Book review: Comunità internazionale e obblighi «erga omnes» by Paolo Picone [Jovene, Napoli, 2006, 684 pp, ISBN 8824316018, €35 (p/bk)]

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agree with Professor Treves when he questions the feasibility and opportunity of introducing a distinction between serious and non-serious violations of *jus cogens* rules: indeed, it appears that seriousness characterizes by definition any violation of such fundamental and intransgressible norms.

The last chapter is dedicated to the implementation of international law in the Italian legal order and is without any doubt one of the highlights of the book. Some sections have been completely re-written to take into account Constitutional Law no 3 of 18 October 2001, which amended Article 117 of the Italian Constitution. There is controversy over whether the new version of this provision really confers constitutional rank in the hierarchy of Italian legal sources to treaties ratified by Italy. Professor Treves agrees with those who argue that no significant changes to the system of sources have been introduced by Law no 3/2001 and that constitutional challenges to national laws based on Article 117 (1) of the Constitution should be exceptional (pp 694–95).

Professor Treves's experience as a judge of the International Tribunal for the Law of the Sea since 1996 emerges throughout the work, where frequent references to the case law of the Tribunal and a detailed section devoted to its composition and functioning stimulate the student to get acquainted with the law of the sea. Furthermore, the author's many references to primary sources, often extensively quoted, make the textbook's approach refreshingly pragmatic. The indexes are detailed and useful, and so is the initial bibliographical note. The extensive footnote apparatus containing references to relevant literature and the final table of cases are also praiseworthy. However, a table of treaties and of national legislation probably would have been helpful for the reader.

To conclude, Professor Treves's treatise is a very learned but also very easily readable book that Italian-speaking students, academics and practitioners will not fail to appreciate. It is this reviewer's hope that an edition in English will make it accessible to a broader readership.

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Comunità internazionale e obblighi «erga omnes» by PAOLO PICONE [Jovene, Napoli, 2006, 684 pp, ISBN 8824316018, €35 (p/bk)]

This book is a collection of essays written by Professor Picone since the early 1980s on the controversial issue of *erga omnes* obligations. The author's aim is to demonstrate that international law can be construed in a realistic way, which takes into account the role played by the great powers on the international scene. In his view, what we call the 'international community' is a social entity superior to individual States and the 'guardian' of the general interests of the prevailing socio-economic forces (p 143). Hence, if the international legal order is characterized by the formal (legal) equality of States, the international community, on the contrary, rests necessarily on disequality (pp 145–46).[1] Starting from this premise, the author points out that international law was initially aimed at merely regulating the coexistence of States, but has subsequently developed rules on the cooperation and eventually the interdependence among the different forces. This has led to the decline of the 'contractual' concept of international law in favour of a 'verticalisation' of the normative processes, most evidently shown by the appearance of the concept of *erga omnes* obligations. Such obligations, that impose a conduct enforceable by all States acting *uti universi*, imply that there are interests of the international community as a whole distinct from those of individual States. Professor Picone persuasively holds that *erga omnes* obligations and *jus cogens* provisions are not necessarily the same thing. Indeed, although

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[1] The author further distinguishes the international community as 'source' of law (defined only by the prevailing forces) and the international community as addressee of the law (composed, in this case, by all States): pp 44–45.

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many *jus cogens* provisions do impose *erga omnes* obligations, there might also exist peremptory norms that are bilateral in character (pp 30–33). The author thus argues that international crimes consist of certain (serious) violations of *erga omnes* obligations, and not of *jus cogens* rules (pp 41–42).

In his flamboyant style, the author applies these general views to specific fields of international law, such as international environmental law (in particular the pollution of the marine environment) and international economic law. Most of the essays are, however, devoted to the United Nations and the use of force. In the author's view, in certain cases the link between the international community (as defined above) and an international organization is so strong that the latter can operate not only as an instrument of its Member States but also as a 'material' organ of the former. This happens when the organization is structured so that the forces prevailing in the international community can actually control the organization, and when the organization has been created for the protection of the general interests of the international community as a whole (pp 176–78). According to Professor Picone, the United Nations meets both these requirements and can thus act at the same time as a traditional international organization, entrusted by its members to pursue the purposes defined in its Charter and within the limits contained therein, and as a material organ of the international community for the protection of *erga omnes* obligations according to customary international law. The exercise of new powers by the Security Council, such as the creation of international criminal tribunals,[2] the establishment of peacekeeping operations of the 'second' and 'third' generation, nation-building, international administration of territories and the authorization to use force by States and regional organizations outside any control or direction by the Council itself, must all be seen as manifestations of the latter phenomenon. The Security Council has in particular been employed by States acting *uti universi* well beyond the conditions set up in Chapter VII, in order to endorse interventions that they had already intended to carry out unilaterally for the protection of *erga omnes* obligations. Such use of the UN is envisaged, according to Professor Picone, in an emerging norm of customary international law (p 332).

The author presents an admirable analysis of cases of use of force by States with or without the Security Council's authorization. In his view, Article 2 (4) of the UN Charter applies exclusively to the use of force by States in their reciprocal ('bilateral') relations and does not prohibit the use of force as a countermeasure in response to the violation of *erga omnes* obligations, as those obligations were unknown at the time the Charter was drafted: such countermeasures are thus still regulated by customary international law. Therefore, the legality of the unilateral interventions carried out by States for the enforcement of *erga omnes* obligations since the early 1990s must be assessed in the light of customary international law, and not of the Charter, with the consequence that it is irrelevant whether or not those interventions were authorized by the Security Council or whether or not a subsequent resolution was adopted to expressly or implicitly approve them. Hence, the 1999 Nato Operation 'Allied Force' against Yugoslavia was (at least initially) lawful as it was aimed at enforcing the *erga omnes* obligation to prevent serious violations of human rights (even though it eventually became unlawful because of NATO's conduct during the hostilities), while the 2003 Operation 'Iraqi Freedom' was not motivated by any violation of *erga omnes* obligations and was thus inconsistent with customary international law.[3] The references made by the United States and the United Kingdom to certain Security Council resolutions was nothing but the (attempted) misuse of multilateral institutions to implement unilateral policies, without this having any effect on the legality of the intervention.

[2] The creation of the International Criminal Tribunal for the former Yugoslavia is thus seen by the author as a sanction adopted by the Security Council to react against the violations of *erga omnes* obligations committed by the belligerents in Yugoslavia (p 358).

[3] According to Professor Picone, disarmament is not an *erga omnes* obligation and the links between Iraq and international terrorism were not sufficiently established (pp 490–97). What the author seems to imply is that, for customary international law to justify a forcible reaction, the serious violation of *erga omnes* obligations must be occurring at the time the intervention takes place, as it is well-known that the Saddam Hussein regime had committed serious violations in the past, for instance against Kurds and Shiites.

The non-application of Article 2 (4) to countermeasures adopted by States in response to the violation of *erga omnes* obligations (or, to put it differently, to the commission of international crimes) is confirmed, according to the author, by the fact that Article 51 autonomously and expressly regulates the reaction to the only international crime known when the Charter was drafted (pp 417–19).[4] In Professor Picone's view, the Article 51 model, providing for the primacy of the United Nations in the repression of an international crime and for the unilateral use of force by the victim and also by third States only when the organization is unable to adopt the necessary measures, should be applied to the enforcement of all *erga omnes* obligations.

The book ideally ends where it started, ie with a critical discussion of the International Law Commission (ILC) Articles on State Responsibility. The author regrets the fact that, in the version finally adopted in 2001, the Commission exclusively focused on the relationship between reciprocal rights and obligations and neglected functional powers exercised by States on behalf of the international community (p 608). The ILC Articles have also left unsolved the issue of the link between international crimes and the competences of the United Nations. Professor Picone doubts that the solutions expressly proposed by the Commission are effective: at the end of the day, the most important provision is the saving clause contained in Article 41 (3), which reaffirms the role played by customary international law in regulating the consequences of a serious violation of a peremptory norm and which also necessarily affects the scope of Articles 48 (2) and 54 (pp 636–38). The specific customary regimes allowing all States to use armed force to enforce certain *erga omnes* obligations are thus preserved and the idea of 'international crimes', ie breaches of international law involving more serious consequences than 'ordinary' violations, still permeates the ILC Articles (p 643).

The book usefully reproduces as an appendix the text of the ILC Articles on State Responsibility in their 1996 and 2001 versions. Readers would have probably also benefited from an index, especially considering that, because of its being a collection of essays, some concepts are discussed several times throughout the book. However, the book is far from being repetitive. With its stimulating and challenging pages, often in contrast with the predominant views, it is easy to predict that it will become the *livre de chevet* of all those interested not only in the problem of *erga omnes* obligations, but also in the broader question of the future developments of the international legal order.

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Indigenous Peoples' Land Rights Under International Law: From Victims to Actors by JERÉMIE GILBERT [Transnational Publishers Inc, Ardsley, New York, 2006, 349 pp, ISBN 1-57105-369-7, $115.00 (h/bk)]

Indigenous Peoples' Land Rights Under International Law: From Victims to Actors is a welcome addition to the ever-growing literature on indigenous peoples' rights under international law. Gilbert admirably achieves his main goal 'to provide a comprehensive understanding of the international law approach to indigenous peoples' land rights' (xiii). Gilbert's passion for his subject is palpable and illuminates every page, as do his zeal to expose international law's complicity in indigenous peoples' loss of their territories and tentative hope that international law might now provide some protection of indigenous peoples' lands. The choice of topic is also to be

[4] In Professor Picone's opinion, if Art 2 (4) does not apply to violations of *erga omnes* obligations, then Art 51 is not an exception to the prohibition of the use of force contained in that provision, but rather an autonomous regulation of the reaction to the crime of aggression in order to protect the related *erga omnes* obligation (p 256).

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