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Failure of the Islamic Republic of Iran to Comply With Erga Omnes Obligations in International Human Rights Law

Mahmoud Masaeli *

Abstract

In international law, and particularly in international human rights law, the conception of erga omnes obligations stand for a certain mandatory duty for states to take towards the interests of the international community as a whole. Stemming from Latin origin, and signifying duties 'towards all' or 'towards everyone', erga omnes obligations require that all states comply with the norms and principles that the international community has reason to value. Despite the clarifications about the erga omnes obligations of states towards the interests of the international community, the Islamic Republic of Iran has wittingly ignored such obligations. In the field of international human rights law, this reluctance by Iran to fulfill the erga omnes obligations is more and more evident and shameless.

Keywords

Erga omnes Obligations, People's rights, International Human Rights, Interests of the International Community

* Mahmoud Masaeli is Professor of Human Rights, Global Ethics and Development and Holds a Ph.D. in Political Science from Carleton University, Canada. His latest publication: *An Introduction to Freedom and Human Rights in International Political Theory* [in Persian]. Iran Academia University Press. 2021.

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Executive Summary

In international law, and particularly in international human rights law, the conception of *erga omnes* obligations stand for a certain mandatory duty for states to take towards the interests of the international community as a whole. Stemming from Latin origin, and signifying duties 'towards all' or 'towards everyone', *erga omnes* obligations require that all states comply with the norms and principles that the international community has reason to value. Despite the clarifications about the *erga omnes* obligations of states towards the interests of the international community, the Islamic Republic of Iran has wittingly ignored such obligations. In the field of international human rights law, this reluctance by Iran to fulfill the *erga omnes* obligations is more and more evident and shameless.

Erga and Omnes

Originating from the Latin term, *ergā* means 'towards', 'with regard to', 'respecting', and *omnēs*, plural of *omnis* means 'all', the term *erga omnes* in the field of law means obligations concerning fundamental values and interests of the international community. Since the nature of *erga omnes* obligations implies a firm duty emanating from the 'ought' rather than the 'is', failure in undertaking those obligations constitutes a wrongful act committed not only against the states affected by that act, but also against all members of the international community as a whole.[1]

Inspired by this universal norm, international law distinguishes the general rules governing the behaviour of states from the rules that extend beyond the consent of states. In other words, contemporary international law, either in academic scholarship or in the practice of the International Court of Justice, is eager to place the conception of *erga omnes* obligations at the top of the hierarchy of the duties of states in the international arena. These are the obligations implying a 'must' i.e., duties that must be fulfilled independent of the will of the law-makers and their own consent.

While hailed as an emerging norm in contemporary international law, the roots of the term *erga omnes* obligations can be traced back to the Roman account of *jus gentium* i.e., the law of nations; better reflected as the law of people. According to *jus gentium*, the law does not emanate from the consent of states, rather it extends its roots in the evolving human conscious. Accordingly, this conception of the law is best understood by reasonable people. The very nature of *jus gentium* designates a universal character to this account of law and places its importance at the centre of community to be the states, organizations, and people. In this way, *jus gentium* is a common law for all human beings, and is comprehended by their own rational character, therefore lying at the heart of many political and social issues of the contemporary world.

Cicero is the father of *jus gentium* as a concept of law "retained without letters, either by the law of the nations, or by the

1 Boleslaw A. Boczek, *International Law: A Dictionary* (Lanham, Maryland, Toronto, Oxford: The Scarecrow Press, Inc, 2005), 7.

custom of their ancestors."[1] Due to its unwritten nature, and having been practiced by nations, one is convinced to agree that *jus gentium* commands a certain duty beyond the consent of the states. Therefore, the duties emanating from *jus gentium* are strict and not negotiable, nor are they irrevocable. Duties emanating from jus gentium contain an order to not commit an action against the community of all, accordingly. For this reason, *jus gentium* stands at the highest place in international law and supersedes consensual-based law. That is to say that "borrowing an appellation created by an apprehension of the necessary universality of conceptions based on justice and good faith, would be termed *jus gentium* -the law common to all peoples, the law universal."[2]

The late Middle Ages' scholarship adjusted *jus gentium* in accordance with Christian theology. Thomas Aquinas (1225-1274), the late medieval theologian, heralded a faith-based account of *jus gentium* and the originating *erga omnes* obligations. In this perspective, the law must fit the eternal and absolute law of nature ordered by God.[3] Using the concept of the common good introduced by Aristotle, in *Summa Theologica,* Aquinas argues that the world of creation follows good purposes and is governed by the laws emanated from the divine intellect. This divine intellect, *lex aeterna*, can be sought in the eternal law of nature by reason.[4] To explain natural law, he considered the world of creation as an existing and objective reality whose basic components and elements interact with each other according to causal laws. By its rational capacity, a human is able to realize the importance of those purposes for the common good. According to Aquinas, human beings can reach intangible truths by their very nature through the tangible phenomenal world.[5] In the same way, God also manifests to man through the world of creation and his signs. This view is taken from a verse from Romans (1:20) in the Bible which says that "For since the creation of the world, His invisible attributes are clearly seen, being understood by the things that are made, *even* His eternal power and Godhead."[6] The human intellect can comprehend the truth of the divine intellect through natural laws. This capacity of the human intellect is clear proof of the existence of God. As the source of life, God has created the universe with a harmonious plan. So, there are lofty goals hidden in this beautiful creation that can be perceived by human intellectual capacity.[7] The most important message of harmonised design of creation is goodness and the public good. But since good is an abstract thing, human beings must put it

1 Gordon E. Sherman, "Jus Gentium and International Law," *The American Journal of International Law* 12, No. 1(January 1918): 58.

2 Ibid., p, 59.

3 Thomas Aquinas,*Summa Theologicae* (Irvine, USA: Xlist Publishing, 2015).

4 Ibid., 143.

5 Ibid., 224.

6 Ibid., 379.

7 Ibid.

into practice through good social behaviors. Human contribution to the good life requires eternal law; *jus gentium*.

Spanish Jesuit priest, and the leading scholar of Salamanca School, Francisco Suárez (1548-1617 pulled *ius gentium* out of the theologically restrictive view of Aquinas and located it in a grey shadow overlap between natural and human law for the purpose of responding to the needs of emerging humanism of the sixteenth century. Suárez tried to utilize the ancient account of *jus gentium*, but adjusting it in accordance with the urgency of the newly emerging international community coordinated through commercial relations, diplomatic sphere, and the outbreak of *Jus gentium* has the character of positive law deriving from the common consent of nations. It does not consist in a necessary deduction from natural law, but as O'Connell puts is, is sanctioned by it.[1] The time being needs a concept of law capable of practically responding to ongoing transformations in politics, commerce, diplomacy, and war. This view of *jus gentium*, growing out of the practices of nations and the custom, best suits those needs. Therefore, "*jus gentium* is not immutable. Nor is it necessarily common to all as is natural law. It is, rather, "*regulariter et fere omnibus*. (Regularly and almost everyone)."[2] This means that at the verge of the scattered opinions among nations and people, the reasonability of *jus gentium* makes it acceptable by everyone.

Erga omnes in the Judicial Practice

International law has always considered the consent of states as the foundation of the law ruling over international relations. This strict state-based norm has been prevailing in international law since the Peace of Westphalia (1648) until the mid-Cold War era. The Status of the *Eastern Carelia Case* of 1923 by the Permanent Court of International Justice, for instance, shows the consent of the state as the basis of international law. Similarly, *The S.S. Lotus Case* of 1927 established sovereignty and consent of states as the basis of international law. These cases reflect the realist nature of international law in advocating the consent of the states as the basis of their obligations in international law.

In contrast to the above cases, and in spite of consent of the states as the sources of the obligations of states, the International Court of Justice in *The Barcelona Traction Light and Power Company Case* of 1970, confirmed certain obligations beyond the consent of states.[3] Similarly, in the *East Timor* Case, the Court considered *erga omnes* obligations as the essential principle in contemporary international law, which is different from the rule of consent by states. In *The Legal Consequences for the State of the Continued Presence of South Africa in Namibia,* the Court considered the fundamental differences between the *erga omnes* character of a norm and the rule of consent to jurisdiction, and prioritized erga omnes obligations over all

1 Daniel P. O'Connell, "The Rational Foundations of International Law," *Sydney Law Review* 2, no.2 (1957): 261. See: http://classic.austlii.edu.au/au/journals/SydLawRw/1957/2.pdf

2 Ibid., 262.

3 Ibid.

other obligations.[1] Also, the idea about the nature and character of *erga omnes* obligations was reiterated by the Court in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. In this case, t*he Court recognized the obligations violated by Israel having a certain obligations *erga omnes*.

It is quite evident that by the end of the Second World War, and opening of a new normative horizon to subjugate states to the new international normative order, the very *Jus gentium* required designation of *erga omnes* obligations on states for the benefits of the international community. For instance, no state should commit genocidal policies and actions in any manner. This assigned duty to states emanates from the *erga omnes* obligations toward all community of mankind. This category of biding obligations, was the core of the decision of the ICJ in *Democratic Republic of Congo v. Rwanda*. The Court recognized this obligation as the supreme norm of international law. In the view of the Court, the Convention involves *erga omnes* obligations from which no derogation is permitted. In the same vein, the Court delivered its landmark verdict on 20 July 2012 in the *Belgium v. Senegal Case,* and confirmed that all states have the obligation *erga omnes*.[2]

In one of the most recent decisions by the Court, on 23 January 2020, the Court once again confirmed the supreme binding nature of *erga omnes* obligations on states. The case was brought to the ICJ by Gambia concerning acts adopted, taken and condoned by the Government of Myanmar against members of the Rohingya group. The Court observed that "all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity."[3]

The non-consensual obligations towards all, either *erga omnes* obligations is turning to be a newly emerging norm in international law. This emergence is not only admitted by academic reasoning as well as the practice of the International Court of Justice, but also by the United Nations International Law Commission. Working on internationally wrongful act of a state, ILC states that such actions entail international responsibility of that state. The Commission distinguishes the responsibilities arising from treaty obligations from the obligations toward all and everyone.

A Deceitful Plot

The Islamic republic of Iran has intentionally ignored the *erga omnes* obligations, while as a member of the international community, and notably the UN, must comply with the rules of international law. How is this possible? The response must be seen behind the deceitful mask on the face of the Islamic

1 Case Concerning East Timor (Portugal vs. Australia), International Court of Justice, Judgment of June 30, 1995, para. 229.

2 Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), International Court of Justice, overview of the case.

3 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) Request for the indication of provisional measures.

government. Ayatollah Khomeini established the theory of the *Guardianship of the Islamic Jurist*, known also as a system of governance called the *Rule by the Oppressed.* This system brought about important reflections both in the domestic and international spheres.

Khomeini identified this rule as the ideal model of Islamic governance. At the centre of this ideal populist rule stands the global ideal governance preparing the way for the appearance of the hidden Imam. Doubtlessly, by its nature, the system a denial of the modern governance constructed around national interests and international cooperation. In the Islamic perspective, national and international are two sides of the same coin. There is no difference between the two since both are formed under the sole inspiration of Islamic ideology and aims at establishing the Islamic Ummah. The ideal Islamic global governance is identified in line with the five principles of the Islamic revolution.

- Freedom and independence are attainable if the current model of global governance is renounced. This denial is a sacred mission by the members of the Islamic Ummah.
- The non-alignment, which is another word for identifying independence, comes through awakening the oppressed people of the world and supporting all Muslims to form the Islamic Ummah.
- The current international system is corrupt since it is not grounded on the divide law. Ummah must eradicate this system in order to protect people in their welfarist needs.
- Just trust in God. The divine law empowers all to break the chains of dependency.
- When the demon is destroyed by the Islamic rule, and angels take over society, not only are the material needs of people met, but more importantly, people's moral progress finds its way.

The formation of the Ummah has already been promised by God, and is on the way. The Quran on chapter 28, verse 5 promises this ideal governance: "And We chose to confer favour upon those who had been rendered weak in the land and to make them leaders and to bestow a kingdom upon them, thus make them inheritors of Our blessings." Khomeini frankly took the position to bring this Qur'anic paradise to earth:

We have repeatedly stated this fact and truth in our Islamic and international foreign policy that we seek to expand Islam's influence in the world and reduce the dominance of the world ... We seek to eradicate the corrupt roots of Zionism, capitalism and communism in the world.

Although this populistic ideology of the Islamic ideal governance masked its suppressive nature under compelling terms such as freedom, independence, progress, social justice, and a battel against colonialism and imperialism, from the very beginning it couldn't veil its suppressive mission against the human rights and democratization. Now, for the critical observers, the anti-humanist nature of the Islamic political system is revealed. The Islamic system is not willing per se, and cannot comply with the norms of international law including the *erga omnes* obligations. Although the Islamic

regime presents itself deceptively cooperative with the world, the truth cannot be denied that the Islamic political ideology is essentially unable to comply with the erga omnes obligations.