

# *The epistemological foundation of the erga omnes obligations in public international law*<sup>1</sup>

O fundamento epistemológico das obrigações *erga omnes* no direito internacional público

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## ABSTRACT

The present work presents the epistemological foundation for the existence of *erga omnes* obligations in International Law, making use, for that purpose, of the foundationalist theory of epistemology through reductionism to methodological individualism, verifying, first, human nature, then, the nature of Law passing to Domestic Law to, finally, demonstrate that *erga omnes* obligations are *sine qua non* for the existence of International Law, without which it will become a simple political science (international relations), through the bibliographic review and the method inductive.

**KEYWORDS:** International right. Epistemology. Obligations Erga Omnes. Philosophy.

## RESUMO

O presente trabalho apresenta o fundamento epistemológico para a existência das obrigações *erga omnes* no Direito Internacional, socorrendo-se, para tanto, da teoria fundacionalista da epistemologia mediante o reducionismo até o individualismo metodológico, averiguando, primeiro, a natureza humana, em seguida, a natureza do Direito passando para o Direito Interno para, enfim, demonstrar que as obrigações *erga omnes* são *sine qua non* para a existência do Direito Internacional, sem o qual se converterá em simplória ciência política (relações internacionais), mediante a revisitação bibliográfica e o método indutivo.

**PALAVRAS-CHAVE:** Direito Internacional. Epistemologia. Obrigações Erga Omnes. Filosofia.

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## 1. INTRODUCTION

Great arguments, to uphold an intended magnitude, need initially a great foundation from where it can accurately extract the verification of its cornerstone. Therefore, the analysis from an epistemological perspective allows, *de facto or de jure*, to demonstrate that the obligation *erga omnes* is a pillar of International Law.

For this purpose, the present work aims to analyze the *erga omnes* obligations in International Law and goes beyond the simple analysis of how International Courts make decisions. Thus, through an epistemological investigation and by using the reductionism of methodological individualism, it is determined that the *erga omnes* obligation is a fundamental issue for legal science itself to be possible.

Therefore, in the first chapter, it was presented a necessary outline for the comprehension of epistemology, to then investigate the intersection of human nature with law. With these results, the paper investigates the beginning of Domestic Law and the development of International Law and how in each of these phases there is a fundamental pillar on which the existence of *erga omnes* obligations is based onto demonstrate that, without this, International Law would cease to exist following the whims of the power struggle of International Relations.

## 2. AN OUTLINE ABOUT EPISTEMOLOGY:

The mission of categorizing the locus of epistemology, especially its origin, is complex, but in this right lesson it is seen a replicable synthesis:

Epistemology, as a discipline, is a branch of Philosophy that emerged from the 19th century onwards due to the triumph of Science as a successful knowledge. Furthermore, on the one hand, it has increasingly moved away from Philosophy since Galileo in 1640 and, on the other hand, it has become increasingly complex, mainly from the end of the 19th century, but markedly in the last decades of the 20th century until our days. Etymologically, the word epistemology, whose creation is as recent as the discipline it designates, means theory of science (from the Greek *epistêmé* – science; and *logos* – that studies; cf. Ferreira, 2009). According to Blanché (1988, p. 9), the word epistemology "does not even appear in the *Littré*, nor in the *New Larousse illustrated* [...]" and "its appearance in French dictionaries dates from 1906 [...]." The word in Portuguese derives from the French *epistemologie* and has appeared in Brazilian dictionaries at least since the early 1940s [see To Learn More: The word epistemology' in dictionaries].<sup>3</sup>

<sup>3</sup> MENEGAT, Rualdo. **Introdução à Epistemologia**. Universidade Federal do Rio Grande do Sul – Instituto de Geociências Programa de Pós-Graduação em Geociências. Porto Alegre, 2014. P. 09.

Epistemology, therefore, apprehends the mission of evaluating the knowledge ascertained, pursues the dimension of “when studying Law, it predominantly considers the problem of validity, but always in terms of effectiveness and foundation”<sup>4</sup> and “evaluates the integration of a strategy and tactic of a research, while verifying, in these terms, the consistency of the various possible procedures and of the obtained and obtainable results”.<sup>5</sup>

The fundamental chain of evaluation of epistemology is the triad “Justified True Belief”<sup>6</sup> in which the knowledge can be evaluated as:

There are three components to the traditional (“tripartite”) analysis of knowledge. According to this analysis, justified, true belief is necessary and sufficient for knowledge.

**The Tripartite Analysis of Knowledge:**

S knows that *p* iff

- i. *p* is true;
- ii. *S* believes that *p*;
- iii. *S* is justified in believing that *p*.<sup>7</sup>

Even if the aforementioned triad often leads to erroneous conclusions, it nevertheless allows for a minimal margin of knowledge analysis, because “Although most agree that each element of the tripartite theory is necessary for knowledge, they do not seem collectively to be sufficient”<sup>8</sup> and, hence, more than a perfect research structure – an impractical claim to the human capacity for knowledge itself, very well explained by Hayek – it provides a structure capable of allowing the tracking of the knowledge presented which, without this, dogma becomes science and fundamentalism becomes argument. Thus, it advocates that the importance of the authority of the argument over the argument of authority.

For this, it relies on two main chains of analysis that are foundationalism and coherentism, that is, foundationalism is marked by the understanding that justifications are found “According to foundationalism, our justified beliefs are structured like a building: they are divided into a foundation and a superstructure, the latter resting upon the former”<sup>9</sup>. On the Other hand, coherentism presents

<sup>4</sup> REALZE, Miguel. **Filosofia do direito**. 20. Ed. – São Paulo: Saraiva, 2002. P. 300.

<sup>5</sup> MENEGAT, Rualdo. **Introdução à Epistemologia...** *op. Cit.* P. 19.

<sup>6</sup> ICHIKAWA, Jonathan Jenkins; STEUP, Matthias. The Analysis of Knowledge. **Stanford Encyclopedia of Philosophy**. Califórnia: U.S.A, 2017. – Disponível em: <https://plato.stanford.edu/entries/knowledge-analysis/#KnowJustTrueBeli> – Acesso em: 09/10/2021.

<sup>7</sup> ICHIKAWA, Jonathan Jenkins; STEUP, Matthias. The Analysis of Knowledge. **Stanford Encyclopedia of Philosophy...** *op. Cit.* Idem.

<sup>8</sup> ICHIKAWA, Jonathan Jenkins; STEUP, Matthias. The Analysis of Knowledge. **Stanford Encyclopedia of Philosophy...** *op. Cit.* Idem.

<sup>9</sup> STEUP, Matthias; NETA, Ram. Epistemology. **Stanford Encyclopedia of Philosophy**. Califórnia: U.S.A, 2020. – Disponível em: <https://plato.stanford.edu/entries/epistemology/#Foun> – Acesso em: 09/10/2021.

evaluations where “According to coherentism, this metaphor gets things wrong. Knowledge and justification are structured like a web where the strength of any given area depends on the strength of the surrounding areas.”<sup>10</sup>.

Its clearest illustration<sup>11</sup> demonstrates two ways of seeing the world about methods of assessing cognitive success (knowledge) the first being foundationalism as progression from a common base while coherentism presents no bases but circular confluences that radiate horizontally and vertically as reciprocal feedback from chain of foundations.

In this way and having illustrated the minimum essence for the understanding of epistemology as “epistemology seeks to understand one or another kind of cognitive success (or, correspondingly, cognitive failure)”<sup>12</sup>, it imposes, synthetically, to understand that the present work will be based on the foundationalist understanding through methodological reductionism<sup>13</sup> to demonstrate, finally, that *erga omnes* obligations exist and are the essence of International Law.

### 3. FROM THE HUMAN NATURE TO THE LAW NATURE:

Having overcome the necessary introductions to the epistemological dimension, as well as the fundamental link of this work by its reductionist framework under the thresholds of methodological individualism, that is, the starting point in the human being in its maximum unit, it is necessary to understand who is, then, the human being, and from there, be able to assess which category of law emerges from the coexistence of people, because remembering Rousseau's lesson<sup>14</sup> that if human nature were different from what another type of government is, it would have pleased him .

The return to human nature is fundamental not only because it frequently invokes its relationship with the social contract (the reason why the greatest names related to the subject emerge from contractualists), but also for the reason that it understands the fundamental role of Law in

<sup>10</sup> STEUP, Matthias; NETA, Ram. Epistemology. *Stanford Encyclopedia of Philosophy...* op. Cit. *Idem*.

<sup>11</sup> Henrique. **Epistemologia(s) em Direito Internacional**. Maastricht, 2021. – Disponível em: [https://www.academia.edu/51140764/Epistemologia\\_s\\_em\\_Direito\\_Internacional](https://www.academia.edu/51140764/Epistemologia_s_em_Direito_Internacional) -- Acesso em: 22/12/2021.

<sup>12</sup> STEUP, Matthias; NETA, Ram. Epistemology. *Stanford Encyclopedia of Philosophy...* op. Cit. *Idem*.

<sup>13</sup> “reductionism leads to the first unity of society of politics, to the individual. Methodological individualism is the only real unit of analysis; they are the individuals, only they have interests, wills, and only they act. Collective entities, such as states, parties, groups, movements, societies, countries, do not act, do not have interests or wills. Taking this to extreme consequences, collective entities do not exist at all. They are always and only an agglomeration of different individuals; when members of a particular group change, interests and actions can change.” (GIANTURCO, Adriano. **A ciência política: uma introdução**. 3ª ed. – Rio de Janeiro: Forense Universitária, 2020. p. 3).

<sup>14</sup> “If there were a people of gods, it would be democratically governed, but men are not suited to such a perfect government.” (ROUSSEAU, Jean-Jacques. **Do contrato social**. Trad. Pietro Nasseti, 3ª Ed. – São Paulo: Martin Claret, 2010. p. 66).

society, overcoming the common practice of the philosophers when stopping strictly at the relationship between the state with the family<sup>15</sup> and understanding, thus, that it is in the individual that is the starting point of all analyzes, as Aristotle well recalled “Because the City is by nature a plurality, and if the maximum unity is aspired, from City to family, and from family to individual”<sup>16</sup>

At this point, then, three currents are highlighted: (i) Hobbes and *homo hominis lupus*; (ii) Rousseau and corrupted society; and (iii) Locke and the two powers. The syntheses of ideas can be marked by the pessimist seeing human nature as essentially bad, the optimist seeing it as essentially good, and the realist seeing it as neutral, holding within itself both the powers of life and death.

Thus, Hobbes will consign:

Everything that is valid for men in time of war, when some are enemies of others, is also valid during the time when men live with no other security than that of their own strength and of their own creativity. [...] Anyone who does not consider these things may find it strange that Nature separates men and makes them prone to attack and destroy each other. It may happen that, not trusting this inference, based on passions, man wishes to see it confirmed by experience. Let him take care, then, to consider with himself: when he undertakes a journey, he arms himself and tries to go with him; when he retires, he closes the doors of his house and, even when he is inside, he locks the doors of his house well and, even when he is inside, he locks chests and cupboards; all this despite the knowledge that there are laws and public officials armed to defend him and to retaliate against any injury that may be done to him. .<sup>17</sup>

Rousseau will defend:

The first one who, when enclosing a piece of land, had the audacity to say this is mine and found people simple enough to believe him was the true founder of civil society [...] The spirit and the heart are exercised, humans continues to be domesticated, the connections are

<sup>15</sup> In this sense, the lessons are repeated: “The family is the oldest of societies, and also the only natural one [...] the family is therefore, if you will, the primitive norm of political societies” (ROUSSEAU, Jean-Jacques. **Do contrato social... Op. Cit.** P. 18). “It is clear, therefore, that a large family, if it does not form part of any state, is in itself, as regards the rights of sovereignty, a small monarchy, whether that family is formed by a man and his children, or by a man and his family, his servants, or, finally, by a man, his children and his servants, the father or the lord being sovereign” (HOBBS, Thomas, 1588-1679. **Leviatã, ou Matéria, forma e poder de um Estado eclesiástico e civil.** Trad. Rosina D’angina. 2. Ed. – São Paulo: Martin Claret, 2012. p. 165). “The second part of the definition of Republic that we postulate concerns the family, which is the true source and origin of every Republic and the main member of this Republic.” (BODIN, Jean, 1530-1596. **Os seis livros da república: livro primeiro.** Trad. Carlos Orsi Morel. – 1. Ed. – São Paulo: Ícone, 2011. p. 81).

<sup>16</sup> ARISTÓTELES. **Política.** Trad. Pedro Constantin Tolens. – São Paulo: Martin Claret, 2010. P. 79.

<sup>17</sup> HOBBS, Thomas, 1588-1679. **Leviatã, ou Matéria, forma e poder de um Estado eclesiástico e civil... op. Cit.** P. 105.

Alongside Hobbes will be the first phase of Freud: “[...] the human being is not an affable and loveless creature who, at most, is capable of defending himself when attacked, but he can count on a quota. considerable aggressive tendency in his impulse endowment. For this reason, the neighbor is not only a possible helper and a possible sexual object, but also a temptation to satisfy aggression in him, to exploit his labor force without rewarding him, to use him sexually without his consent, to appropriate him. of his possessions, humiliate him, cause him pain, torture and kill him. *Homo hominis lupus*; who, from all the experiences of life and history, will have the courage to challenge this maxim?” (FREUD, Sigmund, 1856-1939. **O mal-estar na cultura.** Tradução Renato Zwick; revisão técnica e prefácio de Márcio Seligmann-Silva. – 2ª ed. – Porto Alegre, RS: L&PM, 2015. P. 124/125).



extended, and the ties are tightened. Men begin to gather in front of huts or around a large tree: singing, dancing, true children of love and leisure, become entertainment, or rather, the occupation of idle men and women grouped together. **Each one begins to look at others and to want to be looked at himself, and public esteem has taken a toll.** Whoever sang or danced the best, the most beautiful, the strongest, the most skillful or the most eloquent, became the most respected, this was the first step both towards inequality and towards vice: from these first preferences were born on the one hand, vanity and contempt; on the other, shame and envy. The fermentation caused by these new germs finally produced compounds fatal to happiness and innocence.<sup>18</sup>

And in between both, Locke comprehends:

[...] we must take into account the natural state in which men find themselves, this being a state of total freedom to order them to act and regulate their possessions and people **according to their convenience, within the limits of the law of nature, without asking permission or depending on the will of any other man.** [...] However, even in the case of a state of freedom, it does not imply licentiousness: despite having man in that state of incoercible freedom to dispose of his own person and possessions, he does not have to destroy himself or anyone else. creature in his possession, unless a more noble end than mere conservation requires it. The state of nature has a law of nature to govern it, which obliges everyone [...] Finally, I agree that civil government is the correct remedy for the inconveniences of the state of nature, which must certainly be great, if the men must be judges in their own cause.<sup>19</sup>

The three perceptions of human nature are mutually exclusive: it is possible to defend only one and as I have already had the opportunity to defend it at another time<sup>20</sup>, it is impossible to adhere to the Lockean and Rousseauian dimensions, since they would imply the absolute lack of coercive character of law and, still, they would mark the obsolete situation of the legal system to regulate angels.

The thesis that society corrupts human nature is undone by the simple observation of propaedeutic logic, because if human nature was good, its internal forces of existence would impose the birth of a society that is also good and, thus, only the existence of narcissistic elements - evil – such as those described by Rousseau himself (and, moreover, evidenced in his own contradiction when he emphasizes that democracy does not belong to men, but to the gods).

<sup>18</sup> ROUSSEAU, Jean-Jacques, 1712-1778. **Discurso sobre a origem e os fundamentos da desigualdade entre os homens.** Trad. Paulo Neves. – Por Alegre: L&PM, 2014. P. 161.

<sup>19</sup> LOCKE, John. **Segundo tratado sobre o governo.** Trad. Alex Marins. – São Paulo: Martin Claret, 2011. P. 15,16 e 20.

Alongside Locke is Freud's second phase: “human instincts are only two kinds: those that tend to preserve and unite [...]; and those who tend to destroy and kill” and, correctly, complement: “if the desire to join the war is an effect of the destructive instinct, the most obvious recommendation will be to oppose its antagonist, Eros. Everything that favors the strengthening of emotional bonds between men must act against war.” (FREUD, Sigmund; EINSTEIN, Albert. **Um diálogo entre Einstein e Freud: por que a guerra?** Apresentação de Deisy de Freitas Lima Ventura, Ricardo Antônio Silva Seitenfus. Santa Maria: FADISMA, 2005. P. 38 e 42).

<sup>20</sup> DITÃO, Ygor Pierry Piemonte. *Homo Hominis Lupus: uma reinterpretação do dano moral.* **Comissão de Filosofia do Direito da 125ª Subseção da OAB/SP.** 2021.

In Locke there is no greater luck, when, in fact, what Locke calls control by Natural Law, is nothing more than human reason that, however, lives in eternal conflict with the primary appetites of nature (hunger, lust, thirst) and because they are more intense than rationality, they always win. Hence, there is only one evil power and one good resistance originated from the existing rationality and social development – especially when society is formed – to control the power and to not exist there are two powers that appear in a lottery game.

For these reasons, what emerges is that the Hobbesian position is the only one capable of correctly explaining human nature that sees its most visceral instincts be overcome by the limits of reason. Secondly, this position explains the nature of Law as a science and social institution<sup>21</sup> of control of these visceral forces according to the limits that reason applies to coexistence in its perpetual struggle for peaceful and harmonious coexistence in the delicate balance of existing resources.

At this stage of the debate, another dispute arises that, coincidentally, is also marked by the existence of three currents that will mark the existence of an inextricable link with the three currents on human nature that Miguel Reale perfectly summarized:

There are three different positions in the face of the relationship between Law and force: a theory imbued with absolute ethics, which maintains that Law has nothing to do with force, not arising or being realized thanks to the intervention of public power. According to the adherents of this doctrine, with regard to Law, there would be the same incompatibility as there is with Morals. This theory, as can be seen, idealizes the legal world, losing sight of what happens in society.

In a diametrically opposite field, we have the theory that sees in Law an effective expression of force. For Jhering, one of the greatest jurists of the past millennium, Law is reduced to “norm + coercion”, in what was enthusiastically followed by Tobias Barreto, when he defined it as “organization of force”. His reckless confrontation of the right to “cannon fodder” became famous, which must be attributed to the polemical impetus that snatched that great spirit.

According to this conception, we could define *Law as the coercive* ordering of human conduct. This is an incisive definition of Law given by the great contemporary master, Hans Kelsen, who, over ninety years old, has always remained faithful to his principles of strict normativism. [...] However, what is true in the doctrine of coercion is the verification of the compatibility of law with force, which gave rise to a theory that puts the problem in more rigorous terms: it is the theory of coercibility, according to which *Law is the coercible* ordering of human conduct.

The difference is only in an adjective, but it is fundamental. For some, force is always present in the legal world, it is immanent to it, and therefore inseparable from it. For others, coercion in law is not effective, but potential, representing a second line of guarantee for the implementation of the norm, when the reasons that commonly lead interested parties to comply with it are shown to be insufficient.<sup>22</sup>

<sup>21</sup> O Direito é, pois, um conjunto de estudos discriminados; abrange um tronco com vários ramos; cada um desses ramos tem o nome de disciplina”. (REALE, Miguel, 1910. **Lições preliminares de direito** / Miguel Reale – São Paulo: Saraiva, 2002. P. 04).

<sup>22</sup> REALE, Miguel, 1910. **Lições preliminares de direito...** op. Cit. P. 47/48.

In conclusion, there are: (i) the *law as coercive*; (ii) *law as ethics*; (iii) the *law as coercible*. The connections are evident: Hobbes will align himself with the first current of Law as coercive, while Rousseau will go hand in hand with ethics and Locke, by exclusion, with Law as coercive, because, in synthesis, the coercive dimension can only exist where the human behavioral basis allows the existence of the two powers of Locke (or of the second phase of Freud) good and bad and, thus, has its potential force, but not immediate. In the second theory of ethics, only Rousseau's optimistic position can be justified by disconnecting the force of law and, finally, the third sees in Hobbes its ally, since force becomes obligatory and permanent where the human inclination to its reciprocal destruction by the pursuit of their primary appetites, thus presenting the fundamental elements to understand the justification of *erga omnes* obligations in International Law.

## 5. THE PILLARS OF THE ERGA OMNES OBLIGATIONS IN INTERNATIONAL LAW: THE FOUNDATION OF LAW

Understanding, therefore, human nature and the nature of Law, it is necessary to proceed to Law and demonstrate that *erga omnes* obligations are at the foundation of Law. Without it the Law itself would be a fiction such the beautiful ones from Homer, but as effective as its epics and, for this reason, it is necessary to follow some stages of its foundational pillars that will present, finally, the connection and the justification of the cognitive success obtained.

The first foundational pillar is, therefore, in comprehend that human nature will not pursue social peace without the existence of coercive force, that is, by adhering to the Hobbesian thesis of *homo hominis lupus*, and, consequently, refuting the other positions, it is clear that the ethicist theory linked to Rousseauian perception of good human nature, while the theory of coercibility to the Lockean perception of nature of neutral character are incapable of explaining society as it presents itself and, thus, marks the recognition of the Hobbesian theory in which law can only be understood as a set of norms that regulate society with coercive force (latent and powerful, that is, spontaneous compliance with the risk of sanction and forced compliance with coercion).

Considering, therefore, the first pillar of the foundation that man is evil by nature and his appetites, as a rule, exceed rational limits, it becomes clear that the second pillar of the theory of *erga omnes* obligations rests on the essence of the law whose synthesis it appears that the law is a normative set with coercive force. From that moment onwards we have a rupture of the phenomena,



having, on the one hand, political science and, on the other hand, the law. The first, that is, political science is marked by “the aspiration to participate in power or to exert influence over the distribution of power, whether between States or within a State, among the various human groups that the State encompasses”<sup>23</sup> and, therefore, “the common objective of all political activities is the possession and maintenance of political power”<sup>24</sup>, that is, political science has as its object the use of power, while, in the second dimension, “law is, under prism, a protective mantle of organization and direction of social behavior”.<sup>25</sup>

At this point, it is not even necessary to investigate contractualist or naturalist theories of the formation of society and the state, since understanding the finalistic dimension of law (regulating society with coercive force) and its distance from political science<sup>26</sup> (struggle for power and social regulation) and starting from the individual premise of human nature up to the collective maximum of international society, it is possible to move on to the next pillar of law (third pillar) that is observed in the second degree of regulation, which is the domestic law<sup>27</sup> responsible for the regulation of a certain territory.

Finally, what can be deduced is that the encounter between human nature in its inter-social coexistence and the legal nature that emerges from the regulation of this human nature leads to the development of rules that progress from the minimum nucleus of society to its format of consolidation of the State, as Bodin will recall:

Every republic, everybody and college and every home is governed by command and obedience, when the natural liberty that each one has to live at his pleasure is placed under the power of another. And every power to command another is public or private. Public power resides in the sovereign who gives the law or in the person of the magistrates, who bend under the law and command other magistrates and individuals. The command belongs to the heads of families and to bodies and colleges in general and, in each of them in particular, to the smallest part of the whole body, in the collective name.<sup>28</sup>

<sup>23</sup> WEBER, Max, 1864-1920. **Ciência e política: duas vocações** / Max Weber, trad. Marco Antônio Casanova. – São Paulo: Martin Claret, 2015. P. 63.

<sup>24</sup> GIANTURCO, Adriano. **A ciência política: uma introdução** / Adriano Gianturco. – 3. Ed. – Rio de Janeiro: Forense Universitária, 2020. P. 87.

<sup>25</sup> REALE, Miguel, 1910. **Lições preliminares de direito...** *op. Cit.* P. 05.

<sup>26</sup> In this sense, on the difference between politics and law “arts that promote in the long term a certain well-being, the sole objective of all politics” (VOLTAIRE, **Dicionário filosófico** / Voltaire; trad. Pietro Nassetti. – Porto Alegre: Martin Claret, 2012. p. 423) and, also, the philosopher's acid comments about his pessimism towards Natural Law and his inquiry into the question of force.

<sup>27</sup> “Direito nacional, direito positivo de um determinado Estado” (MAGALHÃES, Humberto Piragibe; MALTA, Christóvão Piragibe Tostes. **Dicionários jurídico.** / Humberto Piragibe Magalhães e Christóvão Piragibe Tostes Malta. – 3ª ed. – Rio de Janeiro: Edições Trabalhistas S.A., 1999. P. 343

<sup>28</sup> BODIN, Jean, 1530-1596. **Os seis livros da república: livro primeiro...** *op. Cit.* P. 91.

A natural division appears between derogable norms that the parties, and everyone can, dispose of according to their will and situation, as well as a group of norms whose availability is not known, being imperative to all (which is divided into several groups as norms, cogent and non-cogent or imperative and dispositive norm), comprising, in a very tight synthesis, that "The norm is imperative because it receives a special valuation from the legal system to which it belongs"<sup>29</sup>, while the other norms mark a much more flexible character very close to the dimension public/private necessary for the articulation of other social segments such as family, associations, parties, unions etc.

Its proof materializes at the beginning of the nation-state with the dexterity of its theoretical founder (in unveiling sovereignty) Bodin:

But this should not take place in the other private houses, so that public laws are as common as possible. And yet it must not easily tolerate that family treaties derogate from the dress of the country, let alone the general laws and ordinances. And if any is done against the garments and ordinances, the successors attached to nor obligated [...] who are treated like families that care for children not treated by the laws, just as they are being treated like the treaties to the families of sovereign princes.<sup>30</sup>

The nature of cogent or imperative norms, that is, norms that cannot be derogated from, both between individuals and the holders of power, is not the result of domestic law and its centralized coercive force, but of the very essence of law, which has a character of sets of norms with coercive force. Without this fundamental, non-derogable and imperative core to all, the law would not be a set of rules with a coercive character, but only coercible or merely ethical, since its full and total derogability would allow the mutability to social, personal or and, therefore, the very evolution of human nature, of the society and the state that lead to the realization of an internal structure formed by an untouchable core to particular vocations, presenting themselves as *erga omnes* obligations.

After the phase of mandatory/cogent internal norms, it is possible to understand the nature of international law in its fourth fundamental pillar, which is a set of norms that regulate international society having, by its own consequence, a set of rules that cover conventional derogable norms set within international society, as well as norms that are not derogable, inherent in the relationship of

<sup>29</sup> FRIEDRICH, Tatyana Scheila. **Norma imperativa: a conexão dos direitos humanos com o direito internacional privado** / Tatyana Scheila Friedrich. – (Tese) Doutorado Universidade Federal do Paraná – Curitiba, 2005. – Disponível em:

<https://acervodigital.ufpr.br/bitstream/handle/1884/3045/tese%20Tatyana%20Friedrich.pdf;jsessionid=5DC421A1EDE556D287DD3C70802965A9?sequence=1> – Acesso em: 05.10.2021. P. 250.

<sup>30</sup> BODIN, Jean, 1530-1596. **Os seis livros da república: livro primeiro...** *op. Cit.* P. 89.

different state/societies in a new scenario of alterity unknown to states/societies seen in their own right.

Remembering that:

The low level of technology of the !Kung is compensated by the extreme ability they have for the tasks linked to their survival and their deep connection and adaptation to the environment. Their way of life allows a lot of leisure, leading to a deep socialization: visits between members of neighboring camps are frequent and carried out with noisy manifestations of pleasure.<sup>31</sup>

This is because the law is formed by the composition of concentric circles marked by the existence of the non-derogable and imperative core of *erga omnes* character and of a malleable externality free to the subsequent codification of the other social agents according to their preferences, but limited by the *erga omnes* foundational guidelines, without which Law would be a fiction.

In these concentric circles, International Law specifically, and Law as a whole, has a flexible normative field that the normative mutation carried out by the parties involved (domestic and international law) that does not lead to the erosion of legal science, while it has a rigid internal core (which is cannot be confused with a fundamental norm as in Constitutional Law) which may have distinct groups of values and legal assets over time, but will always have some minimum rigid core. The absence of this core will mean the erosion of the law and its conversion from an analysis

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<sup>31</sup> PINSKY, Jaime. **As primeiras civilizações**. 25ª ed. – São Paulo: Contexto, 2018. In the same sense, moreover, it will recall another work: “For a vivid indication of how persons from even the most diverse cultures can relate to one another in a peaceful, predictable, and mutually beneficial fashion, it is difficult to top Herodotus’s description of ‘silent trading’ between the Carthaginians and an unnamed North African tribe in about the sixth century BC. When the Carthaginians arrived in the tribe’s area by ship, they would unload a pile of goods from their vessels, leave them on the beach and then return to their boats and send a smoke signal. The natives would then come and inspect the goods on their own, leave a pile of gold, and retire. Then the Carthaginians would return; and, if satisfied that the gold represented a fair price, they would take it and depart. If not satisfied, they would again retire to their ships; and the natives would return to leave more gold. The process would continue until both sides were content, at which point the Carthaginians would sail away with their gold, without a word exchanged between the two groups. ‘There is perfect honesty on both sides’, Herodotus assures us, with no problems of theB or con. ict (Herodotus, Histories, p 336).” (NEFF, Stephen C. **A Short History of international law**. The European Journal of International Law Vol. 29 no. 1. 2018. Published by Oxford University Press), until writing developed and then, “The first written document that is known in history was celebrated 3,200 years before Christ, between the cities of Caldeas de Lagash and Umma, when, after a war, the groups solemnly established the borders between the two cities” (MENEZES, Wagner. **Ordem Global e Transnormatividade**. Ijuí: Ed. Unijuí, 2005. p. 32) and, in a similar vein, “The first sure record of the conclusion of a treaty, naturally bilateral, is that of the peace between Hattusil III, king of the Hittites, and Ramesses II, Egyptian pharaoh of the 19th dynasty. This treaty, putting an end to the war in Syrian lands, at a time between 1280 and 1272 BC, provided for perpetual peace between the two kingdoms, alliance against common enemies, trade, migrations, and extradition. It is worth noting the good omen that this ancient pact should, who knows, have projected on the path of conventional international law: the provisions of the Egypt-Hittite treaty seem to have been fulfilled to the letter, marking successive decades of peace and effective cooperation between the two people; and, in the history of Egypt, from that point onwards of the 19th dynasty, there was a certain refinement of customs, with projection in the very use of the language, due to the Hittite influence. The two great civilizations would later enter into a process of decay, without any news of any breach of commitment”. (REZEK, José Francisco. **Direito internacional público: curso elementar**. 15. ed. rev. e atual. – São Paulo: Saraiva, 2014. p. 23).

exclusively phenomenological and will convert law into a political science to analyze the structures and power struggles and no longer the normative character of the law that regulates social relations in international society.

The foundational chain, therefore, of Law and the existence of *erga omnes* obligations proceeds as follows: (a) there is an inaugural basis which is the conclusion of human nature that tends to Hobbes' dimension of using whatever means to achieve what he wants and, consequently, the need for a coercive tool that is able to control the atomized force of agents through the organization of collective force; (b) the creation of two normative groups: 1st the inderogable and imperative norms without which the system as a whole is incapable of existing and 2nd the derogable and malleable norms, without which the system would plaster itself in such a way that it would become innocuous, obsolete and despotic (which covers domestic law); and, (c) transcending the international space, one sees the existence of a group of non-derogable and imperative norms called obligations *erga omnes* without which the international normative space would only be anarchy and a group of conventional norms available according to the need for utility of international subjects in regulating their coexistence in international society.

The conclusion (fifth pillar), therefore, is that the hypothesis of an International Law without norms of an *erga omnes* character, that is, non-derogable norms, is a nonsense situation, since the absence of a fundamental minimum core of mandatory force is the annihilation of the very concept of law that predisposes to a fundamental part that is the coercive force and another that regulates human conduct and without that it would end up being converted into political science in the analysis of questions of power or sociology in the factual observation of social events.

For this reason, it is possible to conclude that:

This approach has made it possible to highlight the novelty introduced (or, at least, confirmed and further strengthened) by the concept of obligations *erga omnes*, namely the idea that today international law does not only govern the reciprocal relations between States, but also involves considerations going beyond the mere sum of their individual interests.<sup>32</sup>

Without this investigation from human nature, it would be impossible to explain why one norm is derogable and another is not. This would cause a wrong understanding of Internal Law, because one would think that there is a normative group of free manipulation by the holder of sovereign power, as well as in International Law, it would be thought that the conventionality of

<sup>32</sup> RAGAZZI, Maurizio. **The concept of international obligations erga omnes**. UK: Oxford University Press, 1997. P. 218.

countries would give them absolute normative freedom to even attack the essential foundations of peaceful coexistence.

International Law has obligations that emerge from different environments such as (i) conventional norms<sup>33</sup>; (ii) customary rules<sup>34</sup>; (iii) bilateral rules<sup>35</sup>; and, finally, (iv) erga omnes effectiveness rules<sup>36</sup>, where latter is subdivided into: (iv.1) universal<sup>37</sup> and (iv.4) non-universal<sup>38</sup>, as structured by Felipe Arady Miranda<sup>39</sup>, endorsed, including by the ILC project of responsibility of states in International Law, which establishes a gradation of violations in its statute 40:

SERIOUS VIOLATIONS OF OBLIGATIONS ARISING FROM IMPERATIVE RULES OF GENERAL INTERNATIONAL LAW

Art. 40. Application of this Chapter:

1. This Chapter applies to the liability that is entailed by a serious breach by a State of an obligation arising from a peremptory norm of general international law.

<sup>33</sup> “international conventions, whether general or special, which establish rules expressly recognized by the disputing states” (ACCIOLY, Hildebrando. **Manual de direito internacional público** / Hildebrando Accioly, G. E. do Nascimento e Silva, Paulo Borba Casella. – 23. Ed. – São Paulo: Saraiva, 2017. p. 143).

<sup>34</sup> “International custom is the set of rules consecrated by long use and observed in the international order as mandatory” (SILVA, Roberto Luiz. **Direito internacional público** / Roberto Luiz Silva. – 4. Ed. – Belo Horizonte: Del Rey, 2010. p. 132).

<sup>35</sup> “In bilateral rules, the State has an obligation towards another State, establishing a link only between them, without any relationship of a third State.” (MIRANDA, Felipe Arady. A universalidade das normas internacionais sobre direitos humanos... *op. Cit.* P. 981).

<sup>36</sup> “the fundamental rules of public international law.” (FROWEIN, Jochen A. Obligations erga omnes. / Jochen A. Frowein. – Max Planck Encyclopedias of International Law, 2008.p. 4)

<sup>37</sup> “Universal norms are those that bind all States of the International Community.” (MIRANDA, Felipe Arady. A universalidade das normas internacionais sobre direitos humanos... *op. Cit.* P. 983).

<sup>38</sup> “Non-universal erga omnes effectiveness norms are norms established by convention of the parties or established by a regional custom. Therefore, they only bind those who have agreed on the subject, or those who are bound by a customary rule in a given region. It is a relative erga omnes effectiveness, as the norm is only valid among a certain group of States, unlike the universal norm, which covers all existing States.” (MIRANDA, Felipe Arady. A universalidade das normas internacionais sobre direitos humanos... *op. Cit.* P. 984). – A clear example is the thesis of Solidarity in Latin America by Wagner Menezes: “In short, given a set of information brought objectively by research and by the recognition of international society itself, it is possible to conclude that contemporary international law has elements and was built, in part, by the influence of the model of international relations developed in Latin America. For this purpose, it offers international society a set of principles, doctrines and institutes that were incorporated into the doctrinal study of International Law and in a practical way in the regional schemes of state representation that followed the model created in Latin America, as was the Solidarity Principle that it reshaped international relations and society as a whole from its positivization on the American continent, initially having a sense of defensive fraternity based on ties of equality between States. A series of economic, social and political factors, however, changed the initial meaning of the Principle of Solidarity, especially in inter-American relations. At the same time, the principle has been rescued, in its initial sense, to support international relations between States, mainly in the process of regional integration, on the other hand, it contributes to the resizing of these relations as international society becomes universal, as seen in the last chapter” (MENEZES, Wagner. **A contribuição da América Latina para o Direito Internacional: o Princípio da Solidariedade** / Wagner Menezes. – Tese (Doutorado) – Programa de Integração da América Latina da Universidade de São Paulo (PROLAM/USP) – São Paulo, 2007. p. 239).

<sup>39</sup> MIRANDA, Felipe Arady. A universalidade das normas internacionais sobre direitos humanos. / Felipe Arady Miranda. – **RIDB, Revista do Instituto de Direito Brasileiro**, ano 1 (2012), n° 2.



2. A breach of such an obligation is serious if it involves the flagrant or systematic breach of the obligation by the responsible State.<sup>40</sup>

Furthermore, international jurisprudence also goes toward the direction of - even if between the natural mishaps and scares of the absence of an epistemological and in-depth analysis made by judges - to establish a fundamental dimension of *erga omnes* obligations incapable of being derogated by bi or multilateral conventionality, mapping, currently, a minimal structure formed by the following elements:

The separate analysis of the four examples of obligations *erga omnes* given by the International Court in its dictum, and their comparison with one another, led to the identification of five common elements which were summarized as follows:

- (1) all four examples relate to narrowly defined obligations;
- (2) all four examples are essentially those of prohibitions rather than positive obligations;
- (3) all four examples are those of ‘obligations’ in the strict sense of the term, to the exclusion of other fundamental legal conceptions;
- (4) all four examples are those of obligations deriving from rules of general international law belonging to *jus cogens* and codified by international treaties to which a large number of States have become parties, and
- (5) all four examples are those of obligations instrumental to the main political objectives of the present time, which in turn reflect basic moral values.<sup>41</sup>

Finally, what is understood is that the existence of cogent norms in International Law is not only compatible with its own structure, but it is *sine qua non* for International Law to not become International Relations, since the cogent norm itself can vary in time inherent to the structure that

<sup>40</sup> Projeto da Comissão de Direito Internacional das Nações Unidas sobre Responsabilidade Internacional dos Estados. – Tradução: Aziz Tuffi Saliba. – Disponível em: <https://iusgentium.ufsc.br/wp-content/uploads/2015/09/Projeto-da-CDI-sobre-Responsabilidade-Internacional-dos-Estados.pdf> -- Acesso em: 05.10.2021.

<sup>41</sup> RAGAZZI, Maurizio. **The concept of international obligations erga omnes...** *op. Cit.* P. 215. In this sense, it is important to bring up some jurisprudential examples to illuminate without boring: “In the Barcelona Traction Case for instance the ICJ described obligations *erga omnes* in the following terms:

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination (para. 34; see also → Aggression; → Genocide; → Slavery; → Racial and Religious Discrimination). [...] In the East Timor Case and in the Israeli Wall Advisory Opinion (paras 155–159) the ICJ qualified as obligations *erga omnes* the obligation to respect the right of self-determination as well as certain obligations under → international humanitarian law. [...] In the Israeli Wall Advisory Opinion the ICJ circumscribed the obligations of third States as follows: Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention (para. 159; See also → Jerusalem; → United Nations Charter; → Self-Determination”. (FROWEIN, Jochen A. **Obligations erga omnes**. Max Planck Encyclopedias of International Law, 2008, p. 02/03).

precedes it. Because “the scope of action of the norm changes in the international context; increases the dispersion of its creation and application, but without reaching its nature”<sup>42</sup>, but its existence cannot be excluded, since the structure proper to the normative category of International Law cannot completely departed from the minimum structure of Law in itself of a set of norms that regulates society with coercive force and, therefore, enjoys an imposing and obligatory fundamental nucleus for all: this is the DNA of the *erga omnes* obligations of International Law, the Law itself as a legal science.

## 5. CONCLUSION:

In order to overcome the simple opinionated consideration – as some International Courts even do – of considering the obligation *erga omnes* normative groups of personal esteem, the present work relied on an epistemological dive into human nature to, then, from there, understand the true function and concept of Law for society, understanding, finally, that essentially evil (Hobbesian) human nature requires the existence of a normative structure of a coercive (and not only coercible or ethical) nature.

With this argument, society expands and the human being integrates a family, a clan until it becomes a State and, thus, the Internal Law appears as a set of rules of a coercive nature that regulates that territory by establishing a group of non-derogable and sovereign rules. leaving the rest to a normative group available by the various social segments that make up that new phenomenon called the state: *e.g.* family, associations, parties, leagues, unions.

This State finds, after its definition *interna corporis*, alterity and in the relationship with other states, it begins to investigate and experience the need to regulate its institutional activity with other countries, thus emerging International Law that, like Internal Law, begins to experience the existence of malleable normative fields accessible to the free regulation and convention of the countries. On the other hand, it is faced with the existence of another group of non-derogable norms that will become the *erga omnes* obligations whose offense implies the immediate need to reparation under penalty of making the continuity of peaceful coexistence between nations unfeasible and impossible: the great mission of International Law.

<sup>42</sup> FINKELSTEIN, Cláudio. **Hierarquia das normas no direito internacional: jus cogens e metaconstitucionalismo**. São Paulo: Saraiva, 2013. P. 121.

Consequently, through a foundational epistemological investigation, it is possible to start from human nature to the relationship between countries and demonstrate that *erga omnes* obligations: (i) exist; (ii) are non-derogable; (iii) without them, International Law itself ceases to exist and becomes International Relations; and (iv) its violation prevents the peaceful maintenance of society as long as it is not repaired, being, therefore, the fundamental mortar of the existence of humanity and of International Law.

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