimes against humanity (Palestine) and the principles outlined in the UN Charter (Ukraine and Iran). Although most countries have condemned Benjamin Netanyahu as a perpetrator of crimes against humanity and the ICJ has issued a ruling, the implementation of *erga omnes* obligations does not seem to be proceeding.

Moreover, there appears to be a sense of complacency that reflects a desire to remain in their comfort zone and avoid involvement in the conflict. On the other side, the route through the UN Security Council is unlikely to lead to the fulfillment of *erga omnes* obligations, as it is fraught with the political interests of its member states. The law is strict for the lower classes and lenient for the upper classes. Therefore, a deep and complex chasm between the ideal *(das sollen)* and the reality on the ground *(das sein)* has already emerged. Three issues pose challenges in fulfilling *erga omnes* obligations: *locus standi*, political dominance, and ambiguity of the norm. *Locus standi* issue, theoretically, holds that any country can file a claim under *erga omnes* obligations; in practice, the ICJ is often reluctant to grant standing (the right to bring a case) to countries that have not been directly harmed. The concept of *actio popularis* (the right of citizens to sue) remains a subject of intense debate in the literature. Political dominance of law enforcement is often hampered by political interests, limited national capacity, and inconsistencies in international cooperation. It is unsurprising that, to date, no case has been accepted by the ICJ solely on the grounds of a general violation of *erga omnes* obligations. Ambiguity of the norm defines the distinction between *ius cogens* (non-derogable norms) and *erga omnes* that remains unclear (Christianti, 2017) – creating uncertainty in determining which obligations have superior status and are universally enforceable.

If referring to the discussion outlined above and cases decided by international courts, the limits of international law regarding the fulfillment of *erga omnes* obligations lie in the procedural realm – particularly concerning legal standing and the jurisdiction of international courts. The essence of an *erga omnes* obligation is that all states have a legal interest in holding violators accountable (Koskenniemi, 2006). However, this interest does not necessarily mean that all states have the standing to bring a lawsuit *(actio popularis).* The International Court of Justice (ICJ) distinguishes between *Erga omnes partes* obligations and *Erga omnes* (proper) obligations. *Erga omnes partes* obligations arise from multilateral treaties and are intended to protect the collective interests of all contracting states. In such cases, the ICJ has recognized that every contracting State has standing to bring a claim for a breach, as affirmed in the case of Questions Relating to the

Obligation to Prosecute or Extradite (Belgium v. Senegal). Meanwhile, *Erga omnes* (proper) obligations are customary international law obligations that concern the international community as a whole. For this category, recognition of the legal standing of states that have not been directly harmed remains a matter of debate and has not yet been consistently accepted by the ICJ. If legal standing is acknowledged, the next procedural hurdle is the court's jurisdictional authority. For example, the ICJ's jurisdiction remains based on the consent of the states concerned. The *erga omnes* nature of an obligation does not create the court's jurisdiction if the state being sued has not consented. To file a lawsuit, a State must establish a basis for jurisdiction, for example, through a dispute settlement clause in a treaty. In the context of climate change, the United Nations Convention on the Law of the Sea (UNCLOS) can serve as a procedural avenue, but its jurisdiction is limited to disputes concerning the interpretation or application of UNCLOS itself, not other climate agreements such as the UNFCCC or the Paris Agreement.

The International Law Commission (ILC), in Article 48 of its Articles on State Responsibility, recognizes that states other than the injured State may seek accountability if the obligation violated is *erga omnes.* However, this is more of a recognition of the right to seek accountability through diplomatic channels or non-judicial mechanisms and does not automatically grant access to the courts. This limitation indicates a shift from bilateral logic (relations between two states) toward communitarian logic (collective interests); however, it remains hindered by traditional procedural rules. In summary, although the concept of *erga omnes* substantively creates obligations of a universal nature and gives all states an interest in upholding them, the limits on its implementation are largely determined by international law. The absence of general rules permitting *actio popularis* and the heavy reliance of court jurisdiction on State consent mean that the implementation of *erga omnes* obligations still faces significant procedural challenges. For *erga omnes partes* obligations arising from treaties, implementation tends to be clearer because treaty clauses often provide dispute resolution mechanisms and recognize the collective interests of all contracting states.

From the perspective of State sovereignty, there is a tension between rights and obligations because *erga omnes* obligations inherently limit it. A state cannot utilize the pretext of sovereignty or the principle of non-intervention to justify grave human rights violations within its borders. The obligation to protect citizens from mass crimes is part of sovereignty itself, as well as an obligation of the international community. Although *erga omnes* obligations grant every State the legitimacy to hold violators accountable, this legitimacy does not automatically confer standing to bring a case before the International Court of Justice. The ICJ's decision in the East Timor case (Portugal v. Australia) explicitly stated that the *erga omnes* nature of a norm and the rule of consent to jurisdiction are two distinct matters. This means that, notwithstanding the *erga omnes* right to self-determination, Portugal could not sue Australia, as doing so would have required the Court to rule indirectly on the lawfulness of Indonesia's actions in its absence. The court's jurisdiction therefore remains contingent on the consent of the concerned states.

How are *ius cogens* and obligations *erga omnes* applied in Indonesia's legal system have not been explicitly adopted in domestic court decisions, as these principles are more relevant to international law than to domestic law. However, some rulings and legal practices in Indonesia indirectly reflect these principles, especially regarding human rights issues, international crimes, and sovereignty. *Ius cogens* are norms of international law that cannot be set aside, such as prohibitions against genocide, slavery, torture, and aggression (Saraswati & Simbolon, 2025). Although Indonesia has not formally adopted this term in its jurisprudence, some rulings reflect norms recognized as *ius cogens.* Special courts have been formed, such as the Ad Hoc Human Rights Court for East Timor (2002–2003) and the Tanjung Priok Case (2003). Although these courts were deemed ineffective, Indonesia acknowledges that gross human rights violations (such as mass killings and torture) are crimes that must be tried. In international law, gross human rights violations are often correlated to *ius cogens,* but Indonesian courts refer more to Law No. 26 of

2000 on Human Rights Courts than to international norms and Law No. 5 of 1998 on the Ratification of the Convention against Torture. In some cases, such as charges against security personnel for violence, Indonesian courts should refer to the *ius cogens* norm prohibiting torture; however, its application remains weak in practice.

5. The Reception and Practical Application of Ius Cogens and Erga Omnes Obligations in Indonesian Law

The Indonesian Constitutional Court has examined statutory provisions that may conflict with constitutional guarantees – particularly those concerning human rights protection, although its decisions have not explicitly invoked *ius cogens* (Kurnia, 2016). The 2019 constitutional review of the Corruption Eradication Commission Law also illustrates the relationship between anti-corruption measures, constitutional governance, and the protection of fundamental rights. Although anti-corruption is not itself generally recognized as a peremptory norm of international law, efforts to eradicate corruption contribute to human rights protection by promoting accountability, transparency, and the proper allocation of public resources. Similar underlying principles can be identified in several areas of Indonesian legal practice, particularly environmental protection, the protection of Indonesian migrant workers, and maritime disputes in the South China Sea.

In the field of environmental protection, the relationship between fundamental international legal norms and collective obligations becomes particularly relevant in addressing large-scale forest fires and transboundary air pollution. Massive forest fires can generate hazardous air pollution that threatens the right to life, public health, and the right to a clean, healthy, and sustainable environment. Although the prohibition of severe environmental destruction has not been universally established as a peremptory norm of international law, large-scale environmental damage with transboundary or global consequences has increasingly attracted attention in international legal discourse concerning the potential development of environmental *ius cogens*. The recognition of the right to a clean, healthy, and sustainable environment as a human right by the United Nations General Assembly through Resolution 76/300 of 2022 provides an additional normative foundation for addressing environmental degradation. Where forest fires produce hazardous air pollution affecting populations across national borders, the resulting damage may engage Indonesia's international responsibilities under applicable environmental and human rights law. Such circumstances also raise several questions concerning the collective interests of affected States and the extent to which environmental protection obligations may possess an *erga omnes* character. In Indonesia, recurring transboundary haze pollution has exposed challenges in environmental governance, law enforcement, and coordination among government institutions. Although national legislation provides a regulatory framework for environmental protection and forest management, Indonesian judicial decisions have not explicitly developed the concept of *erga omnes* obligations in addressing transboundary environmental harm.

A related issue concerns the protection of Indonesian migrant workers – particularly those employed in the fisheries sector and on foreign fishing vessels. Many migrant workers experience forced labor, unpaid wages, physical violence, restrictions on freedom of movement, and other forms of exploitation that may constitute slavery or slavery-like practices. These practices meet the relevant legal elements; they may violate the prohibition of slavery, which is recognized as a peremptory norm of international law. Human trafficking, particularly involving women and children subjected to forced prostitution, also raises serious concerns regarding violations of fundamental human rights and international legal obligations. Such exploitation frequently develops through deceptive recruitment, false employment promises, coercion, threats, and physical violence. Poverty, economic inequality, armed conflict, and forced migration further increase the vulnerability of individuals to trafficking networks, while corruption and weak law enforcement create conditions in which perpetrators can operate with limited accountability. In

this context, bilateral agreements between Indonesia and destination countries must provide adequate protection for migrant workers and remain consistent with fundamental international legal norms. Any international agreement that conflicts with an established *ius cogens* norm would be subject to the legal consequences prescribed under international treaty law.

The protection of Indonesian migrant workers also involves international obligations arising from human rights instruments – particularly the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, as well as the Palermo Protocol on Trafficking in Persons. Indonesia has ratified the 1990 Convention through Law No. 6 of 2012 and the Palermo Protocol through Law No. 14 of 2009. At the domestic level, Law No. 18 of 2017 on the Protection of Indonesian Migrant Workers establishes the legal framework for protecting workers before departure, during employment abroad, and after their return to Indonesia. These provisions require the Indonesian government to develop effective protection policies, facilitate access to legal assistance, and undertake diplomatic and legal measures when they experience exploitation or serious human rights violations overseas. Destination countries, including Malaysia and Saudi Arabia, also have responsibilities under applicable international commitments and domestic legislation to ensure adequate wages, access to healthcare, freedom from violence, and effective legal protection for migrant workers. Where violations involving torture, human trafficking, or slavery occur, the international community may invoke relevant legal mechanisms and diplomatic channels to address the conduct. The extent to which such responses constitute legally binding *erga omnes* obligations depends on the applicable legal source and the nature of the obligation concerned.

The difficulties surrounding the protection of Indonesian migrant workers can also be observed in reported cases involving severe abuse by foreign employers. The case of Adinda L, an Indonesian migrant worker who reportedly died following torture and abuse by her employer in Malaysia, illustrates the challenges of securing accountability for violations committed against migrant workers outside their home country. Similar concerns arise in cases involving Indonesian workers subjected to forced labor and exploitation aboard foreign fishing vessels, where the cross-border nature of employment relationships complicates the identification of responsible parties and the provision of effective legal remedies. The implementation of Law No. 18 of 2017 continues to face institutional obstacles, including insufficient public awareness, limited access to legal assistance, inadequate coordination among government agencies, and difficulties in monitoring employment conditions in destination countries. Diplomatic relations and differences in bargaining power may also influence the ability of the Indonesian government to secure effective protection and accountability. These circumstances place greater importance on bilateral agreements containing specific human rights safeguards, effective monitoring mechanisms, and enforceable provisions addressing labor exploitation and other serious violations. Indonesia's participation in international and regional forums, particularly the United Nations and ASEAN, provides a further avenue for promoting cooperation among States in combating human trafficking, forced labor, and other forms of exploitation affecting migrant workers.

The South China Sea dispute provides another context in which the interplay between international legal obligations, collective interests, and State sovereignty is particularly evident. In 2020, Indonesia submitted a diplomatic note to the United Nations rejecting China’s maritime claims based on the nine-dash line insofar as they were inconsistent with the United Nations Convention on the Law of the Sea (UNCLOS). Indonesia’s position reflects its commitment to the international law of the sea and the protection of maritime rights and entitlements established under UNCLOS. The 2016 arbitral award in *The South China Sea Arbitration (Philippines v. China)* examined the compatibility of China’s historic rights claims with the maritime entitlements established under the Convention. The arbitral tribunal determined that China's claims to historic rights within the nine-dash line had no legal basis insofar as they exceeded the maritime entitlements provided by UNCLOS. The award also addressed the legal status of maritime features

and the interpretation of maritime entitlements, although it did not determine sovereignty over disputed land features or delimit maritime boundaries between the parties.

The legal framework established by UNCLOS extends beyond the immediate interests of individual disputing States because the Convention regulates the rights and obligations of States concerning maritime zones – including territorial seas, exclusive economic zones, and continental shelves. Certain obligations under UNCLOS may possess an *erga omnes partes* character as they protect collective interests shared by the States parties to the Convention. Nevertheless, the distinction between *erga omnes* and *erga omnes partes* remains important because not every obligation under UNCLOS automatically constitutes an obligation owed to the international community as a whole. This distinction also affects the legal implications of international judicial and arbitral decisions. Although the 2016 arbitral award has broader implications for the interpretation and application of UNCLOS, its binding legal effect under the Convention applies to the parties to the proceedings. China's continued rejection of the award illustrates the difficulties of securing compliance with international adjudicative decisions when a State refuses to accept their legal and political implications. Given the absence of a centralized international enforcement mechanism capable of compelling compliance in all circumstances, diplomatic engagement, ASEAN-led regional cooperation, and sustained international pressure continue to play a significant role in securing the implementation of international maritime law. The dispute also raises several questions concerning the relationship between the authority of international adjudication, the collective interests of States parties to UNCLOS, and the strategic considerations influencing the conduct of major regional powers.

Based on several cases in Indonesia, the domestic legal system is more dominant in determining *ius cogens* and *erga omnes.* Indonesian courts tend to refer to national laws rather than international law, unless the latter is ratified through legislation. Unlike the International Court of Justice, Indonesian courts lack the authority to adjudicate violations of *ius cogens* by other countries. Although Indonesia has ratified numerous international human rights conventions, the enforcement of court decisions remains often ineffective. While the concepts of *ius cogens* and *erga omnes* are not explicitly invoked in Indonesian court decisions, certain underlying principles, including the prohibition of torture and human rights protection, have been adopted into the domestic legal framework through the ratification of international human rights instruments. However, their application remains limited, as Indonesia's legal system focuses more on national law. In the future, if Indonesia expects to be more consistent with international law, there needs to be an internalization of *ius cogens* and *erga omnes* in legislation and jurisprudence.

Although Law No. 24 of 2000 does not explicitly use the term *ius cogens*, several of its provisions reflect this principle. Article 10, which concerns the adoption of international agreements, requires such agreements to be consistent with national interests and the generally accepted principles of international law. This principle may be interpreted as encompassing *ius cogens*. Article 18 further stipulates that *"International agreements may be terminated if: ... they are inconsistent with the 1945 Constitution of the Republic of Indonesia or the fundamental norms of international law."* The term *"fundamental norms of international law"* may refer to *ius cogens*, given that these norms have a superior status and must not be violated by any treaty, including bilateral treaties. Article 19 further provides that *"International agreements shall be terminated if: ... a new norm emerges in international law that conflicts with the contents of the treaty."* Such a new norm may be understood as referring to *ius cogens*, since any treaty conflicting with it must be terminated, as provided under Article 64 of the 1969 Vienna Convention on the Law of Treaties. From the perspective of legal policy, Indonesia prioritizes national interests (Article 10) over strict adherence to *ius cogens*. For instance, Indonesia's position on the Palestinian conflict reflects its support for the principle of self-determination. Thus, although Law No. 24 of 2000 does not explicitly mention *ius cogens*, it acknowledges this principle through the phrases "generally accepted principles of international law" and "fundamental norms of international law." Indonesia

is committed to refraining from adopting treaties that conflict with peremptory norms, although political considerations often influence their implementation.

6. The Tension between State Sovereignty and Erga Omnes Obligations: Institutional Challenges and the Pursuit of Collective Accountability

From the perspective of international and national law, the tension between *erga omnes* obligations and sovereignty continues to evolve in the following manner. Therefore, a paradigm shift is needed—one that moves away from an exclusive focus on State sovereignty toward a human rights-based approach—to prevent impunity for perpetrators of international crimes and seek just solutions to balance the need for a universal order while respecting the interests and sovereignty of States, which are inherent characteristics of international law. Thus, sovereignty is not an absolute right but rather a responsibility. *Erga omnes* obligations represent the recognition that fundamental values *(ius cogens)* transcend the interests of a single State and that the international community has a claim to them. However, the full implementation of these obligations is hampered by an international legal structure that relies on State consent and sovereignty to enforce them. Conversely, the assertion that State sovereignty supersedes *erga omnes* obligations is incorrect, although it is acknowledged that dynamic tension still exists between the two.

From a sovereignty-centered perspective, State sovereignty remains a fundamental principle that limits *erga omnes* obligations, particularly regarding procedure and jurisdiction. This position rests on the premise that international law is fundamentally grounded in State sovereignty and consent, with its enforcement system traditionally operating on a bilateral basis, whereby only a State directly injured by an internationally wrongful act may seek legal redress. *Erga omnes* obligations challenge this system but do not automatically abolish it. Experts also argue that these do not have a higher hierarchical status than ordinary international obligations. Their nature is more about expanding who has a legal (procedural) interest rather than enhancing the binding force of the norm. In other words, *erga omnes* obligations grant legitimacy to other States to bring claims but do not automatically confer the right to sue in international courts if there is no agreed-upon jurisdiction. The International Court of Justice has not yet explicitly recognized a universal right for every State to bring a claim regarding the violation of *erga omnes* obligations outside the context of a multilateral treaty *(erga omnes partes)*. Recognition of legal standing is easier if there is a clause in the treaty granting jurisdiction, which is fundamentally based on the consent of the State parties.

However, the view that emphasizes that sovereignty is not an absolute right asserts that a State cannot use its sovereignty to commit grave human rights violations. Obligations *erga omnes* serve as benchmarks for such responsibilities. This means that these obligations constitute an inherent limitation on State sovereignty, as demonstrated in the case brought by The Gambia (a non-aggrieved state) against Myanmar. In its argument, The Gambia asserted that the obligations under the Genocide Convention are *erga omnes partes* obligations – indicating that every State party has a legal interest in demanding compliance with them. This demonstrates that Myanmar did not obstruct judicial proceedings. Therefore, when a serious violation of an *erga omnes* obligation occurs, all States have a duty not to recognize the resulting illegal situation, assist the violator, and cooperate to end the violation. This becomes a limitation on the freedom of action of other States based on the interests of the international community.

The tension between *erga omnes* obligations and sovereignty cannot result in one dominating the other; thus, conceptually, the actions of a sovereign State cannot arbitrarily disregard *erga omnes* obligations and vice versa. *Ius cogens* occupies a high position in the hierarchy of norms and can override other norms, whereas *erga omnes* obligations have a broad procedural scope. These obligations expand the scope of who can act but do not automatically place them above all other sovereign interests in every situation. Judicial bodies such as the ICJ have failed to clearly

distinguish between *ius cogens* and *erga omnes* obligations. As seen in the ICJ's 1996 Advisory Opinion (AO) on nuclear weapons, which stated: In that AO, the ICJ judges were split in ruling on whether the prohibition on the use of nuclear weapons constitutes *ius cogens,* with a 7–7 vote (Wijaya et al., 2025), while the international community acknowledges that the use of nuclear weapons for wartime purposes would pose a grave threat to and endanger human civilization and future generations as well as cause catastrophic environmental damage. States also have an obligation to prevent the deadly risks resulting from the use of nuclear weapons to protect human interests and the environment. The polarization among judges in interpreting the prohibition on the use of nuclear weapons is highly ambiguous and alarming. This could serve as a basis for countries to develop nuclear weapons and mirrors the polarization within the international community, which faces ambiguity in defining *ius cogens* and obligations *erga omnes.*

When viewed through the lens of traditional international law, political and sovereignty-based approaches do not provide satisfactory solutions. This model places greater emphasis on recognizing the boundaries of international law—where international law ceases to apply upon entering another state's sovereignty—even when a state's actions violate *ius cogens* norms. Therefore, an "out-of-the-box" approach that places law in the service of humanity—rather than the other way around—must be adopted through best practices, as the traditional approach to international law is no longer relevant amid the uncertain global situation that threatens human civilization.

The primary rationale is the recognition by states of fundamental values (*ius cogens* and *erga omnes* obligations) that cannot be set aside in the interest of a state's sovereignty. The goal is the welfare of humanity as a whole, namely, the protection of human values, including the prevention and protection of environmental degradation. This approach must begin with the will of states to establish fundamental values at both the international and national levels, which are then developed through regional agreements to jointly recognize fundamental values – such as *ius cogens* norms and *erga omnes* obligations. However, this concept remains at the stage of "primary rules," as described by Hart. Furthermore, "secondary rules" are required through institutional reforms capable of creating balance and justice through two stages: first, reform of the United Nations organization as an embodiment of the "rules of change," particularly the Security Council, which has long been dominated by the five veto-power states and does not reflect the representation of countries across the world—which by 2026 will number 193, compared to 51 in 1945, the year the UN was founded. Reforming this organization is imperative to maintain balance and uphold the values of humanity and justice that have been neglected. Second, strengthening the International Court of Justice as the embodiment of the rules of adjudication, particularly concerning judges who have thus far remained influenced by political interests, especially when ruling on cases involving violations of *ius cogens* norms and *erga omnes* obligations. The enforcement of the International Court of Justice's rulings lacks the power to compel compliance and is often hindered by the veto rights of Security Council members. Third, the recognition of *ius cogens* norms and *erga omnes* obligations still depends on adjudicators' interpretation due to the lack of certainty in the 1969 Vienna Convention. Hart acknowledges that no rule is ever perfect; there are always weaknesses, such as the polysemy of language and interpretation, as well as legal gaps, which in these situations are left to the judge who, according to Ronald M. Dworkin, applies legal principles by employing moral and justice values.

The African Union's organizational model can serve as a model for establishing the fundamental norms of international law, particularly those related to human rights and the right to self-determination. Through institutional and judicial channels, the AU actively enforces *erga omnes* obligations on its members. For example, the dispute over the separation of the Chagos Archipelago by the United Kingdom from Mauritius became an independent nation. The United Kingdom carried out the forced expulsion of the indigenous population (1968–1973) to build the Diego Garcia military base. In its statement, the UK was found to have violated the right to self-

determination and national integrity, which are *ius cogens* norms in international law and give rise to *erga omnes* obligations. In its ruling, the ICJ declared that the UK's separation of the Chagos Archipelago from Mauritius was illegal.

On the judicial front, the AU has the African Court on Human and Peoples' Rights (AfCHPR), which adjudicates cases of serious human rights violations in Africa. Although the rulings of AfCHPR are formally binding only on the disputing parties, they also possess "res interpretata" effects (Jonas, 2020), serving as interpretive precedents for all member states in addressing similar cases and providing broader normative guidance to other nations. Nevertheless, the implementation of "res interpretata" faces several obstacles, including the fact that several African countries have yet to ratify the Protocol establishing the AfCHPR, thereby limiting the Court's jurisdiction and the reach of its decisions. Moving forward, the progressive consolidation of *ius cogens* norms and *erga omnes* obligations could be advanced through regional agreements that place fundamental humanitarian values at the center of international cooperation while recognizing the continuing relevance of State sovereignty. Such initiatives should also promote the establishment and strengthening of regional judicial mechanisms capable of adjudicating violations of these fundamental norms and ensuring greater accountability for breaches of obligations owed to the international community as a whole. It follows from these regional and international organizations that such practices and recognition (rule of recognition) can develop to further reinforce *ius cogens* and *erga omnes* norms as mandatory norms that are observed by all countries, which, of course, also requires reforms in the UN and the Security Council. Sovereignty remains a fundamental principle, but *erga omnes* obligations represent the recognition that there are fundamental values that transcend the interests of a single state, which is prioritized often depends on the context of the case, the type of obligation that has been violated, and the available legal mechanisms for enforcement.

Senegal, as a member State of the African Union, should serve as an example by implementing the ICJ ruling on the acts of torture and crimes against humanity committed by former Senegalese President Hissène Habré. In this case, the Government of Senegal established a special court to follow up on the ICJ decision by limiting its sovereignty and placing the principles of *ius cogens* and *erga omnes* above its sovereignty. The same has also been done by the Government of Indonesia following the 1999 referendum in East Timor (now Timor-Leste), by establishing an ad hoc Human Rights Court based on Law No. 26 of 2000 on Human Rights Courts through the DPR's proposal and Presidential Decree No. 53 of 2001, which was refined by Presidential Decree No. 96 of 2001, to prosecute the perpetrators of gross human rights violations in East Timor. This decision represents Indonesia's goodwill that crimes against humanity constitute violations of the principle of *ius cogens*, and that all states are obliged to prosecute them. Indonesia has consciously fulfilled *its erga omnes* obligations, even when the perpetrators are its nationals.

By comparing the cases mentioned above, it must be emphasized that *erga omnes* obligations are international legal obligations owed by a State to the international community as a whole, rather than merely to a specific State *(erga omnes partes).* Although theoretically robust, their implementation faces various challenges: (1) There is no agreed-upon official list of which obligations qualify as *erga omnes.* The ICJ has provided only examples rather than an exhaustive list. Consequently, states often disagree on whether a particular norm falls within the *erga omnes* category. (2) In practice, it is difficult to determine which State has the right to file a suit when an *erga omnes* obligation is breached. States that are not directly injured often hesitate to bring a claim—or face rejection when doing so—because international law remains bound by the principles of consent and direct interest. (3) There is no global executive body capable of compelling states to comply with *erga omnes* obligations. The ICJ can only adjudicate a dispute if the parties consent to its jurisdiction. Sanctions, such as embargoes or interventions, are often politically motivated and inconsistent. (4) The application of *erga omnes* is frequently influenced by the political interests of major powers. Violations by powerful states tend to go unchecked,

whereas weaker states are more easily subjected to punitive measures. This undermines the concept's credibility and universality. (5) Given the multitude of legal regimes (human rights, trade, environment, and the law of the sea), differing interpretations arise regarding how *erga omnes* obligations should be applied in each specific field, which creates legal uncertainty. (6) The principles of sovereignty and non-intervention are often invoked by states to reject outside interference, even in the face of serious violations. This creates tension between *erga omnes* obligations and the principle of sovereignty. (7) Proving *erga omnes* violations requires robust evidence, yet access to information is often restricted. Furthermore, issues of international jurisdiction frequently present procedural obstacles. Last, (8) the legal consequences for the violating State and other states remain unclear. Are all states required to impose sanctions? Is there an obligation to withhold recognition of an illegal situation? State practice remains inconsistent.

C. Conclusion

The relationship between *ius cogens* and *erga omnes* obligations reflects the normative ambition of international law, but their scope and operation remain unsettled. The identification of *ius cogens* depends on acceptance and recognition by the international community of States as a whole. However, the lack of a comprehensive and universally agreed list of such norms leaves their identification open to differing interpretations and disagreement. Courts clarify the content and consequences of peremptory norms, but do not always expressly characterize a prohibition as *ius cogens*. They may rely instead on customary international law or treaty obligations, making the boundaries between these categories difficult to determine. Identification must therefore rest on legal criteria and evidence of acceptance and recognition. Moral principles and human dignity inform the rationale of peremptory norms, but moral importance does not confer *ius cogens* status. Law and morality are complementary reinforcing, while remaining conceptually distinct. A breach of a *ius cogens* norm gives rise to obligations owed to the international community as a whole, whereas not every *erga omnes* obligation derives from a peremptory norm.

The consequences of serious breaches of obligations arising under *ius cogens* have negative and positive dimensions. Under the rules of State responsibility, States must not recognize as lawful a situation created by a serious breach, or render aid or assistance in maintaining it. They must also cooperate through lawful means to bring the breach to an end. The scope of this positive obligation remains uncertain – particularly regarding the forms of cooperation required, the threshold of a serious breach, and the measures expected of third States. Moreover, the *erga omnes* character of an obligation does not automatically establish a court's jurisdiction or confer an unrestricted right to institute proceedings. The distinction between *erga omnes* and *erga omnes partes*, the need for a jurisdictional basis, and the relevance of State consent create procedural barriers to accountability. These are compounded by inconsistent State practice, geopolitical interests, unequal political influence, and the absence of a central authority capable of ensuring compliance in practice.

Improving the effectiveness of these principles requires progress at normative and institutional levels. Clearer criteria for identifying peremptory norms and determining the consequences of serious breaches would strengthen legal certainty, while consistent State practice and principled judicial reasoning would help consolidate their authority. The United Nations, particularly the Security Council, remains central to collective responses; nevertheless, the *veto* system and competing political interests can obstruct consistent action. Security Council reform is therefore important to improve the representativeness and effectiveness of international enforcement, although political and institutional obstacles remain. In addition, regional organizations can provide complementary mechanisms for cooperation, monitoring, and accountability. The African Union offers experience through its human rights framework and regional judicial institutions, despite limitations in jurisdiction, participation, and implementation. Regional initiatives should complement rather than replace universal institutions, reinforcing international standards and

encouraging States to fulfil shared responsibilities. As a result, the effectiveness of *ius cogens* and *erga omnes* obligations depends on aligning legal recognition, judicial interpretation, institutional capacity, and political commitment so that fundamental norms are able to provide protection for human dignity and the interests of the international community.

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