BOOK REVIEWS

THE RETURN OF SUPERNORM

The Concept of International Obligations Erga Omnes by Maurizio Ragazzi (Oxford: Clarendon Press, 1997) pages i–xl, 1–264. Price $AUD230.00 (hardcover). ISBN 0 19 826480 1.

> In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[1]

I PROSPER WEIL

For many years now, Prosper Weil's article 'Relative Normativity in International Law?', published in 1983, has been prescribed reading in the general course in international law at the Melbourne University Law School.[2] Ironically, then, a generation of Melbourne University law students are familiar with the concept of *erga omnes* only because Weil attempted to demolish the jurisprudential basis for the category in his influential essay. Maurizio Ragazzi, the author of the study under review,[3] seems to speak directly to these former and present students when he reassures us that even 'Weil (who cannot be regarded as an enthusiastic supporter of the concept) acknowledged that obligations *erga omnes* have become a key component of the conceptual apparatus of contemporary international law'.[4] So in whom are we to place our trust? Weil circa 1983 or Weil circa 1992?

In 1983, Weil argued that since international law was a rudimentary normative system, it needed norms of high quality to ensure that the law remained persuasive and engendered compliance among states. This is what Professor Thomas Franck describes as 'legitimacy'.[5] In a system depending on self-regulating horizontal consensus rather than vertical enforcement, legitimacy and effectiveness can only be achieved through a combination of textual determinacy (the rules must possess clarity), symbolic validation (there must be cultural reinforcement of such rules through the use of rituals and cues), adherence (the rules

[1] *Barcelona Traction, Light & Power Co Ltd (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3, 32 (Judge ad hoc Riphagen dissenting) ('*Barcelona Traction*').

[2] Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413.

[3] Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (1997).

[4] Ibid xi, citing Weil's Hague Lectures from 1992: Prosper Weil, 'Le Droit International en Quête de Son Identité: Cours General de Droit International Public' [1992] 6 *Recueil des Cours* 9, 287.

[5] Thomas Franck, *The Power of Legitimacy among Nations* (1989) 24.

must conform to a hierarchy of norms) and coherence (there must be lateral consistency amongst rules).[6] Weil believes that 'norms' *erga omnes* violate these requirements and thus threaten to undermine the legal system's legitimacy and, more dramatically, its survival.[7]

It is important to note that Weil targets associated concepts such as 'crime', *jus cogens* norms and objective treaty regimes in his critique.[8] Each of these, as well as the category *erga omnes,* infect the system with variable and graduated normativity and relativise international legal norms. What does this mean? Put bluntly, any attempt to create supernorms will suggest that the everyday norms are less important, perhaps less binding and more easily disregarded. In a system in which states are already tempted to disobey the edicts of the international system such additional temptations are unhelpful to say the least.

Thus, in a system with no sovereign, no police force, no magistrates and no recognisable legislative authority, 'state crime', for Weil and others,[9] is a meaningless category. All infractions of international law operate at the delictual level. There are only torts in the international law regulating interstate behaviour.[10] Public international law is essentially a contractual system made up of private actors (ie states). In Professor Ian Brownlie's words, state responsibility is 'a form of civil responsibility.'[11] To describe something as a crime is simply to say that a state has committed a truly horrible delict. This may be useful at a rhetorical level but at the normative level it is damaging because it implies that other breaches of international law are less significant. Hence, Weil's category of 'attenuated normativity'.[12] This view is not without its proponents. The United States government, in its response to the *Draft Articles on State Responsibility* prepared by the International Law Commission ('ILC'), states that:

> [T]he concept of international crimes of state bears no support under customary international law of state responsibility, would not be a progressive development, and would be unworkable in practice.[13]

What, then, of *erga omnes* norms? According to the ILC:

> [T]here are in fact a number, albeit a small one, of international obligations which, by reason of the importance of their subject-matter for the international

6 Ibid 49.

7 Weil, 'Towards Relative Normativity in International Law?', above n 2, 432–3.

8 Ibid 423.

9 See, eg, Ian Brownlie, *State Responsibility: Part I* (1983) 23.

10 The recent expansion of war crimes institutions and norms applies to individual responsibility. For a discussion of the competing notions of criminality see Gerry Simpson, 'Didactic and Dissident Stories in War Crimes Trials' (1997) 60 *Albany Law Review* 801, 819–23.

11 Brownlie, above n 9, 23.

12 Weil, 'Towards Relative Normativity in International Law?', above n 2, 416.

13 Marian Nash, US Department of State, 'Contemporary Practice of the United States Relating to International Law' (1998) 92 *American Journal of International Law* 243, 257.

> community as a whole, are — unlike the others — obligations in whose fulfilment all States have a legal interest.[14]

So, in most cases, a state has to be directly affected by a breach in order to bring an action on the international plane, but in certain cases the very nature of the subject matter (for example: genocide, self-determination, serious violations of human rights) makes it a matter in which any state can claim a legal interest. An example of such a claim arose in the *Case Concerning East Timor*[15] where Portugal argued that Australia owed obligations *erga omnes* to respect the East Timorese right to self-determination.[16] Accordingly, while Portugal had an interest in the case by virtue of its status as an administering power in East Timor, it also had an interest as a member of the world community. Judge Weeramantry, in his dissenting judgment, wrote that self-determination was 'a right assertible *erga omnes*'.[17] The logical inferences to be drawn from this line of argument are that any state from Iceland to Argentina might have brought Australia to court in this instance and that Australia had a duty to comply with 'the underlying norms and principles'[18] of the right to self-determination as opposed only to binding Security Council resolutions.

The concept of *erga omnes* then sounds highly commendable but Weil has doubts. First, he argues there is no way of determining which are to be *erga omnes* norms. Apartheid? Racial discrimination? Sexuality discrimination? The international community has provided no means by which an identification can be made. Second, the concept diverges from the effective if rather modest bilateralism of the current international order to a system in which 'any state in the name of higher values as determined by itself, could appoint itself the avenger of the international community. ... [C]haos and violence would come to reign among states'.[19] This is a grim prophecy — half gallic hyperbole, half sincere positivist anxiety.

II METHOD AND PHILOSOPHY

In the 28 years since *Barcelona Traction* there has been much chaos and violence, but little of it can be attributed to the existence of *erga omnes* norms. Indeed, for many writers, *erga omnes* obligations have the potential to influence the practice of states in a number of positive ways. This is clearly Maurizio Ragazzi's view in his scholarly account of the development, content and applica-

[14] ILC, 'Report of the International Law Commission to the General Assembly on the Work of Its Twenty-Eighth Session' [1976] 2 *Yearbook of the International Law Commission* 99, UN Doc A/31/10 (1976).

[15] *Case Concerning East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90 ('*Case Concerning East Timor*').

[16] Memorial Submitted by the Government of the Republic of Portugal, 18 November 1991, [4.71], as cited in Ragazzi, above n 3, 138.

[17] *Case Concerning East Timor* [1995] ICJ Rep 90, 202.

[18] Ragazzi, above n 3, 138, citing *Case Concerning East Timor* [1995] ICJ Rep 90, 210 (Judge Weeramantry).

[19] Weil, 'Towards Relative Normativity in International Law?', above n 2, 433.

tion of the concept. His treatise is a book length response to Weil's secular doubts and an affirmation of his own, almost religious, enthusiasm for the concept.

These are not inappropriate metaphors given the historical and philosophical terrain on which we find ourselves. International law is, in part, an attempted reconciliation between natural law and positivism; the former drawing on religion and a higher normativity for its inspiration, the latter on the deeds (and consent) of states. The two have never really been fully reconciled and international lawyers continue to battle the demons of apology and utopia in their writings.[20] Weil is, of course, a positivist nonpareil, while Ragazzi's support for *erga omnes* norms would place him more in the neo-naturalist camp. Ragazzi's neo-naturalism draws on the ideas of natural law but fastens them to a more contemporary notion of world community. According to Ragazzi, *erga omnes* is part of 'the need, which has been present since time immemorial in international relations, to search for peace and justice among States through the promotion of their common good.'[21]

Ragazzi's *method*, however, is extremely positivistic, or as he himself puts it quoting from *Mark* 1:27, 'a new teaching! With authority'.[22] The development of *erga omnes* is traced painstakingly through a number of the most important cases at the Permanent Court of International Justice and the International Court of Justice, its postwar successor. The story begins with *Barcelona Traction* where the court first refers to *erga omnes*.[23] This review of the case is comprehensive and detailed. Ragazzi concludes by remarking that the concept combines two features: universality (all states are bound by these obligations) and solidarity (all states have a legal interest in their protection).[24] But how does this universalism gel with the consensual nature of the system (states are bound only by that to which they give their consent)? Ragazzi suggests that states *have* consented to the creation of such norms. Prior to explaining how this has come about, the author takes us through the prefigurations of the *erga omnes* concept. His discussions of state servitudes, permanent dedications and international status, as examples of principles based on common interest rather than reciprocity, represent legal history at its best — unpretentious and careful. His claims for these doctrines are appropriately modest since most of these legal regimes were based on a widening circle of reciprocity rather than a notion of universal international law.[25]

III THE CONSENSUAL AND THE UNIVERSAL

Chapter three discusses the relationship between two of the supernorms Weil derides — *erga omnes* obligations and norms *jus cogens*. *Jus cogens* norms are those norms from which no derogation is permitted. This idea is embodied in

[20] See Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989).
[21] Ragazzi, above n 3, 218.
[22] Ibid 1.
[23] *Barcelona Traction* [1970] ICJ Rep 3, 32.
[24] Ragazzi, above n 3, 17.
[25] Ibid 41.

article 53 of the *Vienna Convention on the Law of Treaties*.[26] States cannot enter into treaties which breach a *jus cogens* norm. The issue of *jus cogens* came up in *Horta v Commonwealth*[27] before the High Court of Australia (though Ragazzi does not mention it) where it was argued (unsuccessfully) that the *Timor Gap Treaty*[28] was in conflict with the *jus cogens* norm of self-determination and therefore was void.[29]

The categories *jus cogens* and *erga omnes* are obviously quite different, the former being a category of substantive rules, the latter being a species of norms giving rise to universal standing. However, they share a tendency towards the universalisation of international law, that is, the idea that the law of the international order should be binding on all (regardless of consent) and that all states should have an interest in their enforcement. Most of all, both sets of norms are defined not just by their legality but also by their tendency to embody principles of international morality and good order. As one writer puts it, these norms are 'rooted in the international conscience'.[30]

Is there an international conscience though and how would we identify it? The judges at Nuremburg thought there was such a thing as the 'conscience of mankind'[31] but this does not sit easily with international law's pluralistic and consensual foundations. States represent societies with radically different moral and religious traditions. According to positivists, international law can therefore be seen as a minimal legal order designed to prevent violence and ensure some level of cooperation rather than one aimed at reinforcing an, inevitably, hegemonic moral consensus.

Ragazzi attempts to circumvent this problem by arguing that these supernorms have been accepted by the diverse range of states and that therefore the problem of moral coercion does not arise. However, he is forced to admit that supernorms make no sense if a state is able to escape being bound by them by persistently objecting to the opposability of a rule to itself. Therefore, it seems such norms bind states against their will — a fundamental departure from a basic proposition of the international legal order. This is what makes such norms controversial.

IV WHICH OBLIGATIONS ARE *ERGA OMNES*?

These categories are controversial for another reason to which I have already alluded. It is very difficult to define the substantive crimes which fall within these

[26] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

[27] (1994) 181 CLR 183.

[28] *Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in the Area between the Indonesia Province of East Timor and Northern Australia*, 11 December 1989, [1991] ATS No 9, 29 ILM 469 (entered into force 9 February 1991).

[29] *Horta v Commonwealth* (1994) 181 CLR 183, 197.

[30] Ragazzi, above n 3, 54, citing Mustafa Yasseen, Member for Iraq of the International Law Commission, in International Law Commission, '683rd Meeting' [1963] 1 *Yearbook of the International Law Commission* 63

[31] Ragazzi, above n 3, 104, citing Kotaro Tanaka, 'Some Observations on Peace, Law, and Human Rights' in Wolfgang Friedman, Louis Henkin and Oliver Lissitzyn (eds), *Transnational Law in a Changing Society: Essays in Honor of Philip C Jessup* (1972) 254

categories. The main body of this book is devoted to this task. Ragazzi allocates a chapter each to aggression, genocide, slavery and racial discrimination. This list overlaps but is not coextensive with the various crimes being debated by states attempting to establish an international criminal court. For example, racial discrimination is not regarded as an international crime though it can be a component part of the crime of genocide. Similarly, *jus cogens* norms like the prohibition on the use of force may not give rise to obligations *erga omnes* even though the narrower norm prohibiting aggression does appear to do so.

Ragazzi's discussion on aggression is a useful one. Much of this ground has been covered already but an interesting thesis emerges in this chapter. The author argues that 'the relevance of the concept [of obligations *erga omnes*] lies not only in allowing the opposability to all States to that obligation, but also in *the consequences and analogies* that can be drawn from the character *erga omnes* of a certain obligation'.[32] He discusses the various exceptions and defences to the rule that outlaws the use of force, such as necessity, invitation and self-defence,[33] and concludes that a characterisation of the prohibition as an *erga omnes* obligation has the effect of nullifying these defences in certain circumstances. The example he gives is of the US laying of mines in Nicaraguan territorial waters which was a subject of the 1986 *Nicaragua* decision.[34] Here, even the dissenting American judge Stephen Schwebel accepted that the US's general right to self-defence did not excuse the unnotified laying of mines since the international obligation to notify international shipping of the existence of a minefield was *erga omnes*.[35] Note that the use of force against Nicaragua could conceivably have been justified by reference to a right to collective self-defence. The laying of the mines could not be justified on these grounds because the US had breached its obligations to Nicaragua and the rest of the world community.

This is an argument I have not come across before but whatever its merits one would have to question whether it relates to aggression at all. It strikes me that Ragazzi is incorrect in saying that there are defences to aggression. Aggression, by definition, is an unlawful use of force. In fact, what the author is discussing are the various defences to the wider prohibition on the use of force of which the minelaying prohibition is part. It is interesting to compare Ragazzi's argument here with that of André de Hoogh in his book, *Obligations Erga Omnes and International Crimes*.[36] De Hoogh adopts a quite different line, distinguishing between international crimes generally and the crime of aggression in particular. De Hoogh's conclusion is that 'only ... the crime of aggression can then be considered to relate to a true obligation *erga omnes*'.[37]

[32] Ragazzi, above n 3, 78 (emphasis added).
[33] Ibid 78–9.
[34] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14.
[35] Ibid 269.
[36] André de Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (1996).
[37] Ibid 398.

Elsewhere, Ragazzi discusses the prohibitions on slavery (one of the oldest supernorms), racial discrimination (an obligation *erga omnes* at least when it rises (or sinks) to the level of apartheid), human rights abuses (*erga omnes* in cases of basic human rights), the duty of non-recognition of illegal uses of force (see Kuwait and, more controversially, East Timor) and the relationship between the concept of *actio popularis* and obligations *erga omnes* (where Ragazzi makes a little too much of the difference between the two). He does not really come to any concrete conclusion here but does shed much light on the nature of these norms.

The author's analysis of genocide is perhaps most topical given the recent debates in Rome about the proposed criminal court's jurisdiction over the crime of genocide.[38] Is there a positive obligation *erga omnes* to prevent and punish the crime of genocide? There is of course a negative obligation to desist from acts of genocide but the establishment of a positive duty would represent a revolution in our understanding of norms *erga omnes* (all negative obligations up to now). The ILC relied on the *Genocide Convention*[39] of 1948 for its decision to give the International Criminal Court inherent jurisdiction over genocide.[40] Ragazzi appears to support this decision when he states that:

> [T]he character *erga omnes* would not be restricted to the prohibition of genocide, but would attach in general to the 'rights and obligations enshrined by the Convention', an expression that would seem to include the obligation to prevent and punish acts of genocide.[41]

It may not be too far-fetched to state that in the absence of a working system of territorial jurisdiction, it would appear that the international community has a duty *erga omnes* to establish a permanent international criminal court.

V CONCLUSION

There is certainly room for further study on the precise relationship between obligations *erga omnes* and other concepts within the international legal order such as international crime and universal jurisdiction.[42] There is no analysis, for example, of the important finding in the *Case Concerning East Timor*[43] that the indispensable third parties doctrine takes precedence over an obligation *erga omnes* in a potential clash between the two.[44] On the other hand, Ragazzi is perhaps over-reliant on World Court jurisprudence and does not provide enough

[38] United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998.

[39] *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 13 January 1951) ('*Genocide Convention*').

[40] ILC, 'Report of the International Law Commission on the Work of Its Forty-Sixth Session' [1994] 2 *Yearbook of the International Law Commission* 38, UN Doc A/49/10 (1994).

[41] Ragazzi, above n 3, 96.

[42] The relationship between crime and obligations *erga omnes* is the subject of book length treatment by De Hoogh, above n 36.

[43] [1995] ICJ Rep 90.

[44] Ibid 102

evidence of state practice to indicate what are the effects of these obligations *erga omnes*.

These are not major reservations though, and it would be churlish to deny that Raggazi has written an absorbing and detailed book. Ultimately, the idea of obligations *erga omnes* may seem esoteric to many non-international lawyers and meaningless to some international lawyers. Nonetheless, the very existence of these norms points to a possible change in the international legal system from one based on bilateralism and consensus to one in which community values play a larger part in the promotion of an international society. Maurizio Ragazzi has made a significant contribution to our understanding of these values.

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