EJIL:Talk!

May 21, 2019

# Clarification and Conflation: Obligations Erga Omnes in the Chagos Opinion

*Written by Craig Eggett and Sarah Thin*

Share Tweet Email Share

The recent ICJ Advisory Opinion concerning the Chagos Islands has, understandably, received a great deal of attention. The controversies surrounding the more political elements of the decision have dominated headlines. However, in this blog post, we want to focus on one particular aspect of the Court's decision. Tucked away at the end of the opinion, paragraph 180 recognises the *erga omnes* character of the obligation to respect self-determination and finds that there exists an obligation, binding on all states, to cooperate with the UN to complete the decolonisation of Mauritius:

> '180. **Since respect for the right to self-determination is an obligation erga omnes, all States have a legal interest in protecting that right** […]. The Court considers that, **while it is for the General Assembly to pronounce on the modalities required to ensure the completion of the decolonization of Mauritius, all Member States must co-operate with the United Nations to put those modalities into effect**. As recalled in the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations:
>
> "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle" […].' (emphasis added).

This is followed by confirmation in paragraph 182 and in operative paragraph 5 (with only Judge Donoghue dissenting, on unrelated grounds), that 'all Member States must co-operate with the United Nations to complete the decolonization of Mauritius.'

here [64], and here [15]). However, the notion of *erga omnes* remains surrounded by a considerable lack of conceptual clarity. There is frequent conflation, even at the level of the ICJ, between this and other international legal concepts. Paragraph 180 of the *Chagos* opinion provides both a well-needed clarification and a potential source of confusion in this regard.

### Clarification

First, the clarification. The Court's use of terminology – speaking of an obligation *erga omnes* to respect the right of self-determination – is a welcome improvement. In previous decisions, the Court had referred instead to 'rights *erga omnes*' of peoples to self-determination (*East Timor*, [29]).

Of course, while rights and obligations go hand in hand, it is *obligations* that have *erga omnes* character, not rights. It does not make sense to speak of rights *erga omnes* in this context. To say that a right has *erga omnes* character or is 'opposable towards all' is simply a description of the scope of application of the right. For example, the right of a coastal state to enact certain legislation in relation to its Exclusive Economic Zone is opposable towards all other states. In this sense it a right *erga omnes*. But many rights have this kind of structure – this does not make them special. If a state fails to respect these rights of a coastal state, this does not generate a procedural right of standing on the part of all states to invoke responsibility on that basis.

An **obligation** *erga omnes*, in contrast, is one that is owed to the international community as a whole. The legal effect of such a characterisation is the generation of a procedural right of standing, on the part of all states, to invoke the responsibility of a state that is in breach of this obligation. The *erga omnes* character of a given obligation may indeed be dependent upon 'the importance of the rights involved' (*Barcelona Traction*, [33]). Each of these rights may entail a number of different obligations, from the obligation to respect that right to the obligation to promote or protect it. Some of these obligations may be opposable *erga omnes* some may not be. In any case, the concept of *erga omnes* attaches to the obligation, not the right.

There is therefore an important distinction between and obligation *erga omnes* and its corresponding right(s). By referring to the **obligation** *erga omnes* to respect the **right** to self-determination, the Court in *Chagos* provided a welcome clarification on this point.

paragraph 180 has been drafted creates the potential for unfortunate confusion. It could easily be read as implying that the *erga omnes* nature of this obligation to respect self-determination entails an obligation binding on all states "to co-operate with the United Nations in order to complete the decolonization of Mauritius." This is indeed how the Opinion has been interpreted by a number of commentators, including in contributions to this blog. Marko Milanovic, for example, seems to draw this line of causation: "UN member states must cooperate to finalize the decolonization of Mauritius…**since** self-determination is an obligation *erga omnes*" (emphasis added). As explained above, this is not the generally accepted function of *erga omnes* obligations. The sole consequence of characterising an obligation as *erga omnes* is the generation of a right of standing on all states.

This confusion could stem from the conflation of the consequences of a breach of an obligation *erga omnes* with those of a serious violation of a peremptory norm under Articles 40-41 ARSIWA. Article 41(1) imposes an obligation on all states to "cooperate to bring an end through lawful means" a serious breach of a **peremptory norm**. Despite the history of confusion both in and out of the Court (see e.g. here, Article 5 and here [157]-[159]) between obligations *erga omnes* and peremptory norms, these are different legal concepts. It is generally recognised that while all peremptory norms entail obligations *erga omnes*, not all obligations *erga omnes* arise from peremptory norms. While they may be related through the interests they protect, and there may be significant overlap, they are functionally distinct.

If the Court is basing the obligation to cooperate towards the decolonisation of Mauritius on the *erga omnes* character of the obligation to respect the right to self-determination, this would be an unfortunate conflation of obligations *erga omnes* and peremptory norms. It is of course possible that the Court is of the opinion that the rule requiring states to respect the right to self-determination is a peremptory norm, and that the UK has committed a serious breach of this rule. In such circumstances it would be appropriate to apply Article 41 ARSIWA. However, despite the similarity in language, the obligation to cooperate with the UN to complete the decolonisation of Mauritius is not a direct application of Article 41, which requires states to cooperate (not necessarily with the UN) to bring to an end the breach of the norm in question. There is also no mention of the other consequences imposed by Article 41, namely that "No State shall recognize as lawful a situation created by a serious breach [of a peremptory norm] nor render aid or assistance in maintaining that situation." Furthermore, there is no mention in the Court's language of the peremptory character of the rule.

case, the right to self-determination. However, the space and attention dedicated to this at the end of the Opinion would not seem to support such a drastic change to the international legal infrastructure.

**Proposed Solution**

We propose an alternative interpretation that is far more satisfactorily reconcilable with the existing notion of *erga omnes*. Rather than being a consequence of the *erga omnes* character of the obligation to respect self-determination, the obligation to cooperate referred to by the Court arises from a self-standing rule of customary international law. This is reflected in, e.g., UNGA Resolution 2625, as quoted above.

In referring to the obligation to cooperate, the Court does not explicitly draw the causal link from *erga omnes*. Just because the reference to the obligation to cooperate immediately follows the recognition of the *erga omnes* character of the obligation to respect self-determination does not mean the latter follows *from* the former. This interpretation is thus supported by a textual reading of the Opinion. It is also preferable in that it maintains a higher level of conceptual clarity with regard to the parameters of notion of *erga omnes* and its relationship with other legal concepts.

It may seem pedantic to pick away at a single paragraph in an opinion that spans such global and important themes as the self-determination of peoples and the end of the colonial era. But there is value in this pedantry. The concept of *erga omnes* is a useful one: it facilitates the integration of community interests into international law, and the reflection of those interests in the invocation of state responsibility. Unfortunately, this connection to higher ideals sometimes seems to result in *erga omnes* becoming a rhetorical plaything; a handy term to emphasise the importance of certain rules or interests, to the extent that its legal meaning becomes obscured. If *erga omnes* is to maintain its juridical utility, it must be treated with the conceptual clarity that it deserves.

## CATEGORIES

International Court of Justice

Self-Determination

## TAGS

## LEAVE A COMMENT

Comments for this post are closed

## COMMENTS

SHOW


### Craig Eggett

Craig Eggett is a Lecturer and PhD Candidate in international law at the University of Maastricht. His research is focused on the nature and function of "general principles of law" in the international legal system.


## MORE ARTICLES BY CRAIG EGGETT

No other articles by this author

## RELATED ARTICLES

### The Bougainville Independence Referendum and the 'Duty to Consult'

announced that almost 98% of Bougainvilleans voting in the recent independence referendum had voted…

READ MORE

## Electoral Cyber Interference, Self-Determination and the Principle of Non-Intervention in Cyberspace

August 26, 2019 Nicholas Tsagourias

Introduction In recent years we have witnessed persistent attempts to interfere in elections by using cyber means. Russia's cyber interference in the 2016 US presidential…

READ MORE

## Anticipating the Chagos Advisory Opinion: The Forgotten History of the UK's Invocation of the Right …

February 19, 2019 Orfeas Chasapis Tassinis

What does 2019 have in store for international law? Little seems predictable, but 2019 is likely to be the year in which the International Court of Justice…

READ MORE

Subscribe to EJIL:Talk!

Sign up to receive updates on our latest posts.

Email address

SUBSCRIBE!