

# THE ELUSIVENESS OF ‘INTERDEPENDENT OBLIGATIONS’ AND THE INVOCATION OF RESPONSIBILITY FOR THEIR BREACH

BY PRIYA URS \*

## ABSTRACT

Since the adoption in 2001 of the International Law Commission’s ‘Articles on the Responsibility of States for Internationally Wrongful Acts’, attention has been increasingly drawn to the enforcement by states individually of multilateral obligations. The Commission, for its part, addressed the invocation of responsibility for breaches of such obligations by distinguishing between the respective entitlements of ‘an injured State’, under article 42, and ‘a State other than injured State’, under article 48. In line with this distinction, the existing debate has focused largely on clarifying the entitlement of ‘a State other than an injured State’ to invoke responsibility for breaches of obligations owed *erga omnes partes* or *erga omnes*, in accordance with article 48. In contrast, little or no attention is paid in the discussion to ‘interdependent obligations’, which, while deemed to constitute a subset of obligations *erga omnes partes*, were deliberately placed by the Commission in article 42(b)(ii) as multilateral obligations whose breach was said to injure ‘all the other States to which the obligation is owed’. This article lends necessary clarity to this ‘curious category’ of obligations with a view to the distinction between article 42(b)(ii) and article 48, both of which address breaches of multilateral obligations, but which set out different routes to the invocation of responsibility.

**Keywords:** International Law Commission, state responsibility, *locus standi*, obligations *erga omnes*, obligations *erga omnes partes*, interdependent obligations, integral obligations.

\* Junior Research Fellow in Law, St John’s College, University of Oxford. Email: [priya.urs@sjc.ox.ac.uk](mailto:priya.urs@sjc.ox.ac.uk). I am grateful to Paolo Palchetti, Malgosia Fitzmaurice, Christian Tams, Mamadou Hébié, Jacob Katz Cogan, Miles Jackson and the anonymous reviewers for their comments. Thanks also to the participants at: the workshop in honour of Judge Giorgio Gaja at All Souls College, Oxford (2022); the ASIL Research Forum at the University of Pittsburgh (2023); the ‘Common Interests and Common Spaces’ workshop at the Grotius Centre for International Legal Studies (2023); and the research seminar at the Glasgow Centre for International Law and Security (2024). My thanks to Jessica Sutton for her assistance with the French literature.

## I. INTRODUCTION

Who can invoke the responsibility of a state for the breach of an international obligation? Alongside the institutional responses of international organisations and other treaty-based mechanisms is the invocation of responsibility by states individually, in accordance with relevant treaty provisions or, in their absence, based on the general rules of standing codified by the International Law Commission (ILC, the Commission) in the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). In its final answer to the question, the Commission distinguished between the respective entitlements of ‘an injured State’, under article 42, and ‘a State other than an injured State’, under article 48. Whether responsibility for the breach of an obligation is invoked under article 42 or article 48 falls to be assessed by reference to the ‘character and content’ of the obligation breached and ‘the circumstances of the breach’.<sup>1</sup> Yet it was not the task of the Commission to provide a rigorous classification of obligations to aid the application of the injury-based distinction it drew.<sup>2</sup>

In recent years, the framework proposed by the ILC has been used to support the entitlement of ‘a State other than an injured State’ to invoke responsibility for breaches of multilateral obligations<sup>3</sup>—obligations owed *erga omnes partes* or *erga omnes*<sup>4</sup>—in accordance with article 48(1)(a)-(b) of the ARSIWA. This is presumably a result of the weight of the collective interests underlying obligations owed to ‘a group of States’<sup>5</sup> or ‘the international community as a whole’<sup>6</sup> and the recognition of the limits of

<sup>1</sup> ILC, Articles on the Responsibility of States for Internationally Wrongful Acts 2001 (‘ARSIWA’) art 33(1). See also ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, With Commentaries, ILC Ybk (2001) II(2), 118 (‘ARSIWA Commentary’).

<sup>2</sup> A notable methodological divide is between the ‘pragmatism’ of the ‘British approach’, which supports a case-by-case assessment of relevant obligations, and the continental favouring of the use of taxonomy. On the former, see D Hovell, ‘The “Common Law Method”: British Approaches to the Development of International Law’ (2023) BYIL 10-11 (forthcoming). On the latter, see F Coulée, ‘Droit des Traités et Non-Réciprocité: Recherche sur l’Obligation *Intégrale* en Droit International Public’ (PhD thesis, Université Pantheon-Assas, Paris II, 1999); P d’Argent, ‘Les Obligations Internationales’ (2019) 417 Recueil des Cours de l’Académie de Droit International 9.

<sup>3</sup> The term ‘multilateral obligations’ refers to ‘obligations owed not individually to a particular State but to a collective, a group of States, or even to the international community as a whole’. ILC, Third Report on State Responsibility, by Mr James Crawford, Special Rapporteur, UN Doc A/CN.4/507 (2000), 34 (‘Crawford’s Third Report’). See also J Crawford, ‘Multilateral Rights and Obligations in International Law’ (2006) 319 Recueil des Cours de l’Académie de Droit International 331, 344, 346.

<sup>4</sup> *Barcelona Traction, Light and Power Co, Limited (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3, 32. See also CJ Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005) 117-157. Obligations *erga omnes partes* and obligations *erga omnes* are addressed in article 48(1)(a) and (b) respectively of the ARSIWA. Obligations *erga omnes partes* are usually taken to constitute a subset of obligations *erga omnes*. Equally, obligations *erga omnes* may be described as the subset of obligations *erga omnes partes* for which the ‘partes’ or group is the international community as a whole.

<sup>5</sup> ARSIWA art 48(1)(a), referring additionally to obligations ‘established for the protection of a collective interest of the group’.

<sup>6</sup> ARSIWA art 48(1)(b).

institutional responses to breaches of these obligations. Following the recent jurisprudence of the International Court of Justice (ICJ), it is now beyond doubt that ‘a State other than an injured State’ is entitled to invoke the responsibility of a state in breach of an obligation *erga omnes partes*, if not also an obligation *erga omnes*,<sup>7</sup> by bringing a case before the Court.<sup>8</sup> In contrast, the conditions under which the breach of such an obligation could be said to give rise to injury and thereby to permit ‘an injured State’ to invoke responsibility for the breach in accordance with article 42, rather than article 48, are not clearly articulated.<sup>9</sup>

Among other things,<sup>10</sup> article 42(b), in subclause (ii), entitles ‘an injured State’ to invoke responsibility for the breach of an obligation owed to ‘a group of States’ or ‘the international community as a whole’—an obligation owed *erga omnes partes* and *erga omnes*, respectively<sup>11</sup>—if the breach ‘is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation’. In the face of virtually non-existent practice in relation to article 42(b)(ii), which breaches of which obligations are actually addressed by this subclause, and what the scope of article 42(b)(ii) implies for the division between article 42 and article 48, remain unclear.<sup>12</sup> The obligations addressed in article 42(b)(ii), variously referred to as ‘interdependent obligations’ and ‘integral obligations’, have also received little scholarly attention to date. This ‘curious category’ of obligations is ‘only rarely studied in depth’, with relevant questions being ‘barely asked, let alone addressed’.<sup>13</sup>

Closer scrutiny confirms that the line between article 42(b)(ii) and article 48 is neither self-evident nor neat. Three sources of uncertainty exist. First, the distinction has been obscured by the use interchangeably of ‘interdependent obligations’ and ‘integral obligations’, among various other terms, to describe obligations addressed under both article 42(b)(ii)

<sup>7</sup> P Urs, ‘Obligations *Erga Omnes* and the Question of Standing before the International Court of Justice’ (2021) 34 LJIL 505, 517–518.

<sup>8</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Merits) [2012] ICJ Rep 422, 449–450; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Preliminary Objections) [2022] ICJ Rep 477, 515–518; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Request for the Indication of Provisional Measures: Order) [2020] ICJ Rep 3, 17; *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada, The Netherlands v Syrian Arab Republic)* (Request for the Indication of Provisional Measures: Order) General List No 188 [2023] ICJ 1, 13–14; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Request for the Indication of Provisional Measures: Order) General List No 192 [2024] ICJ 1, 12.

<sup>9</sup> d’Argent, ‘Les Obligations Internationales’, 64–66.

<sup>10</sup> Article 42(b)(i) permits a state to invoke responsibility for the breach of an obligation *erga omnes partes* or obligation *erga omnes* if the breach ‘specially affects’ it.

<sup>11</sup> The same language appears in article 48(1)(a) and (b) of the ARSIWA.

<sup>12</sup> CJ Tams, ‘Individual States as Guardians of Community Interests’ in U Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011) 385.

<sup>13</sup> *ibid.*

and article 48(1)(a)-(b).<sup>14</sup> Second, the obligations addressed in article 42(b)(ii) do not admit of easy definition. On the one hand, they appear alongside bilateral obligations<sup>15</sup> and multilateral obligations whose breach is capable of ‘specially affect[ing]’ another state,<sup>16</sup> indicating that their breach is in some sense comparable to breaches of bilateral and ‘bilateralisable’ obligations.<sup>17</sup> On the other hand, article 42(b) describes the obligations addressed thereunder as obligations owed to ‘a group of States’ or ‘the international community as a whole’—a clear textual reference to the same multilateral obligations addressed by article 48(1)(a)-(b). This similarity complicates the task of drawing a principled distinction between article 42(b)(ii) and article 48.<sup>18</sup> In reality, the obligations addressed in article 42(b)(ii) ‘are not always easily distinguishable from’ the obligations *erga omnes partes* and obligations *erga omnes* in article 48(1)(a)-(b), which, ‘while aimed at protecting a collective interest, do not, in case of a breach ... give all States other than the responsible State the legal entitlements which are due to an injured State’.<sup>19</sup> Third, article 42(b)(ii) only addresses breaches of relevant obligations that are ‘of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation’. Whether this textual requirement excludes from the scope of article 42(b)(ii) breaches that are not in factual terms of such a character, leaving them to be enforced in accordance with article 48, is open to question.<sup>20</sup> This lack of clarity stems from the fact that the ILC, when drafting article 42(b)(ii), relied on the wording of article 60(2)(c) of the Vienna Convention on the Law of Treaties (VCLT), which defines the power to suspend multilateral treaties in the event of a material breach, and may not reflect relevant considerations under the law of state responsibility.

In the light of the persisting uncertainty, this article seeks to clarify the distinction drawn by the ILC between the respective entitlements to standing under article 42(b)(ii) and article 48(1)(a)-(b) of the ARSIWA and, where necessary, to suggest a better reading of article 42(b)(ii).<sup>21</sup>

<sup>14</sup> G Gaja, ‘The Concept of an Injured State’ in J Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 945; Tams, *Enforcing Obligations Erga Omnes in International Law*, 55 (fn 31), 62 (fn 70); d’Argent, ‘Les Obligations Internationales’, 82; N Nedeski, *Shared Obligations in International Law* (CUP 2022) 91–92.

<sup>15</sup> ARSIWA art 42(a).

<sup>16</sup> ARSIWA art 42(b)(i).

<sup>17</sup> See A-L Sicilianos, ‘The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility’ (2002) 13 EJIL 1127, 1133–1134.

<sup>18</sup> Coulée, ‘Droit des Traités et Non-Réciprocité’, 29; d’Argent, ‘Les Obligations Internationales’, 99.

<sup>19</sup> Gaja, ‘The Concept of an Injured State’, 945. See also Tams, *Enforcing Obligations Erga Omnes in International Law*, 57; d’Argent, ‘Les Obligations Internationales’, 85–86.

<sup>20</sup> Gaja, ‘The Concept of an Injured State’, 945.

<sup>21</sup> The article’s focus on the work of the ILC in this regard is explained by the Commission’s pivotal and longstanding role in codifying and progressively developing the law of state responsibility, which one commentator rightly predicted would have ‘great influence in arbitration and other adjudicatory processes’. DD Caron, ‘The ILC Articles on State Responsibility: The Paradoxical

Lending clarity to the distinction is necessary for various reasons. To begin with, the invocation of responsibility by states individually remains an important route to enforcement in a decentralised international legal order.<sup>22</sup> In the absence of specially applicable rules,<sup>23</sup> this entitlement is grounded in the rules set out by the Commission in article 42 and article 48 of the ARSIWA. Next, distinct consequences follow the invocation of responsibility under article 42 and article 48 respectively. While the breach of an obligation addressed under article 42 is said to cause injury to the state or states to which the obligation is owed and entitles ‘an injured State’ to seek various remedies through adjudication<sup>24</sup> and to resort to unilateral countermeasures,<sup>25</sup> the breach of an obligation *erga omnes partes* or an obligation *erga omnes* under article 48 entitles ‘a State other than an injured State’ to seek more limited remedies,<sup>26</sup> and perhaps also precludes or limits the resort by such a state to countermeasures.<sup>27</sup> Simply put, in the absence of specially applicable

Relationship between Form and Authority’ (2002) 96 AJIL 857, 858. When it comes to the rules on the invocation of responsibility in particular, the work of the Commission has no close comparator.

<sup>22</sup> If all relevant states ‘had to act together in response to a breach, international responsibility could hardly ever be invoked and would become entirely theoretical’. G Gaja, ‘The Protection of General Interests in the International Community’ (2011) 364 Recueil des Cours de l’Académie de Droit International 97.

<sup>23</sup> ARSIWA art 55. See also J Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) 255.

<sup>24</sup> See ARSIWA ch II, pt II; Sicilianos, ‘The Classification of Obligations’, 1139.

<sup>25</sup> See ARSIWA ch II, pt III.

<sup>26</sup> As provided in article 48(2)(a), a state other than an injured state may seek the ‘cessation of the internationally wrongful act, and assurances and guarantees of non-repetition’ and, as per article 48(2)(b), it may seek the ‘performance of the obligation of reparation ... in the interest of the injured State or of the beneficiaries of the obligation breached’. These remedies exclude reparation for the state invoking responsibility. J Crawford, *State Responsibility: The General Part* (CUP 2013) 551; Sicilianos, ‘The Classification of Obligations’, 1139–1140.

<sup>27</sup> Article 54 of the ARSIWA left open the question of the lawfulness of countermeasures by states other than injured states, since the ILC considered that, at the time, ‘[p]ractice on th[e] subject [wa]s limited and rather embryonic’. ARSIWA Commentary, 137. Others have since taken a firmer stance. In 2005, the Institut de Droit International suggested that countermeasures by such states are permissible in the event of a ‘widely acknowledged grave breach of an *erga omnes* obligation’. ‘Obligations Erga Omnes in International Law’ art 5(c), Institut de Droit International, Krakow (2005). See also Tams, *Enforcing Obligations Erga Omnes in International Law* ch 6; EK Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (Routledge 2010) 203–207. In 2017, Dawidowicz concluded that there is now sufficient evidence of a customary entitlement for states other than injured states to take countermeasures. M Dawidowicz, *Third-Party Countermeasures in International Law* (CUP 2017) 282–284. In contrast, Paparinskis cautions that contrary state practice must not be overlooked. M Paparinskis, ‘The Once and Future Law of State Responsibility’ (2020) 114 AJIL 618, 624 (fn 63). See also C Hillgruber, ‘The Right of Third States to Take Countermeasures’ in C Tomuschat and J-M Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (Martinus Nijhoff 2006) 287. Even if countermeasures by states other than injured states are permissible, the resort to such measures may be qualified or conditioned in different ways. Crawford, for example, proposed that countermeasures by a state other than an injured state be taken at the request and on behalf of an injured state. Crawford’s Third Report, 108, draft article 50A. Compliance with the procedural requirements for the taking of countermeasures may also pose difficulties in multilateral contexts. K Sachariew, ‘State Responsibility for Multilateral Treaty Violations: Identifying the “Injured State” and Its Legal Status’ (1988) 35 NILR 273, 286. Whichever view is preferred, the distinction between article 42 and article 48 of the ARSIWA is relevant to addressing the entitlement to countermeasures by states other than injured states.

rules, the distinction between article 42 and article 48 guides the determination, whether provisionally by a state or authoritatively by a court, of the entitlement to invoke responsibility for the breach of an obligation, the availability of various remedies, and the permissibility of countermeasures. In light especially of the growing interest in the invocation of responsibility for breaches of obligations *erga omnes partes* and obligations *erga omnes* in accordance with article 48, and with no agreed method for identifying such obligations,<sup>28</sup> clarifying the entitlements of an injured state under article 42 helps clarify the entitlements of a state other than an injured state under article 48. Turning to practice, a better understanding of article 42(b)(ii) will inform, in turn, the amenability of polycentric disputes to adjudication.<sup>29</sup> Such clarification may prove valuable in the context of the pending advisory opinions on the consequences of breaches by states of obligations relating to climate change.<sup>30</sup> In particular, the question may be posed whether breaches of multilateral obligations for the preservation of shared resources or areas beyond national jurisdictions could be ‘of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation’. In a departure from the existing practice and scholarship, this characterisation would support the invocation of responsibility for relevant breaches under article 42(b)(ii) rather than article 48.<sup>31</sup>

More generally, clarifying the character of the obligations addressed under article 42(b)(ii) and the consequences of their breach, not only for the wrongdoing state but for a group of states or the international community as a whole, answers the wider call for an inquiry into the nature of obligations reflecting common interests and the notion of injury in this context. This inquiry is necessitated in part by the precarious foundations of various categories of multilateral obligations, namely ‘interdependent obligations’, ‘integral obligations’, obligations *erga omnes partes*, and obligations *erga omnes*, whose existence is affirmed in the existing doctrine but whose articulation, and whose relationships

<sup>28</sup> As Weil, referring to obligations *erga omnes*, observed: ‘we are ... faced with a category capable of an expansion all too likely to get out of hand’. P Weil, ‘Towards Relative Normativity in International Law?’ (1983) 77 AJIL 413, 432. See further Tams, *Enforcing Obligations Erga Omnes in International Law*, ch 4; Proukaki, *The Problem of Enforcement in International Law*, 49–52; M Ragazzi, *The Concept of International Obligations Erga Omnes* (OUP 2000) 182–187; Dawidowicz, *Third-Party Countermeasures in International Law*, 272.

<sup>29</sup> See generally A Shams, ‘Tempering Great Expectations: The Legitimacy Constraints and the Conflict Function of International Courts in Climate Litigation’ (2023) 32 Review of European, Comparative and International Environmental Law 193; J Mossop, ‘Dispute Settlement in Areas beyond National Jurisdiction’ in De Lucia, Oude Elferink and Nguyen (eds), *International Law and Marine Areas beyond National Jurisdiction* (Brill 2022) 402–403. See further Section V.

<sup>30</sup> In a recent request for an advisory opinion from the ICJ, the UN General Assembly invoked the language of article 42 of the ARSIWA when it asked the Court to articulate the consequences of breaches of certain environmental obligations for, *inter alia*, ‘injured or specially affected’ states. *Obligations of States in Respect of Climate Change*, Request for Advisory Opinion, 12 April 2023.

<sup>31</sup> See Sections III.B.ii and IV.B.ii.

with one another, remain in many respects ambiguous.<sup>32</sup> A better understanding of these various categories of obligations, in turn, provides a clearer view on how to address global challenges requiring coordinated responses by states and how to pursue their common interest in doing so through the performance of obligations owed to other states.

Against the backdrop of these various considerations, and with a view to advancing the important work of the ILC on the subject, this article lends clarity to the distinction drawn by the Commission between the breaches of obligations addressed under article 42(b)(ii) and article 48(1)(a)-(b) respectively of the ARSIWA. The article proceeds in three parts. Section II explains the use of the terms ‘interdependent obligations’ and ‘integral obligations’, sometimes inconsistently and at other times interchangeably, across the work of various Special Rapporteurs in the ILC and concludes as to the relative merits of each term to describe the obligations addressed in article 42(b)(ii). Preferring the term ‘interdependent obligations’, Section III identifies the handful of such obligations which the ILC considered should be addressed under article 42(b)(ii) and examines the adequacy of the Commission’s circumscription of the application of article 42(b)(ii) in this way. Drawing from the work of the Commission and the literature, the section then seeks a principled basis for distinguishing ‘interdependent obligations’ from the obligations *erga omnes partes* and obligations *erga omnes* whose breach is, in the absence of a specially affected state,<sup>33</sup> addressed under article 48. Section IV scrutinises the extent to which the character of the breach and its consequences qualify the scope of article 42(b)(ii).

Ultimately, the article finds that the handful of ‘interdependent obligations’ proposed by the ILC as obligations whose breach is addressed under article 42(b)(ii) of the ARSIWA gives insufficient guidance to the application of a general rule of standing. At the same time, scrutiny of principled criteria for defining ‘interdependent obligations’, suggested in the work of the ILC and in the literature, shows that only limited principled distinctions may be drawn.<sup>34</sup> No such criterion is sufficient to distinguish so-called ‘interdependent obligations’ from the obligations *erga omnes partes* and obligations *erga omnes* whose breach is, in the absence of a specially affected state,<sup>35</sup> addressed under article 48(1)(a)-(b). The performance of ‘interdependent obligations’ is, like the performance of all obligations owed *erga omnes partes* or *erga omnes*, multilateral. This performance is ‘owed not individually to a particular State but to a collective, a group of States, or even to the international community as a whole’.<sup>36</sup> If the term ‘interdependent obligations’ is to be used at all, it is best reserved for use as

<sup>32</sup> Indeed, ‘it is not too much to say that the terminology in this field is an unresolved shambles’. Crawford, ‘Multilateral Rights and Obligations in International Law’, 412.

<sup>33</sup> ARSIWA art 42(b)(i).

<sup>34</sup> See Section III.B.

<sup>35</sup> ARSIWA art 42(b)(i).

<sup>36</sup> Crawford’s Third Report, 34. See also Crawford, ‘Multilateral Rights and Obligations in International Law’, 344, 346.

no more than descriptive shorthand for breaches of certain obligations *erga omnes partes* and *erga omnes* that change the position of all the states to which the obligation is owed with respect to the further performance of the obligation, as is required under article 42(b)(ii). Moreover, the textual requirement in article 42(b)(ii) of a ‘radical’ change in the position of all the states to which the obligation is owed should not be seen as unduly limiting its scope. The consideration, through this lens, of obligations for the preservation of shared resources or areas beyond national jurisdictions illustrates that, where the factual circumstances of a breach support it, the textual requirement as to the character of the breach in article 42(b)(ii) could be met by other obligations than those few suggested by the Commission. This suggests, in turn, and again only where the factual circumstances of a breach support it, a wider entitlement to standing under the subclause than that assumed to date.

## II. TERMINOLOGICAL CLARIFICATION: ‘INTERDEPENDENT’ AND ‘INTEGRAL’ OBLIGATIONS

A first cause for confusion in the application of article 42(b)(ii) of the ARSIWA is terminological. Both within the ILC and in the scholarship, the terms ‘interdependent obligations’ and ‘integral obligations’ are variously used—sometimes to refer to distinct classes of obligations, at other times interchangeably—to describe the obligations whose breach is addressed by the subclause. The inconsistency is explained in part by the separate inquiries into the character of multilateral obligations in the law of treaties and the law of state responsibility respectively.<sup>37</sup> In the ILC’s work on the law of treaties, the term ‘interdependent obligations’ was applied to the obligations addressed in article 60(2)(c) of the VCLT, the language of which is largely reproduced in article 42(b)(ii) of the ARSIWA.<sup>38</sup> Conversely, in the ILC’s work on state responsibility—which, it is relevant to note, spanned across ‘45 years (1956–2001), five Special Rapporteurs, and 34 reports’, and was concluded in the face of ‘practical difficulties, and changes of direction along the way’<sup>39</sup>—terminological consistency with the earlier work on the law of treaties was lost and, in the end, the term ‘integral obligations’ was more often used to describe the obligations addressed in article 42(b)(ii) of the ARSIWA.<sup>40</sup> This inconsistency obscures the character of the

<sup>37</sup> É Wyler, ‘Quelques réflexions sur la typologie des obligations en droit international, avec référence particulière au droit des traités et au droit de la responsabilité’ (2019) 65 *Annuaire Français de Droit International* 25, 29–30.

<sup>38</sup> On the similarity with the Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 60(2)(c), see Section IV.B.i.

<sup>39</sup> FI Paddeu and CJ Tams, ‘Encoding the Law of State Responsibility with Courage and Resolve: James Crawford and the 2001 Articles on State Responsibility’ (2022) 11 *Cambridge International Law Journal* 6, 9–10.

<sup>40</sup> M Fitzmaurice and O Elias, *Contemporary Issues in the Law of Treaties* (Eleven International 2005) 162–163.



obligations addressed in the subclause. Nor is it clear how ‘interdependent obligations’ and ‘integral obligations’ relate to obligations *erga omnes partes* and obligations *erga omnes*, the latter terms being introduced to the work of the ILC in the context of the law of state responsibility and now commonly used to refer to the obligations in article 48(1)(a) and (b) respectively.<sup>41</sup> All these categories of obligations are ‘multilateral obligations’ owed to a group of states or the international community as a whole rather than to individual states.<sup>42</sup>

This section lends terminological clarity by considering the respective origins of the terms ‘interdependent obligations’ and ‘integral obligations’ in the work of the ILC. Subsection A traces the roots of both terms to the work of Special Rapporteur Gerald Fitzmaurice on the law of treaties and notes the use of the term ‘interdependent obligations’ to describe the obligations finally addressed in article 60(2)(c) of the VCLT. Subsection B examines the later work of Special Rapporteur James Crawford on the law of state responsibility, by which time the term ‘integral obligations’ was used, alongside ‘interdependent obligations’, to describe the obligations in article 60(2)(c) of the VCLT and, owing to the ILC’s reliance on that provision in its work on the law of state responsibility, ultimately in article 42(b)(ii) of the ARSIWA.

On balance, the consistent use of ‘interdependent obligations’ is preferable, if only provisionally,<sup>43</sup> to describe the obligations whose breach is addressed in article 42(b)(ii). The distinct ‘integral obligations’ is better reserved to describe a different subset of obligations *erga omnes partes* and obligations *erga omnes*, in article 48(1)(a) and (b) respectively.<sup>44</sup>

### *A. Special Rapporteur Fitzmaurice and the law of treaties*

In 1957, the ILC Special Rapporteur Gerald Fitzmaurice in his Second Report on the Law of Treaties attempted the classification of international obligations with a view to determining the consequences that should follow, under the law of treaties, the ‘fundamental breach’ of a multilateral treaty.<sup>45</sup> In that context, the Special Rapporteur thought it necessary to distinguish from other multilateral treaties<sup>46</sup> those treaties

<sup>41</sup> Ragazzi, *The Concept of International Obligations Erga Omnes*, 201.

<sup>42</sup> Crawford’s Third Report, 35 (table 1). See also Crawford, ‘Multilateral Rights and Obligations in International Law’, 344, 346.

<sup>43</sup> The choice of the term ‘interdependent obligations’ to describe the obligations addressed in article 42(b)(ii) is for ease of reference alone; it is ultimately questioned in light of the conclusions reached in Sections III and IV.

<sup>44</sup> See further Section III.B.

<sup>45</sup> ILC, Second Report on the Law of Treaties by Mr. G.G. Fitzmaurice, Special Rapporteur, UN Doc A/CN.4/107, ILC Ybk (1957) II, 31 (‘Fitzmaurice’s Second Report’). See also ILC, Second Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, UN Doc A/CN.4/156, ILC Ybk (1963) II, 75 (‘Waldock’s Second Report’). For an account of these developments, see d’Argent, ‘Les Obligations Internationales’, 82–84.

<sup>46</sup> This includes multilateral treaties composed of reciprocal obligations and those encompassing ‘integral obligations’. Special Rapporteur Fitzmaurice was not the first to attempt such a

in respect of which a state's obligations, 'by reason of the character of the treaty, are necessarily dependent on a corresponding performance by all the other parties'.<sup>47</sup> The Special Rapporteur described such obligations as 'interdependent obligations', in respect of which

[t]he obligation of each party ... is necessarily dependent on a corresponding performance of the same thing by all the other parties, since it is of the essence of such a treaty that the undertaking of each party is given in return for a similar undertaking by the others.<sup>48</sup>

The statement was made in relation to obligations of disarmament and the non-proliferation of certain weapons. In the opinion of the Special Rapporteur, the fundamental breach of provisions of a multilateral treaty containing such obligations justified a deviation from his general view that 'a breach, however serious, does not give the other parties a right to terminate the treaty'.<sup>49</sup> For him, 'in the case of obligations of the [] interdependent[] type', a fundamental breach will not only justify the suspension by the other states parties of their obligations towards the breaching state, as in the case of bilateral and multilateral treaties comprising 'bilateralisable' obligations.<sup>50</sup> It will additionally permit the other states parties to 'ceas[e] to perform any obligations of the treaty ... which are of such a kind that ... their performance by any party is necessarily dependent on an equal or corresponding performance by all the other parties'.<sup>51</sup> For the Special Rapporteur, moreover, where a state party to such a treaty 'commits a general breach of the entire treaty in such a way as to constitute a repudiation of it, or a breach in so essential a particular as to be tantamount to a repudiation', all the other states parties must be entitled to withdraw from or to terminate the treaty.<sup>52</sup>

These multilateral treaties, comprising 'interdependent obligations', were not only distinguished from bilateral treaties and multilateral treaties creating bilateral obligations between pairs of the committing states. They were also distinguished from what the Special Rapporteur circumscribed as a distinct category of multilateral:

law-making treaties (*traités-loi*), [] system or régime creating treaties (e.g., for some area, region or locality), [] treaties involving undertakings to conform to certain standards and conditions, or [] any other treaty where the juridical

classification. See P-M Dupuy, 'L'Unité de l'Ordre Juridique International' (2000) 297 *Recueil des Cours de l'Académie de Droit International*, 141-145; Coulée, 'Droit des Traités et Non-Réciprocité', 34-58; Tams, *Enforcing Obligations Erga Omnes in International Law*, 54.

<sup>47</sup> Fitzmaurice's Second Report, 30. See also draft article 19(ii)(b), *ibid* 31.

<sup>48</sup> *ibid* 54. See further Tams, *Enforcing Obligations Erga Omnes in International Law*, 56-57.

<sup>49</sup> Fitzmaurice's Second Report, 31.

<sup>50</sup> *ibid*.

<sup>51</sup> *ibid*.

<sup>52</sup> *ibid*. The ILC ultimately considered that any state to which the obligation is owed must, in such a case, be permitted to suspend the performance of its own obligations 'without first obtaining the agreement of the other parties'. ILC, Draft Articles on the Law of Treaties with Commentaries, ILC Ybk (1966) II, 255 ('VCLT Commentary').

force of the obligation is inherent, and not dependent on a corresponding performance by the other parties to the treaty ... so that the obligation is of a self-existent character, requiring an absolute and integral application and performance under all conditions.<sup>53</sup>

The Special Rapporteur described the obligations in such treaties, such as human rights treaties, as 'integral obligations'—sometimes also referred to as 'solidary',<sup>54</sup> 'absolute' or 'self-existent' obligations<sup>55</sup>—in which case '[t]he obligation has an absolute rather than a reciprocal character—it is, so to speak, an obligation towards all the world rather than towards particular states. Such obligations may be called self-existent, as opposed to concessionary, reciprocal or interdependent obligations'.<sup>56</sup> When it came to these 'integral obligations', the Special Rapporteur considered that the breach of the treaty by a state party would justify neither the non-performance of the obligations of other states parties towards the breaching state nor the termination by them of the treaty.<sup>57</sup>

Any remaining doubt as to the distinction drawn by Special Rapporteur Fitzmaurice between the categories of 'interdependent obligations' and 'integral obligations' was dispelled by his subsequent Third Report on the Law of Treaties of 1958. In it, he proposed three distinct categories of multilateral obligations: 'the mutually reciprocating type',<sup>58</sup> the 'interdependent type, where a fundamental breach of one of the obligations of the treaty by one party will justify a corresponding non-performance generally by other parties',<sup>59</sup> and 'the integral type, where the force of the obligation is self-existent, absolute and inherent for each party, and not dependent on a corresponding performance by the others'.<sup>60</sup>

Ultimately, the taxonomy of multilateral obligations proposed by Special Rapporteur Fitzmaurice was discarded by Special Rapporteur Humphrey Waldock, who considered the distinctions drawn by his

<sup>53</sup> Fitzmaurice's Second Report, 31. Although the Special Rapporteur referred to the character of multilateral treaties, he was in fact speaking of the nature of the obligations in them. d'Argent, 'Les Obligations Internationales', 82.

<sup>54</sup> Crawford's Third Report, 36.

<sup>55</sup> Fitzmaurice's Second Report, 30.

<sup>56</sup> *ibid* 54. These integral obligations create 'objective standards' that 'require[] parties to adopt a parallel conduct within their own jurisdiction'. B Simma and CJ Tams, 'Article 60' in O Corten and P Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary II* (OUP 2011) 1363. See further Tams, *Enforcing Obligations Erga Omnes in International Law*, 55.

<sup>57</sup> Fitzmaurice's Second Report, 31.

<sup>58</sup> ILC, Third Report by G.G. Fitzmaurice, Special Rapporteur, UN Doc A/CN.4/115, ILC Ybk (1958) II, 27 ('Fitzmaurice's Third Report'). The term presumably refers to bilateral obligations in multilateral treaties.

<sup>59</sup> *ibid* 27–28.

<sup>60</sup> *ibid* 28. Note, however, the use by the Special Rapporteur of 'integral' for 'interdependent' in draft article 19(3)(e) in his subsequent Fourth Report on the Law of Treaties. ILC, Fourth Report on the Law of Treaties by Mr. G.G. Fitzmaurice, Special Rapporteur, UN Doc A/CN.4/120, ILC Ybk (1959) II, 46. The reference is clearly to 'interdependent obligations'. Tams, *Enforcing Obligations Erga Omnes in International Law*, 62 (fn 70).

predecessor as being irrelevant to the determination of the consequences of a material breach, as opposed to a fundamental breach, of a multilateral treaty.<sup>61</sup> Some elements of Special Rapporteur Fitzmaurice's proposal nevertheless made their way into the final text of article 60 of the VCLT.<sup>62</sup> The earlier Special Rapporteur's category of 'interdependent obligations' was specifically addressed in draft article 57(2)(c) of 1966 and, in nearly identical language, in article 60(2)(c) of the VCLT.<sup>63</sup> In its final form, article 60(2)(c) provides that, in the event of a material breach of a multilateral treaty, any state party is permitted unilaterally to invoke the breach as a ground for suspending its obligations under the treaty 'if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty'.<sup>64</sup> Conversely, 'integral obligations' were not entirely excluded from the scope of the provision, as Special Rapporteur Fitzmaurice suggested they should be.<sup>65</sup>

The VCLT recognises the distinct status of Special Rapporteur Fitzmaurice's interdependent obligations in other contexts too, namely when addressing the permissibility of the modification or suspension of a multilateral treaty between certain states parties *inter se* and when enumerating permissible responses to the breach of treaty provisions.<sup>66</sup>

### *B. Special Rapporteur Crawford and the law of state responsibility*

Many years later, Special Rapporteur James Crawford, the last in a series of Special Rapporteurs, considered the consequences, this time under the law of state responsibility, of the breach by a state of its multilateral obligations.<sup>67</sup> When addressing which states should be permitted to invoke responsibility for such a breach, the Special Rapporteur identified three categories of multilateral obligations: obligations *erga omnes partes*, which included what the Special Rapporteur referred to as 'integral obligations',<sup>68</sup>

<sup>61</sup> Special Rapporteur Waldock insisted that since elements of reciprocity could be evidenced even in multilateral treaties comprising integral obligations, they deserved to be included, alongside other multilateral treaties, in the proposed provision on the consequences of the breach of a treaty. Waldock's Second Report, 76-77. His own proposal for widening the group of states entitled to suspend their obligations under a multilateral treaty was also ultimately qualified to include only specially affected states in article 60(2)(b) of the VCLT.

<sup>62</sup> See Tams, *Enforcing Obligations Erga Omnes in International Law*, 58-61; Simma and Tams, 'Article 60', 1363-1364.

<sup>63</sup> Draft article 57(2)(c) permitted '[a]ny other party to suspend the operation of the treaty with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty'. VCLT Commentary, 253.

<sup>64</sup> Note the exclusion, in article 60(5) of the VCLT, of 'provisions relating to the protection of the human person contained in treaties of a humanitarian character'.

<sup>65</sup> Fitzmaurice and Elias, *Contemporary Issues in the Law of Treaties*, 150.

<sup>66</sup> See VCLT arts 41(1)(b)(i), 58(1)(b)(i), 60(2)(c).

<sup>67</sup> The ILC's work on the law of state responsibility was not restricted to treaty breaches.

<sup>68</sup> Crawford's Third Report, 34.

obligations *erga omnes*, and multilateral obligations generally.<sup>69</sup> The third category presumably addressed obligations in multilateral treaties of a bilateral or 'bilateralisable' kind.<sup>70</sup> Diverging from the terminology used by Special Rapporteur Fitzmaurice, whose proposed category of 'interdependent obligations' was reflected in article 60(2)(c) of the VCLT, Special Rapporteur Crawford referred to the same provision as addressing 'integral obligations'.<sup>71</sup> Yet he defined 'integral obligations' in the same way that Special Rapporteur Fitzmaurice had defined 'interdependent obligations', that is to refer to the obligations eventually addressed in article 60(2)(c) of the VCLT. The chairman of the drafting committee, Peter Tomka, also used the term 'integral obligations' as Special Rapporteur Crawford did.<sup>72</sup> So did the earlier Special Rapporteur Gaetano Arangio-Ruiz.<sup>73</sup> A footnote in the ILC's commentary to the ARSIWA indicates that the Commission was aware that the term 'integral obligations' had 'sometimes given rise to confusion' and that 'the term "interdependent obligations" may be more appropriate'.<sup>74</sup>

Special Rapporteur Crawford took the same approach in much of his academic commentary, referring to 'integral obligations' as 'analogous to those recognized in Article 60(2)(c) of the VCLT, as 'obligations that operate on an all-or-nothing basis', as 'obligations of such a character that a breach affects per se all other states to which the obligation is owed', and as 'obligations whose breach threatens the structure of the whole regime'.<sup>75</sup> His definition of 'integral obligations', which coincides perfectly with Special Rapporteur Fitzmaurice's definition of 'interdependent obligations', excluded, as Special Rapporteur Fitzmaurice would have done, 'obligations for the protection of the human person, because a breach by one state does not entitle other states to suspend their own obligations'.<sup>76</sup>

<sup>69</sup> *ibid* 34-35.

<sup>70</sup> For Special Rapporteur Crawford, this category addressed the position of 'specially affected states', that is obligations in respect of which 'particular States or subgroups of States are recognized as having a specific legal interest in compliance': *ibid* 35.

<sup>71</sup> *ibid* 34 (fn 199).

<sup>72</sup> ILC, Statement of the Chairman of the Drafting Committee, Mr. Peter Tomka, 53<sup>rd</sup> Session of the ILC (2001) 47-48 <[https://legal.un.org/ilc/sessions/53/pdfs/english/dc\\_resp1.pdf](https://legal.un.org/ilc/sessions/53/pdfs/english/dc_resp1.pdf)> accessed 12 September 2023 ('Statement of the Chairman of the Drafting Committee').

<sup>73</sup> The Special Rapporteur referred to "integral" rights and obligations (peace treaties, disarmament treaties, treaties on the environment). ILC, Third Report on State Responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, UN Doc. A/CN.4/440, ILC Ybk (1991) II(1), 27 ('Arangio-Ruiz's Third Report').

<sup>74</sup> ARSIWA Commentary, 118 (fn 669). The footnote recurs in Crawford, *The International Law Commission's Articles on State Responsibility*, 257 (fn 706). On one other occasion, Special Rapporteur Crawford used the term 'interdependent obligations' as Special Rapporteur Fitzmaurice would have done, to describe the obligation in the 1959 Antarctic Treaty to 'refrain from asserting new claims to territorial sovereignty over Antarctica'. Crawford, *State Responsibility*, 547. See also Gaja, 'The Concept of an Injured State', 945.

<sup>75</sup> Crawford, *State Responsibility*, 547. See also J Crawford, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts' in U Fastenrath and others, *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011) 227, 229.

<sup>76</sup> *ibid* note 29. Special Rapporteur Fitzmaurice described such obligations as 'integral obligations'.

Terminological differences notwithstanding, the invocation of responsibility for the breach of Special Rapporteur Crawford's 'integral obligations'—substantively equivalent to Special Rapporteur Fitzmaurice's category of 'interdependent obligations'—was, as in the law of treaties, addressed separately from other classes of bilateral and multilateral obligations, including the class of obligations *erga omnes partes* to which they were deemed to belong.<sup>77</sup> Special Rapporteur Crawford reasoned that, 'in the case of [such] an [ ] obligation any breach undermines the position of all the other States parties, to an extent that justifies treating each State party as individually injured'.<sup>78</sup> Borrowing in large part the language of article 60(2)(c) of the VCLT, article 42(b)(ii) of the ARSIWA thus entitles a state to invoke the responsibility of a breaching state as 'an injured state' where the obligation breached is owed to 'a group of States, including that State, or the international community as a whole' and where the breach 'is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation'.

In the absence of a specially affected state,<sup>79</sup> breaches of other obligations *erga omnes partes* and obligations *erga omnes* were left to be addressed in accordance with article 48(1)(a) and (b) respectively of the ARSIWA.

### C. Preliminary terminological preference for 'interdependent obligations'

For terminological purposes alone, the question that remains to be addressed is which of the two terms, 'interdependent obligations' or 'integral obligations', is preferable when describing the obligations whose breach is addressed by article 42(b)(ii) of the ARSIWA. The term 'integral obligations' is, following the substantial and influential work of Special Rapporteur Crawford on the law of state responsibility, now more likely to be used to describe the obligations addressed by article 42(b)(ii). Indeed, the ARSIWA provided the 'lexical code' of state responsibility, which 'has come to stick'.<sup>80</sup> Considerations of expediency might thus support the use of this term consistently in the context of the law of state responsibility. Conversely, the reliance by Special Rapporteur Crawford on the law of treaties and specifically on article 60(2)(c) of the VCLT, in which context the term 'interdependent obligations' is more

<sup>77</sup> What Special Rapporteur Crawford described most often as 'integral obligations' remained, in his view, a subset of the class of obligations *erga omnes partes*, which he defined as relating to 'matters of the common interest of the parties'. Crawford's Third Report, 34.

<sup>78</sup> *ibid* 34 (fn 199). See also *ibid* 31; ILC, Fourth Report on State Responsibility, by Mr. James Crawford, Special Rapporteur, UN Doc A/CN.4/517, 10-11 ('Crawford's Fourth Report').

<sup>79</sup> Whether the entitlement of a specially affected state, under article 42(b)(i), supersedes the entitlement of 'a State other than an injured State', under article 48, is open to question. See ARSIWA Commentary, 119.

<sup>80</sup> Paddeu and Tams, 'Encoding the Law of State Responsibility with Courage and Resolve', 10.

often used, warrants the use consistently of ‘interdependent obligations’ to describe the obligations described under both that provision and article 42(b)(ii) of the ARSIWA. The Commission’s own admission that the use of the term ‘integral obligations’ might give rise to confusion likewise supports the use of ‘interdependent obligations’.<sup>81</sup> Mindful of these various considerations, none of which is decisive, the article prefers the term ‘interdependent obligations’ to refer to the obligations whose breach is addressed under both article 60(2)(c) of the VCLT and article 42(b)(ii) of the ARSIWA. It notes, where necessary, the contrary use by the Commission, its Special Rapporteurs, or the literature of the term ‘integral obligations’ to describe these obligations. How to actually circumscribe the proposed category of ‘interdependent obligations’ remains to be seen.<sup>82</sup>

The term ‘integral obligations’ is more appropriately used, as Special Rapporteur Fitzmaurice did, to refer to ‘undertakings to conform to certain standards and conditions’, as in multilateral human rights treaties.<sup>83</sup> In the framework of the ARSIWA, integral obligations are also obligations owed *erga omnes partes* or *erga omnes*, as the case may be. The invocation of responsibility for the breach of an integral obligation may be by a specially affected state under article 42(b)(i), where relevant, or by a state other than an injured state, under article 48(1)(a) or (b), as the case may be.<sup>84</sup> In contrast, breaches of integral obligations are unlikely to ever be addressed under article 42(b)(ii).<sup>85</sup>

### III. THE CHARACTER OF THE OBLIGATIONS ADDRESSED UNDER ARTICLE 42(b)(ii) OF THE ARSIWA

Notwithstanding the formal distinction between the invocation of responsibility for breaches of so-called ‘interdependent obligations’, on the one hand, and obligations *erga omnes partes* and obligations *erga omnes*, on the other, the dividing line between these classes of obligations is not as clear as the structuring of article 42(b)(ii) and article 48(1)(a)-(b) of the ARSIWA suggests. The fact that different consequences arise from breaches of obligations under article 42(b)(ii) and article 48(1)(a)-(b) respectively does not itself clarify which obligations are addressed by each provision.<sup>86</sup> Setting aside the requirement in article 42(b)(ii) as to the character of the breach,<sup>87</sup> the only textual difference in the character of the obligations addressed by each provision is the reference in article

<sup>81</sup> ARSIWA Commentary, 118 (fn 669).

<sup>82</sup> See Section III below.

<sup>83</sup> Fitzmaurice’s Second Report, 31. Recall Section II.A.

<sup>84</sup> P-M Dupuy, ‘A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility’ (2002) 13 EJIL 1053, 1072.

<sup>85</sup> See further Section III.B.ii.

<sup>86</sup> Wyler, ‘Quelques réflexions sur la typologie des obligations en droit international’, 40-41.

<sup>87</sup> On the character of the breach, see Section IV.

48(1)(a) to obligations ‘established for the protection of a collective interest’ of a group of states, a qualification that does not appear in article 42. Yet both article 42 and article 48 refer to breaches of obligations that implicate the interests of ‘a group of States’ or ‘the international community as a whole’, and Special Rapporteur Crawford himself considered the obligations under article 42(b)(ii) to constitute a subset of obligations *erga omnes partes*.<sup>88</sup> Earlier Special Rapporteurs also hinted at such a classification,<sup>89</sup> as does the existing scholarship, with commentators regretting that interdependent obligations and integral obligations—as understood by Special Rapporteur Fitzmaurice<sup>90</sup>—are ‘essentially similar’.<sup>91</sup> The task of defining interdependent obligations for the purpose of applying article 42(b)(ii) is thus impeded by the fact that interdependent obligations ‘are not always easily distinguishable from those [obligations] which, while aimed at protecting a collective interest, do not, in case of a breach of the relevant obligation, give all States other than the responsible State the legal entitlements which are due to an injured State’.<sup>92</sup> This reality calls for clarification as to which obligations are actually addressed as ‘interdependent obligations’ under article 42(b)(ii) of the ARSIWA.

This section asks whether there is in fact a principled distinction between the respective classes of obligations addressed under article 42(b)(ii) and article 48(1)(a)-(b) of the ARSIWA.<sup>93</sup> Subsection A first

<sup>88</sup> Crawford’s Third Report, 35 (including note 199). See also Statement of the Chairman of the Drafting Committee; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Preliminary Objections, Declaration of Judge ad hoc Kreß) [2022] ICJ Rep 477, 553 (fn 30); J Pauwelyn, ‘A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?’ (2003) 14 EJIL 907, 123.

<sup>89</sup> ILC, Preliminary Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles on State Responsibility), by Mr. Willem Riphagen, Special Rapporteur, UN Doc A/CN.4/330, ILC Ybk (1980) II(1), 114-115, 120 (‘Riphagen’s First Report’). In relation to article 60(2)(c) of the VCLT, the Special Rapporteur commented that the reference to ‘particular multilateral treaties in which the legal relations between each party and each other party are inextricably interwoven and constitute an indivisible whole’ is ‘not far from saying that such particular multilateral treaties create a legal situation in which each obligation of a State party to the treaty is an obligation *erga omnes*’: *ibid* 120.

<sup>90</sup> Recall Section II.A.

<sup>91</sup> Sachariew, ‘State Responsibility for Multilateral Treaty Violations’, 281. Due to this similarity, Coulée rejects the use of the language of ‘collective interests’ or ‘collective purpose’ to affirm the status of an obligation as an integral obligation rather than an interdependent obligation. Such language may be used to describe both kinds of obligations. Coulée, ‘Droit des Traités et Non-Réciprocité’, 251-252. See also Gaja, ‘The Concept of an Injured State’, 945; Tams, *Enforcing Obligations Erga Omnes in International Law*, 56-57; d’Argent, ‘Les Obligations Internationales’, 85-86; P-M Dupuy, ‘Back to the Future of a Multilateral Dimension of the Law of State Responsibility for Breaches of “Obligations Owed to the International Community as a Whole”’ (2012) 23 EJIL 1053, 1060-1061; Dupuy, ‘L’Unité de l’Ordre Juridique International’, 140 (fn 230); Pauwelyn, ‘A Typology of Multilateral Treaty Obligations’, 113; Wyler, ‘Quelques réflexions sur la typologie des obligations en droit international’, 29-30, 48.

<sup>92</sup> Gaja, ‘The Concept of an Injured State’, 945.

<sup>93</sup> Clarifying the scope of article 42(b)(ii) rather than that of article 48(1) is preferable since the latter provision refers to the residual entitlement of ‘[a]ny state other than an injured State’—‘an injured State’ being defined in article 42—to invoke the responsibility of a state in breach of the obligations addressed by the provision.



provides an account of the interdependent obligations identified in the work of the ILC, which amounted to the circumscription of a limited, if arbitrary, set of obligations whose breach is addressed under article 42(b)(ii). It considers the sufficiency of the Commission's use of examples to guide the application of article 42(b)(ii). Drawing from this account and from the literature to date, Subsection B then scrutinises two potential criteria for defining interdependent obligations in a principled manner.<sup>94</sup> The first criterion is the suggestion that the obligations whose breach gives rise to injury under article 42, including article 42(b)(ii), operate reciprocally, while the obligations addressed in article 48 do not. The second criterion is drawn from the textual requirement in article 42(b)(ii) that the breach of the obligation be 'of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation'. Although this requirement addresses the character of the breach rather than the character of the obligation, the implication is that the performance of the obligation by all the committing states is a *conditio sine qua non* for meeting the underlying objective.<sup>95</sup> The relative importance of collective compliance to meet the objectives underlying interdependent obligations could constitute a defining feature of such obligations.

In the end, the pragmatic stance of the ILC that breaches of only a handful of obligations are addressed under article 42(b)(ii) lends insufficient clarity to the application of a rule of standing of general applicability. At the same time, neither of the two proposed criteria is sufficient to draw a principled distinction between interdependent obligations and other obligations owed *erga omnes partes* or *erga omnes*. Only limited distinctions emerge.

#### A. The ILC's circumscription of a limited set of 'interdependent obligations'

While there is no apparent distinction between interdependent obligations, on the one hand, and obligations owed *erga omnes partes* or *erga omnes*, on the other, the line between the obligations addressed by article 42(b)(ii) and article 48(1)(a)-(b) respectively is often taken to be clear. The Commission, for its part, considered that breaches of interdependent obligations under article 42(b)(ii) will in reality only 'arise under treaties establishing particular regimes'.<sup>96</sup> As one commentator explains, 'a very narrow understanding of the category [of interdependent obligations] ... helped avoid problems'.<sup>97</sup> Nor was it the task of the

<sup>94</sup> The discussion also draws from not dissimilar approaches to the identification of obligations *erga omnes*. See Tams, *Enforcing Obligations Erga Omnes in International Law*, ch 4.

<sup>95</sup> On the requirement as to the character of the breach, see Section IV.

<sup>96</sup> ARSIWA Commentary, 119. See also Statement of the Chairman of the Drafting Committee, 48.

<sup>97</sup> Tams, *Enforcing Obligations Erga Omnes in International Law*, 57.

Commission, in the context of its work on the law of state responsibility, to devise a comprehensive taxonomy of international obligations.<sup>98</sup> In Special Rapporteur Crawford's view, a '[t]axonomy may assist in the interpretation and application of primary rules, but it is no substitute for it'.<sup>99</sup> Perhaps mindful of this limitation, the Commission declared its discussion of various classes of obligations to be 'illustrative only'.<sup>100</sup>

Special Rapporteur Crawford nevertheless prepared an extensive list of obligations *erga omnes partes*, including interdependent obligations, that encompassed: obligations relating to the environment, such as the protection of biodiversity or the mitigation of global warming; obligations of disarmament, such as those in 'a regional nuclear-free-zone treaty or a test-ban treaty'; 'obligations arising under a regional human rights treaty'; and other obligations in respect of which 'compliance is recognized as a legal interest of all the States parties'.<sup>101</sup> The list did not reflect, however, the distinction ultimately drawn between article 42(b) (ii) and article 48(1)(a)-(b). It thus offers limited guidance in teasing interdependent obligations apart from other obligations *erga omnes partes* and *erga omnes*<sup>102</sup> with a view to their enforcement under article 42(b)(ii).

Examples of interdependent obligations are nonetheless found in the work of the Commission. The most frequently cited among them is an obligation of disarmament, whose characterisation as an interdependent obligation, first by Special Rapporteur Fitzmaurice, was explained by him in the following terms:

the obligation of each party to disarm, or not to exceed a certain level of armaments, or not to manufacture or possess certain types of weapons, is necessarily dependent on a corresponding performance of the same thing by all the other parties, since it is of the essence of such a treaty that the undertaking of each party is given in return for a similar undertaking by the others.<sup>103</sup>

The Special Rapporteur referred further to obligations in treaties 'not to make use of certain weapons or methods of war'.<sup>104</sup> In the

<sup>98</sup> ILC, Second Report on State Responsibility, by Roberto Ago, Special Rapporteur—'The Origin [sic] International Responsibility', UN Doc A/CN.4/233, ILC Ybk (1970) II, 184-185; Sicilianos, 'The Classification of Obligations', 1133.

<sup>99</sup> ILC, Second Report on State Responsibility, by Mr. James Crawford, Special Rapporteur, UN Doc A/CN.4/498 (1999), 27.

<sup>100</sup> ARSIWA Commentary, 118.

<sup>101</sup> Crawford's Third Report, 35. The Special Rapporteur also referred to article 380 of the Treaty of Versailles, which, in the words of the Permanent Court of International Justice, made the Kiel Canal 'an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world'. *SS Wimbledon*, PCIJ Rep Series A No 1, 15, 22. See further ILC, Arangio-Ruiz's Third Report, 27; Fourth Report on State Responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, UN Doc A/CN.4/444, ILC Ybk (1992) II(1), 80 ('Arangio-Ruiz's Fourth Report').

<sup>102</sup> Although the ILC referred to interdependent obligations as a subset of obligations *erga omnes partes*, there is no principled reason to exclude the consideration, additionally, of obligations *erga omnes*.

<sup>103</sup> Fitzmaurice's Second Report, 54. See also ARSIWA Commentary, 119.

<sup>104</sup> Fitzmaurice's Second Report, 54 (fn 73).

context of the ARSIWA, the Commission referred to 'a nuclear-free zone treaty',<sup>105</sup> and the prohibition of new claims to sovereignty over Antarctica.<sup>106</sup> Other examples of interdependent obligations proposed by commentators are treaties variously 'prohibiting the use of particular weapons',<sup>107</sup> prohibiting the testing of nuclear weapons,<sup>108</sup> and 'providing for the non-acquisition of territory by force'.<sup>109</sup> Closely analogous examples include the respective obligations not to make claims to sovereignty over the high seas,<sup>110</sup> the Area,<sup>111</sup> the moon and other celestial bodies in space<sup>112</sup> (described by one commentator as obligations of 'non-appropriation'),<sup>113</sup> and the obligation to use Antarctica,<sup>114</sup> the moon and other celestial bodies for peaceful purposes only, the latter two including a prohibition on the installation of weapons in space.<sup>115</sup> Writing in his personal capacity, and without

<sup>105</sup> ARSIWA Commentary, 119.

<sup>106</sup> Antarctic Treaty (signed 1 December 1959, entered into force 23 June 1961) 402 UNTS 71 art IV(2); Convention for the Conservation of Antarctic Marine Living Resources (concluded 20 May 1980, entered into force 7 April 1982) 1329 UNTS 47 art 4(2)(a). See ARSIWA Commentary, 119; Crawford, *The International Law Commission's Articles on State Responsibility*, 260; J Crawford, 'Chance, Order, Change: The Course of International Law' (2013) 365 *Recueil des Cours de l'Académie de Droit International* 448.

<sup>107</sup> Simma and Tams, 'Article 60', 1365.

<sup>108</sup> Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (signed 5 August 1963, entered into force 10 October 1963) (Nuclear Test Ban Treaty) art 1(1); Comprehensive Nuclear Test Ban Treaty (opened for signature 24 September 1996) art I(1). See B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours de l'Académie de Droit International* 336-337.

<sup>109</sup> Simma and Tams, 'Article 60', 1365.

<sup>110</sup> Geneva Convention on the High Seas (signed 29 April 1958, entered into force 30 September 1962) 450 UNTS 11 art 2; UN Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS) art 89.

<sup>111</sup> UNCLOS art 137(1). The Area comprises 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'. UNCLOS art 1(1). In contrast, Coulée describes this obligation as an integral obligation on the ground that, in the event of a sovereign claim to part of the Area by one state party, no other state party could make a competing claim to sovereignty. Coulée, 'Droit des Traités et Non-Réciprocité', 246-247. For the purpose of characterising such an obligation as interdependent, the relevant point is not whether all the other states parties to which the obligation is owed could each make competing claims to sovereignty in the event of a breach, but whether their position with respect to the further performance of the obligation not to make such claims is changed.

<sup>112</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (opened for signature 27 January 1967, entered into force 10 October 1967) 610 UNTS 205 art II; Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (opened for signature 18 December 1979, entered into force 11 July 1984) 1363 UNTS 3 art 11(2)-(3). Crawford, 'Chance, Order, Change', 448; but see Coulée, 'Droit des Traités et Non-Réciprocité', 247-248.

<sup>113</sup> R Wolfrum, 'Solidarity and Community Interests: Driving Forces for the Interpretation and Development of International Law' (2019) 416 *Recueil des Cours de l'Académie de Droit International* 227.

<sup>114</sup> Antarctic Treaty art I; Protocol on Environmental Protection to the Antarctic Treaty (signed 4 October 1991, entered into force 14 January 1998) 2941 UNTS 9 (Madrid Protocol) art 7. See also ARSIWA Commentary, 119.

<sup>115</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies art 4; Agreement Governing the Activities of States on the Moon and Other Celestial Bodies art 3(1). See also Crawford's Fourth Report, 10-11; Coulée, 'Droit des Traités et Non-Réciprocité', 247-248.

further elaboration, Special Rapporteur Crawford added ‘certain regimes for the protection of the environment’.<sup>116</sup>

Given the limited set of obligations addressed by the Commission under article 42(b)(ii), the question might rightly be posed whether there is any need for a more principled approach to identifying interdependent obligations. Indeed, the possibility cannot be excluded that the line between article 42(b)(ii) and article 48 was an arbitrary—although not necessarily objectionable, and perhaps even pragmatic—choice by the ILC to limit states’ entitlement to standing for breaches of multilateral obligations and thereby to limit the scope of article 42(b)(ii).<sup>117</sup> This aim tends to support the circumscription of a limited set of interdependent obligations. The sparse scholarly attention afforded article 42(b)(ii) since 2001 also seems to support such an approach.<sup>118</sup>

For an enterprise aimed at the formulation of general rules of state responsibility,<sup>119</sup> however, the circumscription of a limited set of obligations to be addressed under article 42(b)(ii) seems unsatisfactory.<sup>120</sup> It was, on one view, not desirable ‘so readily’ to ‘remove all references to a typology, however incomplete or sketchy, of the various types of primary obligations’.<sup>121</sup> Without such a typology, another commentator regrets, the Commission’s placement of the subset of interdependent obligations in article 42(b)(ii) and other obligations *erga omnes partes* in article 48(1)(a) ‘creat[ed] some confusion between the interdependent obligations and obligations laid down in order to protect extra-state interests, by bringing them under the same category of obligations *erga omnes partes*, without throwing light on their differences or on the resulting legal consequences’.<sup>122</sup> The consideration of the distinct consequences that flow from the invocation of responsibility under article 42(b)(ii) and article 48 respectively supports the call for further clarification as to the obligations addressed under each provision.<sup>123</sup> As one commentator explains, ‘[t]he objective of this classification is ... to arrive at a

<sup>116</sup> Crawford, *State Responsibility*, 547. See also Arangio-Ruiz’s Third Report, 27.

<sup>117</sup> Paddeu and Tams note Crawford’s ‘wariness [of] overly principled arguments’. Paddeu and Tams, ‘Encoding the Law of State Responsibility with Courage and Resolve’, 23.

<sup>118</sup> Tams, ‘Individual States as Guardians of Community Interests’, 385.

<sup>119</sup> Paddeu and Tams, ‘Encoding the Law of State Responsibility with Courage and Resolve’, 12–17.

<sup>120</sup> The need for a suitable methodology to identify other categories, such as obligations *erga omnes* and peremptory norms of international law, should be equally felt here. On obligations *erga omnes*, see e.g. Tams, *Enforcing Obligations Erga Omnes in International Law*, 128–156. On peremptory norms, see e.g. K Johnston, ‘Identifying the *Jus Cogens* Norm in the *Jus Ad Bellum*’ (2020) 70 ICLQ 29, 30–31. Notably, in the context of its recent work on peremptory norms, the ILC considered it ‘essential that the identification of such norms and their legal consequences be done systematically and in accordance with a generally accepted methodology’. ILC, ‘Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), With Commentaries’, UN Doc A/77/10 (2022) 17. It is beyond the scope of this article to propose the most suitable methodology for describing each of these categories.

<sup>121</sup> Dupuy, ‘A General Stocktaking’, 1059.

<sup>122</sup> Sicilianos, ‘The Classification of Obligations’, 1135–1136.

<sup>123</sup> Dupuy, ‘A General Stocktaking’, 1059.

functional scheme to be able to delimit the range of states empowered to invoke the responsibility of the defaulting state and to act in consequence'.<sup>124</sup>

Ultimately, as the ILC itself seemed implicitly to accept, some departure from its starting point of neutrality towards the nature of primary obligations is warranted in the context of the rules on the invocation of responsibility for a breach. The avowed narrowness of the category of interdependent obligations notwithstanding, the application in a given case of article 42(b)(ii) or instead of article 48(1)(a)-(b) requires an answer to 'the preliminary question of which State has rights or interests corresponding to the obligations of the responsible State'.<sup>125</sup> The use of a handful of examples, in this context, does not adequately assist the task of arriving at a defensible determination, through the examination of relevant primary obligations,<sup>126</sup> of whether a breach is to be addressed in accordance with article 42(b)(ii) or article 48(1)(a)-(b).<sup>127</sup> The desire for conceptual clarity and a decisive answer to the question of the availability of various remedies and of countermeasures all support a clearer articulation of the obligations addressed by article 42(b)(ii). None of this should be taken to exclude that there may be good reasons for limiting the provision's scope.

### *B. The inadequacy of principled criteria for identifying 'interdependent obligations'*

Clarity might be lent through the use of principled criteria to define interdependent obligations. Two potential criteria emerge from the work of the ILC and the literature. The first is a condition of reciprocity, which could be said to characterise the obligations whose breach gives rise to injury under article 42, including under article 42(b)(ii), but not the obligations addressed under article 48. The second criterion is implied by the requirement in article 42(b)(ii) that the breach of the obligation 'is of such a character as radically to change the position of all the

<sup>124</sup> Sicilianos, 'The Classification of Obligations', 1133.

<sup>125</sup> Gaja, 'The Concept of an Injured State', 941. See also Sachariew, 'State Responsibility for Multilateral Treaty Violations', 282; Dupuy, 'A General Stocktaking', 1070.

<sup>126</sup> ARSIWA Commentary, 118; Crawford's Third Report, 35; Tams, *Enforcing Obligations Erga Omnes in International Law*, 57. For different reasons, this task may be more difficult in the context of customary international law. M Fitzmaurice, 'Material Breach of Treaty: Some Legal Issues' (2001) 6 *Austrian Review of International and European Law* 3, 36; Gaja, 'The Concept of an Injured State', 946.

<sup>127</sup> The use of illustrative examples as the preferred methodological approach of the ILC is also seen in the context of its work on other rules in the ARSIWA, such as article 40. In that context, the Commission similarly listed various examples of peremptory norms of general international law to demonstrate the scope of the rule. Unlike in relation to article 42(b)(ii), however, the Commission in its discussion of such norms had the weight of practice behind it. See ARSIWA Commentary, 112-113. Notably, peremptory norms subsequently became an independent topic of the Commission's work; perhaps the same might one day be true of obligations *erga omnes partes* and obligations *erga omnes*.

other States to which the obligation is owed with respect to the further performance of the obligation'. Although this text addresses the character of the breach, it might offer some indication as to the kinds of obligations addressed by the subclause.<sup>128</sup> It could be taken to suggest that collective compliance is an indispensable condition for meeting the objectives underlying interdependent obligations.

Scrutinising each criterion in turn, this section concludes that, in the end, neither a requirement of reciprocity nor the necessity of collective compliance to meet underlying objectives offers sufficiently clear guidance to the task of distinguishing interdependent obligations, whose breach is addressed by one or more injured states in accordance with article 42(b)(ii), from other obligations *erga omnes partes* and obligations *erga omnes*, whose breach is, in the absence of a specially affected state,<sup>129</sup> addressed by a state other than an injured state under article 48. The difficulty with drawing the relevant distinctions is, in respect of each criterion, compounded by the lack of clarity as to the definition of obligations *erga omnes partes* and obligations *erga omnes*.<sup>130</sup>

Subsection i shows that reciprocity may be understood in different ways and, as such, is not an especially useful criterion for distinguishing the obligations addressed by article 42, including article 42(b)(ii), from those addressed by article 48. Whatever role reciprocity plays, the 'structure of performance' of interdependent obligations is multilateral; that is, the performance of the obligation towards one state amounts to the performance of the obligation towards all the others. As such, interdependent obligations are performed, and thus owed, *erga omnes partes* or *erga omnes*.<sup>131</sup>

Subsection ii argues that the text of article 42(b)(ii) does not either offer a clear principled criterion for identifying interdependent obligations. Whether the performance of the obligation by all the committing states is a *conditio sine qua non* for meeting the underlying objective must be assessed by weighing the importance, in the view of the committing states, of collective compliance to achieve the relevant objective. Such a requirement could be met by many obligations *erga omnes partes* or *erga omnes*, suggesting a much wider scope for article 42(b)(ii) than that envisaged by the ILC. Conversely, any attempt to circumscribe the obligations addressed under article 42(b)(ii) by assessing the importance of the underlying objectives would involve drawing a subjective and perhaps even arbitrary importance-based line between the respective obligations addressed under article 42(b)(ii) and article 48(1)(a)-(b).

<sup>128</sup> The character of the breach is addressed in Section IV.

<sup>129</sup> ARSIWA art 42(b)(i).

<sup>130</sup> See Tams, *Enforcing Obligations Erga Omnes in International Law*, 128-156; Proukaki, *The Problem of Enforcement in International Law*, 49-52; Ragazzi, *The Concept of International Obligations Erga Omnes*, 182-187.

<sup>131</sup> Tams, *Enforcing Obligations Erga Omnes in International Law*, 130.

*i. The requirement of reciprocity*

On one view, a distinguishing feature of the obligations whose breach is said to give rise to injury under article 42 of the ARSIWA, including article 42(b)(ii), is their reciprocal character. Reciprocity is generally understood as 'the status of a relationship between two or more States under which a certain conduct by one party is in one way or another juridically dependent upon that of the other'.<sup>132</sup> This understanding of reciprocity makes it a feature of bilateral obligations.<sup>133</sup> It also features in the definition given by Special Rapporteur Fitzmaurice to interdependent obligations, 'the essence' of which is, on his view, that 'the undertaking of each party is given for a similar undertaking by the others'.<sup>134</sup> Such a characterisation could explain the placement of breaches of interdependent obligations alongside breaches of bilateral obligations, under article 42(a) and, somewhat less obviously, breaches of obligations owed to 'a group of States' or 'the international community as a whole' that are capable of specially affecting one or more of those states, under article 42(b)(i).<sup>135</sup>

In contrast, obligations *erga omnes partes* and *erga omnes* are, on this view, deemed not to constitute reciprocal relationships between states.<sup>136</sup> Reciprocity is 'alien to such obligations because they are grounded not in an exchange of rights and duties but in an adherence to a normative system'.<sup>137</sup> The point is demonstrated more clearly by reference to the subset of integral obligations<sup>138</sup> that impose standard-setting conventions<sup>139</sup> or protect 'extra-state interests'<sup>140</sup> in situations in which the beneficiaries of the obligation are not the other states or where 'there may be no particular obligee or beneficiary'.<sup>141</sup> For these obligations:

performance ... will not be effected between States parties at all but rather commit the contracting States to adopt a certain, 'parallel', conduct within their jurisdiction which does not manifest itself as any tangible give and take or interaction *between* the parties involved.<sup>142</sup>

<sup>132</sup> B Simma, 'Reciprocity' in R Wolfrum and A Peters (eds), *Max Planck Encyclopedia of Public International Law* (2008) para 2. Obligations based on reciprocity 'have to be accepted and carried out as the *conditio sine qua non* for the enjoyment of the advantages accruing from the other [states]' performance'. B Simma, 'Reciprocity' in R Bernhardt (ed), *Encyclopedia of Public International Law* (1981) 401.

<sup>133</sup> This includes bilateral obligations in multilateral treaties.

<sup>134</sup> Fitzmaurice's Second Report, 54.

<sup>135</sup> Tams, *Enforcing Obligations Erga Omnes in International Law*, 57.

<sup>136</sup> See Tams, *Enforcing Obligations Erga Omnes in International Law*, 129. Such breaches are nevertheless capable of specially affecting one or more states.

<sup>137</sup> R Provost, 'Reciprocity in Human Rights and Humanitarian Law' (1994) 65 BYIL 383, 386.

<sup>138</sup> Recall the discussion of integral obligations in Section II.A.

<sup>139</sup> Tams, *Enforcing Obligations Erga Omnes in International Law*, 57-58.

<sup>140</sup> Sicilianos, 'The Classification of Obligations', 1135.

<sup>141</sup> Crawford's Third Report, 36.

<sup>142</sup> Simma, 'From Bilateralism to Community Interest in International Law', 337.

On this view, expressed in the early jurisprudence of the ICJ vis-à-vis the Genocide Convention,<sup>143</sup> the obligations found in multilateral human rights treaties 'fall outside the interplay of reciprocity'<sup>144</sup> since they 'lack th[e] element of benefits and burdens actually running between the contracting States'.<sup>145</sup> As one commentator explains, '[a] breach of human rights by state A, however serious it may be, in no way changes the position of other states regarding compliance with their own obligations in the same area'.<sup>146</sup> Unlike bilateral and 'bilateralisable' obligations, such obligations are 'characterised by a complete absence of reciprocity'.<sup>147</sup> This understanding of reciprocity could support the distinction between 'an injured State' under article 42 and 'a State other than an injured State' under article 48.

On this view of reciprocity, moreover, the 'global' or 'collective reciprocity' said by some commentators to characterise interdependent obligations, under article 42(b)(ii), further distinguishes these obligations from bilateral and 'bilateralisable' obligations, under article 42(a) and (b) (i) respectively.<sup>148</sup> When it comes to interdependent obligations, 'the obligation of each party [i]s dependent on a corresponding performance by all the parties'.<sup>149</sup> In other words, 'the performance, by all States, is inextricably linked'<sup>150</sup> such that 'continued performance by one depends on continued performance by all'.<sup>151</sup> The point is demonstrated best in relation to certain plurilateral treaties.<sup>152</sup> An obligation of disarmament, for example—widely taken to be interdependent<sup>153</sup>—is said to reflect 'a

<sup>143</sup> The Court famously observed that 'in a convention of this type one cannot speak of individual advantages to states, or of the maintenance of a perfect contractual balance between rights and duties'. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23.

<sup>144</sup> Sicilianos, 'The Classification of Obligations', 1135.

<sup>145</sup> Simma, 'From Bilateralism to Community Interest in International Law', 365.

<sup>146</sup> Sicilianos, 'The Classification of Obligations', 1135. See also Crawford, *State Responsibility*, 547 (fn 29); Dupuy, 'L'Unité de l'Ordre Juridique International', 140; Provost, 'Reciprocity in Human Rights and Humanitarian Law', 404.

<sup>147</sup> Tams, *Enforcing Obligations Erga Omnes in International Law*, 56. See also Coulée, 'Droit des Traités et Non-Réciprocité', 26, 30, 153, 185.

<sup>148</sup> For the use variously of 'global reciprocity' and 'collective reciprocity', see Coulée, 'Droit des Traités et Non-Réciprocité', 421; Sicilianos, 'The Classification of Obligations', 1135; Dupuy, 'L'Unité de l'Ordre Juridique International', 138; Whelan, *Reciprocity in Public International Law*, 95. Coulée also describes this characteristic as 'surréciprocité'. Coulée, 'Droit des Traités et Non-Réciprocité', 184-185. Simma prefers the term 'genuine' reciprocity. Simma, 'From Bilateralism to Community Interest in International Law', 351. For Dupuy, 'reciprocity reaches its highest stage in the context of interdependent obligations'. Dupuy, 'A General Stocktaking', 1071. Similarly, for d'Argent, 'la réciprocité y joue ... intégralement' (author's translation: reciprocity plays a role ... fully). d'Argent, 'Les Obligations Internationales', 85. The term 'global reciprocity' is not quite accurate vis-à-vis obligations in plurilateral or multilateral treaties that lack universal ratification.

<sup>149</sup> Fitzmaurice's Third Report, 44. Differently put, 'the participation of all the parties is a condition of the obligatory force of the treaty'. Fitzmaurice's Second Report, 36.

<sup>150</sup> Tams, *Enforcing Obligations Erga Omnes in International Law*, 56. See also Coulée, 'Droit des Traités et Non-Réciprocité', 25-26.

<sup>151</sup> Whelan, *Reciprocity in Public International Law*, 101-102.

<sup>152</sup> States parties to a plurilateral treaty constitute a relatively limited group with a particular interest in the subject-matter of the treaty.

<sup>153</sup> Fitzmaurice's Second Report, 54 and fn 73.



sort of global reciprocity in the sense that each state disarms because the others do likewise'.<sup>154</sup> As one commentator elaborates, '[i]t is clear ... that each state reduces its military power because and to the extent that the other parties do likewise. Non-performance, or material breach, of the treaty by one of its parties would threaten the fragile military balance brought by the agreement'.<sup>155</sup> The same rationale would apply to relevant obligations in a peace treaty,<sup>156</sup> 'denuclearization' treaty, or treaty prohibiting nuclear weapons testing.<sup>157</sup> Certain obligations contained in the Treaty on the Non-Proliferation of Nuclear Weapons, for example, have been said to reflect 'a real quid pro quo',<sup>158</sup> or 'give and take' among all the states parties.<sup>159</sup> The same may be said of obligations prohibiting nuclear weapons testing,<sup>160</sup> notably the obligation in the recent Treaty on the Prohibition of Nuclear Weapons not to '[d]evelop, test, produce, manufacture, otherwise acquire, possess or stockpile nuclear weapons or other nuclear explosive devices'.<sup>161</sup>

Yet others take a different view entirely of reciprocity, one that does not assist in distinguishing between the obligations addressed under article 42, including article 42(b)(ii), and those addressed under article 48. Their position is that 'reciprocity governs every international agreement, independently of its content',<sup>162</sup> since 'international law rests upon the logic of reciprocity in its entirety'.<sup>163</sup> The point is made most clearly in relation to treaty-based obligations, in which context 'the very fact that a treaty constitutes an agreement between States' makes it 'formally reciprocal'.<sup>164</sup> On this view, all treaties 'establish reciprocal rights and obligations among the participating States in precisely the same way',<sup>165</sup> whether they 'embody a mutual exchange of benefits or set down uniform rules for future behaviour'.<sup>166</sup> Even a multilateral human rights treaty 'remains a reciprocal promise of the States parties that testifies to the interest each of them takes in the observance of minimum rules of

<sup>154</sup> Sicilianos, 'The Classification of Obligations', 1135.

<sup>155</sup> *ibid* 1134.

<sup>156</sup> See e.g. the obligation not to engage in hostilities in Ceasefire (Lusaka) Agreement (signed 10 July 1999, entered into force 11 July 1999) 2312 UNTS 255 art I(2)(a).

<sup>157</sup> Sicilianos, 'The Classification of Obligations', 1134.

<sup>158</sup> Whelan, *Reciprocity in Public International Law*, 99. Notably, Whelan refers to a range of obligations contained in the Treaty, not only those in articles I and II, as giving rise to reciprocal rights and obligations, which she describes the 'truly interdependent': *ibid* 100.

<sup>159</sup> Simma, 'From Bilateralism to Community Interest in International Law', 336.

<sup>160</sup> Consider the obligation contained in article I(1) of the Nuclear Test Ban Treaty 'not to carry out any nuclear weapon test explosion'. Similarly, in article I(1) of the Comprehensive Nuclear Test Ban Treaty, states parties commit 'not to carry out any nuclear weapon test explosion or any other nuclear explosion'.

<sup>161</sup> Treaty on the Prohibition of Nuclear Weapons (opened for signature 20 September 2017, entered into force 22 January 2021) art 1(a).

<sup>162</sup> Simma, 'Reciprocity' (1981), 400.

<sup>163</sup> *ibid* 403.

<sup>164</sup> Whelan, *Reciprocity in Public International Law*, 73.

<sup>165</sup> Simma, 'Reciprocity' (2008), para 6.

<sup>166</sup> Simma, 'Reciprocity' (1981), 401.

human rights by all the States parties, or maybe by all States'.<sup>167</sup> According to this latter view, it is not only bilateral, 'bilateralisable', and 'collectively' or 'globally' reciprocal interdependent obligations, but all obligations, that may be validly described as embodying reciprocity.<sup>168</sup>

These diverging views of reciprocity, among others,<sup>169</sup> suggest that reciprocity 'may not be as clear' in conceptual terms as it first appears.<sup>170</sup> As such, nor is reciprocity a sufficiently clear criterion for distinguishing the obligations addressed under article 42, including article 42(b)(ii), from the obligations addressed under article 48.

However 'reciprocity' is understood, the ultimately relevant distinction is the one between bilateral and multilateral obligations.<sup>171</sup> Interdependent obligations, like all obligations *erga omnes partes* and obligations *erga omnes*, are multilateral obligations 'owed not individually to a particular State but to a collective, a group of States, or even to the international community as a whole'.<sup>172</sup> Their 'structure of performance'<sup>173</sup> is incapable of being reduced to bilateral relations between pairs of the committing states.<sup>174</sup> The conduct in performance of the obligation towards one state amounts to the performance of the obligation towards all the others. Conversely, the breach of the obligation towards one state necessarily involves the breach of the obligation towards all the

<sup>167</sup> A Paulus, 'Reciprocity Revisited' in U Fastenrath and others, *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011) 126. See also Simma, 'Reciprocity' (1981), 401.

<sup>168</sup> Whelan, *Reciprocity in Public International Law*, 201. This understanding of reciprocity is even deployed to justify the entitlement of a state other than an injured state to invoke the responsibility of a state in breach of its obligations in accordance with article 48: *ibid* 105-107. For a critique of this approach, see Dupuy, 'L'Unité de l'Ordre Juridique International', 141.

<sup>169</sup> For other notions of reciprocity, see e.g. B Simma, 'Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law' (1970) 20 *Österreichische Zeitschrift für öffentliches Recht* 5, 7; Whelan, *Reciprocity in Public International Law*, 101-102; Provost, 'Reciprocity in Human Rights and Humanitarian Law', 383. A third kind of reciprocity, which Simma describes as 'substantive reciprocity', addresses 'the expectation of reciprocity' on the part of a state when deciding whether to undertake obligations, at this stage seeking reciprocity as the 'actual equivalence of the mutual advantages deriving from treaty performance'. Simma, 'Reciprocity' (1981), 401. See also Simma and Tams, 'Article 60', note 71. This understanding of reciprocity is more easily distinguished from the others: '[e]xpectations of reciprocity of course might have played a role during the creation of the obligation in question', but this does not determine the character of the obligation for the purpose of the law of state responsibility. Tams, *Enforcing Obligations Erga Omnes in International Law*, 56.

<sup>170</sup> Tams, *Enforcing Obligations Erga Omnes in International Law*, 57.

<sup>171</sup> See generally Crawford, 'Multilateral Rights and Obligations in International Law'.

<sup>172</sup> Crawford's Third Report, 34. Crawford described 'legal relations that are genuinely multilateral in character' as those 'which involve rights or obligations held in common by a group to class of legal persons as such'. Crawford, 'Multilateral Rights and Obligations in International Law', 346. See also *ibid* 344.

<sup>173</sup> Tams, *Enforcing Obligations Erga Omnes in International Law*, 130.

<sup>174</sup> Arangio-Ruiz's Fourth Report, 62; Coulée, 'Droit des Traités et Non-Réciprocité', 25; d'Argent, 'Les Obligations Internationales', 85. On the 'non-bilateralisable' nature of obligations *erga omnes*, see Tams, *Enforcing Obligations Erga Omnes in International Law*, 129-132; Provost, 'Reciprocity in Human Rights and Humanitarian Law', 386-387; Pauwelyn, 'A Typology of Multilateral Treaty Obligations', 908.

others.<sup>175</sup> When it comes to the obligation to refrain from nuclear weapons testing in the Nuclear Test Ban Treaty, for example, '[i]t is impossible to refrain from testing ... not affecting some States and to test ... affecting others'.<sup>176</sup> Nor is there any reason suggested by the ILC for regarding the performance of interdependent obligations as materially different from the performance of obligations *erga omnes partes* and *erga omnes*. Both article 42(b) and article 48(1) refer to obligations owed to 'a group of States' or 'the international community as a whole'. The additional reference in article 48(1)(a), but not article 42(b), to obligations 'established for the protection of a collective interest of the group' limits the scope of only that subclause; it does not in any way qualify the applicability of article 42(b). None of this should be taken to exclude that the breach of a multilateral obligation, fulfilled vis-à-vis all the other committing states through the same conduct, may 'specially affect' one or more states within the meaning of article 42(b)(i).<sup>177</sup>

In the end, the multilateral nature of the obligations addressed under article 42(b)(ii) is useful to distinguish such obligations from the bilateral obligations addressed under article 42(a). Yet such a characterisation is of limited assistance when seeking to distinguish the obligations addressed under article 42(b)(ii) from those addressed under article 48(1)(a)-(b). Interdependent obligations are performed in the same way as obligations *erga omnes partes* and obligations *erga omnes*, that is multilaterally.<sup>178</sup> As one commentator recognises, this leads to the conclusion that 'interdependent obligations [are] valid *erga omnes*' or indeed *erga omnes partes*.<sup>179</sup>

## ii. The necessity of collective compliance to meet underlying objectives

If the 'structure of performance'<sup>180</sup> of interdependent obligations is the same as that of all obligations *erga omnes partes* and obligations *erga omnes*, then some other principled criterion is needed to distinguish

<sup>175</sup> For this point in the context of article 60(2)(c) of the VCLT, see Simma, 'Reflections on Article 60 of the Vienna Convention on the Law of Treaties', 75.

<sup>176</sup> Sachariew, 'State Responsibility for Multilateral Treaty Violations', 281.

<sup>177</sup> But see the discussion of certain obligations pertaining to ozone-depleting emissions in Section III.B.ii.

<sup>178</sup> d'Argent, 'Les Obligations Internationales', 85-87; Tams, *Enforcing Obligations Erga Omnes in International Law*, 130-132. In contrast, Coulée is satisfied with the use of reciprocity as the distinguishing criterion. In her view, it is possible to distinguish between interdependent obligations and integral obligations based on the reason underlying states' commitment to an obligation. When it comes to interdependent obligations, each state commits because all the others do, while for integral obligations, each state commits with a view to the protection of an extra-state interest. Coulée, 'Droit des Traités et Non-Réciprocité', 231-232. With respect, these justifications are not mutually exclusive.

<sup>179</sup> Tams, *Enforcing Obligations Erga Omnes in International Law*, 132. For Tams, this conclusion is 'problematic' since, '[a]s regards interdependent obligations, attributing *erga omnes* status would be quite unnecessary': *ibid.* It is true, as Tams elaborates, that the characterisation of interdependent obligations as obligations *erga omnes partes* or *erga omnes* would not 'alter their regime of law enforcement': *ibid.* Yet this is not a sufficient reason to exclude the possibility that, based on the multilateral structure of their performance, interdependent obligations are obligations owed *erga omnes partes* or *erga omnes*.

<sup>180</sup> Tams, *Enforcing Obligations Erga Omnes in International Law*, 130.

interdependent obligations from the wider set of obligations owed *erga omnes partes* and *erga omnes* to which they belong. Such a criterion might be drawn from the textual requirement in article 42(b)(ii) of the ARSIWA that the breach of the obligation 'is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation'. While the application of the subclause is conditioned on the character of the breach rather than the character of the obligation, its requirement as to the consequences of a breach may offer some indication as to the kinds of obligations it addresses.<sup>181</sup> It is often suggested that the performance by all the committing states of an interdependent obligation is an indispensable condition for meeting the objective underlying it. As Special Rapporteur Crawford, writing in his personal capacity, explained: 'conformity with the obligations is required by all parties for the success of the regime'.<sup>182</sup> In the words of another commentator, '[t]hese are obligations, scrupulous performance of which by all states bound by them constitutes a condition *sine qua non* for the functioning of the system they set up'.<sup>183</sup>

Although there are reasons to believe that this condition finds its roots in the requirement of a 'material breach' in article 60 of the VCLT,<sup>184</sup> the ILC and the existing scholarship also suggest it as a feature of interdependent obligations. Such a requirement could be used to distinguish these obligations from the obligations *erga omnes partes* and *erga omnes* addressed under article 48(1)(a) and (b) respectively and could be appealing for several reasons. First, the necessity of collective compliance to meet underlying objectives would explain why interdependent obligations are said to 'operate in an all or nothing fashion' and 'require complete collective restraint if they are to work'.<sup>185</sup> This reasoning would also explain why '[a] breach necessarily undermines or destroys the basis for [the other states'] own performance'.<sup>186</sup> That article 42(b)(ii) requires no less than this is evidenced by its earlier wording, eventually discarded, which would have included a wider set of breaches 'of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned'.<sup>187</sup> Second, the emphasis on the

<sup>181</sup> Not dissimilarly, in the context of article 60(2)(c) of the VCLT, Special Rapporteur Riphagen observed that 'the "radical change" is linked with the character of the treaty'. Riphagen's First Report, 119.

<sup>182</sup> Crawford, *State Responsibility*, 547.

<sup>183</sup> Sicilianos, 'The Classification of Obligations', 1134.

<sup>184</sup> A 'material breach' is defined in article 60(3)(b) of the VCLT as consisting of, *inter alia*, 'the violation of a provision essential to the accomplishment of the object or purpose of the treaty'.

<sup>185</sup> Crawford, 'Multilateral Rights and Obligations in International Law', 448.

<sup>186</sup> Crawford, *The International Law Commission's Articles on State Responsibility*, 257. In Whelan's words, 'future performance is fundamentally compromised'. Whelan, *Reciprocity in Public International Law*, 198.

<sup>187</sup> ILC, draft article 42(b)(ii), Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading, UN Doc. A/CN.4/L.600, ILC Ybk (2000) II(2) 69. The earlier draft article 5(d)(ii), when defining an injured state, required that 'the breach of the obligation by one State party necessarily affects the exercise of the rights or the performance of the obligations of all other States parties'. ILC, Sixth Report on the Content, Form and Degrees of International Responsibility (Part

performance of the obligation by all the committing states as the condition for meeting the underlying objective is also supported by the treatment of interdependent obligations in the law of treaties. In that context, it is likewise suggested that the objectives of certain multilateral treaties 'can only be achieved through the interdependent performance of obligations by all parties'.<sup>188</sup> Accordingly, '[t]he non-performance by one party ... affects all other parties to the treaty',<sup>189</sup> 'put[ting] into question the purpose for which [the obligations] have been entered into'.<sup>190</sup> Conversely, this requirement would not be satisfied by integral obligations in 'treaties involving undertakings to conform to certain standards and conditions',<sup>191</sup> such as the obligations contained in multilateral human rights treaties. Meeting the standard-setting objectives underlying such obligations calls for maximal compliance, including continued compliance by all the other states in the event of a breach by any one of them.<sup>192</sup> This would explain why breaches of integral obligations, a subset of obligations owed *erga omnes partes* or *erga omnes*, are addressed under article 48.

Even having set integral obligations aside, identifying interdependent obligations by assessing the necessity of collective compliance to meet underlying objectives is not as straightforward as this reasoning suggests. The difficulty is illustrated by an examination of obligations for the preservation of shared resources or areas beyond national jurisdictions, which, unlike the agreed examples of interdependent obligations,<sup>193</sup> do not admit of easy classification.<sup>194</sup> On one view, breaches of obligations for 'the protection of the environment of an area which is not subject to the sovereignty of any State', such as the high seas, the Area, or the atmosphere, do not typically give rise to injury and thus fall squarely within the scope of article 48(1)(a)-(b) of the ARSIWA.<sup>195</sup> The ITLOS, for instance, describing 'the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area', cited article 48(1) as the applicable rule of standing in relation to breaches of such obligations.<sup>196</sup> The ILC also recently declared that

Two of the Draft Articles); and 'Implementation' (mise en oeuvre) of International Responsibility and the Settlement of Disputes (Part Three of the Draft Articles), by Willem Riphagen, Special Rapporteur, UN Doc. A/CN.4/389, ILC Ybk (1985) II(1) 5-6.

<sup>188</sup> Simma and Tams, 'Article 60', 1365.

<sup>189</sup> *ibid.*

<sup>190</sup> Tams, *Enforcing Obligations Erga Omnes in International Law*, 57.

<sup>191</sup> Fitzmaurice's Second Report, 31.

<sup>192</sup> d'Argent, 'Les Obligations Internationales', 86.

<sup>193</sup> Recall Section III.A.

<sup>194</sup> See e.g. the obligations discussed in Coulée, 'Droit des Traités et Non-Réciprocité', 231-232, 244; d'Argent, 'Les Obligations Internationales', 86-87; Fitzmaurice and Elias, *Contemporary Issues in the Law of Treaties*, 150-151.

<sup>195</sup> Gaja, 'The Protection of General Interests in the International Community', 178.

<sup>196</sup> *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion of 1 February 2011), ITLOS Reports 2011 10, 59. Going far beyond what the ILC had proposed, the Tribunal, citing article 48(1) of the ARSIWA, considered that breaches of relevant obligations could, in the event of damage to the marine environment,

‘certain rules relating to common spaces ... may produce *erga omnes* obligations’, citing, in turn, the ITLOS opinion.<sup>197</sup> Many commentators agree that obligations for the preservation of shared resources or areas beyond national jurisdictions qualify as obligations owed *erga omnes partes* or *erga omnes*, whose breach must, in the absence of a specially affected or otherwise injured state,<sup>198</sup> be addressed in accordance with article 48(1)(a)-(b).<sup>199</sup>

Yet obligations that have as their objective the preservation of shared resources or areas beyond national jurisdictions could equally be characterised as interdependent obligations on the ground that their performance by all the committing states is an indispensable condition for meeting these objectives. As one commentator rightly asks, ‘could one not broaden the rationale underlying [interdependent] obligations and apply it to cases in which a breach affects some other form of community interest, such as a community interest that requires protection at all costs?’<sup>200</sup> Special Rapporteur Crawford, writing in his personal capacity, seemed to hint at this possibility when he said that ‘certain regimes for the protection of the environment’ could comprise interdependent obligations.<sup>201</sup> Earlier constructions of the notion of injury, including in the ILC, also support such a conclusion.<sup>202</sup>

In line with this latter view, article 42(b)(ii) might address, for example, multilateral obligations aimed at the conservation of fisheries, which ban fishing or require states parties to ensure that their nationals comply with quotas on the total allowable catch of certain species of fish, as in some treaties establishing regional fisheries management

the Area, or its resources, give rise to claims for compensation by states parties, among other actors, including the International Seabed Authority ‘acting “on behalf” of mankind’: *ibid.*

<sup>197</sup> ‘Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), With Commentaries’, 66.

<sup>198</sup> ARSIWA art 42(b)(i).

<sup>199</sup> d’Argent, ‘Les Obligations Internationales’, 86-87; Dupuy, ‘L’Unité de l’Ordre Juridique International’, 140; C Chinkin, ‘Alternative Dispute Resolution under International Law’ in M Evans (ed), *Remedies in International Law: The Institutional Dilemma* (Hart 1998) 130; Ragazzi, *The Concept of International Obligations Erga Omnes*, 154-162; N Craik, T Davenport and R Mackenzie, *Liability for Environmental Harm to the Global Commons* (CUP 2023) 166-168; Mossop, ‘Dispute Settlement in Areas beyond National Jurisdiction’, 400-401; A Hachem, O Hathaway and J Cole, ‘A New Tool for Enforcing Human Rights: *Erga Omnes Partes* Standing’ (2024) 62 *Columbia Journal of Transnational Law* 259, 47-52 (forthcoming).

<sup>200</sup> Tams, ‘Individual States as Guardians of Collective Interests’, 385.

<sup>201</sup> Crawford, *State Responsibility*, 547.

<sup>202</sup> Special Rapporteur Arangio-Ruiz supported the characterisation of breaches of environmental obligations as ‘injurious’, although his point was with a view to discarding altogether the proposed distinction between injured and non-injured states. For him, breaches of obligations ‘related to environmental protection in outer space or in any area where contamination or pollution would affect the whole planet’, such as ozone depletion or ‘unlawful oil pollution of the high seas’, violate the rights of all other states undertaking the same obligations. When it comes to obligations relating to ozone depletion, he emphasised, a breach ‘physically affect[s] all States’. Arangio-Ruiz’s Fourth Report, 82, 86. Koskenniemi makes a similar point in respect of ozone depletion. M Koskenniemi, ‘Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol’ (1993) 3 *Yearbook of International Environmental Law* 151.

organisations (RFMOs).<sup>203</sup> Special Rapporteur Fitzmaurice himself referred to the 'interdependence of the obligations' in treaties 'to abstain from fishing in certain waters or at certain seasons'.<sup>204</sup> One commentator reasons that the breach of an obligation on fishing quotas 'affects the enjoyment of fishing rights by all other State parties, as one party has taken more than its allotted share of the resource'.<sup>205</sup> Another explicitly invokes 'the interdependent nature of the obligations' relating to conservation and sustainable use of high seas fisheries under RFMOs.<sup>206</sup> According to this view, a state party's:

[r]efusal to cooperate will render the conservatory and managerial efforts of others nugatory. Those left cooperating will be required continually to adjust their activities to their detriment and eventually may be wholly estopped from exercising any right to fish on the high seas by virtue of the commercial extinction of stocks.<sup>207</sup>

While in some cases causing the other states parties to impose stricter limits on their own catch to meet conservation targets, a breach by one state party could also change the position of all the others by incentivizing them to themselves abandon permissible catch limits. The objective of preservation underlying the obligation would in either event be subject to review and perhaps also revision. The question of permissible responses to breaches of such obligations has acquired particular practical relevance, as in the *Fisheries Jurisdiction* case.<sup>208</sup> Notably, the order for provisional measures in the *Southern Bluefin Tuna* case emphasised the need to consider the underlying objectives of 'ensuring conservation and promoting the objective of optimum utilization of the stock' when it directed the parties to the dispute to 'make further efforts to reach agreement with other States and entities engaged in fishing for southern bluefin tuna'.<sup>209</sup>

If this logic supports the characterisation of relevant fishing obligations as interdependent obligations, moratoriums on whaling,<sup>210</sup>

<sup>203</sup> See e.g. Convention for the Conservation of Southern Bluefin Tuna (signed 10 May 1993, entered into force 20 May 1994) 1819 UNTS 360 art 8(3)(a) and (7).

<sup>204</sup> Fitzmaurice's Second Report, 54 (fn 73). In support, see Dupuy, 'L'Unité de l'Ordre Juridique International', 139; Wyler, 'Quelques réflexions sur la typologie des obligations en droit international', 42.

<sup>205</sup> J Peel, 'New State Responsibility Rules and Compliance with Multilateral Environmental Obligations: Some Case Studies of How the New Rules Might Apply in the International Environmental Context' (2001) 10 *Reciel* 82, 89.

<sup>206</sup> R Rayfuse, 'Countermeasures and High Seas Fisheries Enforcement' (2004) 51 *NILR* 41, 64.

<sup>207</sup> *ibid* 65. On 'response actions' in areas beyond national jurisdictions, see Craik, Davenport and Mackenzie, *Liability for Environmental Harm to the Global Commons*, 162-163.

<sup>208</sup> The case, were it not for its dismissal for a lack of jurisdiction, would have addressed the lawfulness of Canada's arrest of a Spanish ship on the high seas 'to put a stop to the overfishing of Greenland halibut by Spanish fishermen'. *Fisheries Jurisdiction (Spain v Canada)* (Jurisdiction) [1998] ICJ Rep 432, 443.

<sup>209</sup> *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)* (Provisional Measures, Order of 27 August 1999) ITLOS Reports 1999, 280, 297-300 ('*Southern Bluefin Tuna Cases*').

<sup>210</sup> International Convention for the Regulation of Whaling (signed 2 December 1946, entered into force 10 November 1948) 161 UNTS 72 schedule, para 6. In support, see Dupuy, 'L'Unité de

sealing,<sup>211</sup> or the taking of polar bears<sup>212</sup> could also qualify as such, as might obligations to restrict harmful emissions in the universally ratified Montreal Protocol on Substances that Deplete the Ozone Layer.<sup>213</sup> It was in one case suggested, for example, that 'potential non-compliance' with emissions restrictions 'by the Russian Federation ... posed a serious threat to the ongoing viability of the ozone treaty regime'.<sup>214</sup> Indeed, when it comes to obligations to restrict ozone-depleting emissions, 'it is practically impossible to make a meaningful distinction between states directly injured and other states'.<sup>215</sup> The recent disagreement in the ILC as to 'whether or not the obligation to protect the atmosphere is an *erga omnes* obligation in the sense of article 48' of the ARSIWA, a question on which there are 'different views', and the consequences of which are not 'fully clear', confirms the persisting lack of clarity as to the character of obligations for the preservation of shared resources or areas beyond national jurisdictions.<sup>216</sup>

Whichever classification of such obligations is preferred, their assessment against the requirement that collective compliance is a necessary condition to meet underlying objectives shows that the criterion lends limited clarity to the task of identifying interdependent obligations. On the contrary, the use of such a criterion would open the door to an excessively wide reading of article 42(b)(ii), any circumscription of which would depend on the weighing of the importance, in the shared view of

*l'Ordre Juridique International*, 140; A Nollkaemper, 'International Adjudication of Global Public Goods: The Intersection of Substance and Procedure' (2012) 23 EJIL 769, 779-780.

<sup>211</sup> Convention for the Conservation of Antarctic Seals (opened for signature 1 June 1972, entered into force 11 March 1978) 1080 UNTS 175 annex, art II.

<sup>212</sup> Agreement on the Conservation of Polar Bears (signed 15 November 1973, entered into force 26 May 1976) 2898 UNTS 342 art I.

<sup>213</sup> Montreal Protocol on Substances that Deplete the Ozone Layer (opened for signature 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3 arts 2A-2J.

<sup>214</sup> Peel, 'New State Responsibility Rules', 92. See also Wyler, 'Quelques réflexions sur la typologie des obligations en droit international', 42.

<sup>215</sup> Koskenniemi, 'Breach of Treaty or Non-Compliance?', 151. As Koskenniemi notes, when it comes to the Montreal Protocol or 'indeed any environmental treaty designed to deal with other than local problems', 'it is all but impossible to single out any one party as specially affected by a state's failure to reduce its emissions': *ibid* 138. Likewise, Crawford, considering obligations under both the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol, argued that 'there will never be a demonstrable connection with any particular breach and the impact on any particular State party'. Crawford's Third Report, 36. d'Argent shares the difficulty with classifying obligations to limit emissions: 'si le bon sens penche plutôt pour considérer les obligations des réduction des gaz à effet de serre comme des obligations interdépendantes, une vision plus exigeante de la protection de l'environnement pourrait bien y voir des obligations intégrales' (author's translation: if common sense tends to consider greenhouse gas reduction obligations as interdependent obligations, a more demanding vision of environmental protection could well see them as integral obligations). d'Argent, 'Les Obligations Internationales', 86. In his view, the urgent need to protect the ozone layer supports the qualification of obligations to limit emissions as integral obligations (whose performance may not be suspended by the other states in the event of a breach) rather than interdependent obligations.

<sup>216</sup> ILC, 'Report of the International Law Commission (70<sup>th</sup> Session, 3 April-1 June and 2 July-10 August 2018)', UN Doc A/73/10 (2018), 175 cf Craik, Davenport and Mackenzie, *Liability for Environmental Harm to the Global Commons*, 165 (fn 25). The point was reiterated in the commentary to the guidelines as adopted in 2021. ILC, Draft Guidelines on the Protection of the Atmosphere, With Commentaries', UN Doc A/76/10 (2021), 26.



the committing states, of the objectives underlying some obligations and not others. Whether an obligation is interdependent would thus turn on 'the inherently vague and indeterminate notion of "importance"' in relation to underlying objectives.<sup>217</sup> The desirability of such an approach is questionable—even more so if a similarly subjective assessment of importance is used to identify obligations *erga omnes partes*, obligations *erga omnes*,<sup>218</sup> or integral obligations.<sup>219</sup> Relevant distinctions would thus turn on the weighing of the relative importance of underlying objectives. This is not only a highly subjective exercise, but also one whose outcome may be susceptible to change over time. As one commentator remarked in relation to North Korea's decision to leave the Treaty on the Non-Proliferation of Nuclear Weapons, in that context the 'community interest in universal adherence ha[d] become so strong that any course of action in contradiction to the aims which the treaty is designed to serve [wa]s considered inadmissible'.<sup>220</sup> In contrast, the breach of an obligation banning or otherwise restricting fishing may not be considered to fall within article 42(b)(ii) because states do not, or do not yet, attribute the same importance to compliance with these obligations. When it comes to fishery conservation on the high seas, 'the highly diffuse nature of the interests protected may put it beyond the power of any one State to change the position of all members of the relevant group sufficiently' for the purpose of article 42(b)(ii).<sup>221</sup>

### C. Recapitulation

The ILC's circumscription of a handful of interdependent obligations whose breach is to be addressed under article 42(b)(ii) of the ARSIWA, an understandable pragmatic choice in the context of the Commission's

<sup>217</sup> Tams, *Enforcing Obligations Erga Omnes in International Law*, 129. Tams makes the point in relation to the identification of obligations *erga omnes*, noting that such an approach is 'very flexible indeed': *ibid* 136. The point is equally valid here. See also d'Argent, 'Les Obligations Internationales', 86-87; Coulée, 'Droit des Traités et Non-Réciprocité', 26; Wyler, 'Quelques réflexions sur la typologie des obligations en droit international', 41.

<sup>218</sup> *Barcelona Traction, Light and Power Co, Limited (Belgium v Spain)*, 32 ('in view of the importance of the rights involved, all states can be held to have an interest in their protection; they are obligations *erga omnes*'). See Ragazzi, *The Concept of International Obligations Erga Omnes*, 183-184; Proukaki, *The Problem of Enforcement in International Law*, 49-52. Tams identifies various difficulties with the use of such a methodology for identifying obligations *erga omnes*, including the subjectivity of the task of weighing the importance of the protected rights to determine whether corresponding obligations are owed *erga omnes*. Tams, *Enforcing Obligations Erga Omnes in International Law*, 136-156.

<sup>219</sup> d'Argent reasons that, since the states to which an integral obligation is owed are not, in the event of a breach by any one of them, permitted to suspend the performance of their own obligations, the collective interests protected by integral obligations must be more important than those protected by interdependent obligations. d'Argent, 'Les Obligations Internationales', 86.

<sup>220</sup> Simma, 'From Bilateralism to Community Interest in International Law', 333. See also *ibid* 342.

<sup>221</sup> D Guilfoyle, 'Interdicting Vessels to Enforce the Common Interest: Maritime Countermeasures and the Use of Force' (2007) 56 ICLQ 69, 73.

work on state responsibility, left the scope of application of a rule of standing of general applicability unclear. While the members of the Commission could agree that breaches of certain obligations would be addressed under article 42(b)(ii), they did not suggest any clear principle on which to limit the applicability of the rule. At the same time, a closer look at potential principled criteria for identifying the 'interdependent obligations' under article 42(b)(ii) reveals that such obligations are not conceptually different from obligations *erga omnes partes* and obligations *erga omnes*.

First, the requirement of reciprocity admits of varied application and is, on any understanding of reciprocity, not a distinguishing feature of interdependent obligations. While the 'global' or 'collective reciprocity'<sup>222</sup> used to characterise the obligations addressed in article 42(b)(ii) is useful to distinguish these obligations from the bilateral and 'bilateralisable' obligations addressed in article 42(a) and (b)(i), it offers little assistance in distinguishing interdependent obligations from the obligations *erga omnes partes* and *erga omnes* addressed in article 48(1)(a)-(b). The performance of interdependent obligations, like obligations *erga omnes partes* and *erga omnes*, is incapable of 'bilateralisation'. It is multi-lateral in character.

Second, nor does the requirement in article 42(b)(ii) that a breach 'radically ... change[s] the position of all the other States to which the obligation is owed with respect to the further performance of the obligation' suggest a principled criterion for identifying interdependent obligations. This text has been taken to imply that collective compliance is a necessary condition for meeting the objectives underlying interdependent obligations. Yet such a requirement could be met by a range of obligations *erga omnes partes* and obligations *erga omnes* for the preservation of shared resources or areas beyond national jurisdictions, suggesting a much wider scope for article 42(b)(ii) than that envisaged by the ILC. Conversely, any attempt to limit the scope of article 42(b)(ii) by weighing the importance of the objectives underlying various obligations would call for a highly subjective and perhaps even arbitrary assessment. Only breaches of integral obligations are clearly excluded from the scope of article 42(b)(ii), since the objectives underlying integral obligations call for continued performance by all the other states even in the face of a breach.

In the end, neither of the two criteria sufficiently distinguishes 'interdependent obligations' from obligations *erga omnes partes* and obligations *erga omnes*. As such, nor do they provide any principled reason for excluding breaches of obligations *erga omnes partes* and obligations *erga omnes* from the scope of article 42(b)(ii). Besides the exclusion of

<sup>222</sup> Coulée, 'Droit des Traités et Non-Réciprocité', 421; Sicilianos, 'The Classification of Obligations', 1135; Dupuy, 'L'Unité de l'Ordre Juridique International', 138; Whelan, *Reciprocity in Public International Law*, 95.

integral obligations from article 42(b)(ii), the relevant distinction between the entitlement to standing under article 42(b)(ii) and article 48 respectively of the ARSIWA must depend on the character of the breach. Accordingly, so too must any reference to the class of ‘interdependent obligations’.

#### IV. THE CHARACTER OF THE BREACH UNDER ARTICLE 42(b)(ii) OF THE ARSIWA

Article 42(b)(ii) of the ARSIWA, borrowing from the nearly identical wording of article 60(2)(c) of the VCLT, requires that the breach of the obligation be ‘of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation’. Without any principled divide between interdependent obligations, on the one hand, and other obligations *erga omnes partes* and *erga omnes*, on the other,<sup>223</sup> how widely or narrowly article 42(b)(ii) applies depends on how this textual requirement is construed. The implication is that the breach of an obligation that does not radically change the position of all the other states with respect to the further performance of the obligation, and does not otherwise give rise to injury under article 42(b)(i), is addressed under article 48.

This section asks how to read the requirement in article 42(b)(ii) that a breach ‘radically ... change[s] the position of all the other States to which the obligation is owed with respect to the further performance of the obligation’. Subsection A outlines the justification put forward by the ILC for restricting the breaches addressed by article 42(b)(ii) in this way. The Commission’s stated justification for the restriction of article 42(b)(ii) was the desirability, in its view, of a narrow scope for the subclause. A second justification, implicit in the work of the Commission, was a desire for consistency across the law of state responsibility and the law of treaties, with similar language, proposed by Special Rapporteur Fitzmaurice, having already made its way into article 60(2)(c) of the VCLT. Subsection B examines these justifications and other considerations to assess the significance of the requirement as to the character of the breach in article 42(b)(ii).

Ultimately, it is not only a wider range of obligations than those suggested by the ILC that may be addressed under article 42(b)(ii) rather than article 48. The better reading of the requirement in article 42(b)(ii) as to the character of the breach is one that includes all breaches that cause a change in the position of all the other states with respect to the further performance of the obligation, whether such a change is ‘radical’ or not. On this view, it is possible to envisage factual circumstances in which the requirement in article 42(b)(ii) as to the character of the breach is satisfied by breaches of obligations other than those suggested by the

<sup>223</sup> Recall Section III.B.

Commission, in particular obligations *erga omnes partes* or *erga omnes* for the protection of shared resources or areas beyond national jurisdictions.

*A. The ILC's justifications for the requirement as to the character of the breach*

Article 42(b)(ii) of the ARSIWA applies to breaches of obligations owed to a group of states or to the international community as a whole where the breach of the obligation 'is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation'. The reference in article 42(b) to 'the breach of the obligation' suggests that the provision was not meant to apply to all interdependent obligations, however such obligations were conceived by the Commission. The application of article 42(b) was further qualified by the character of the breach.<sup>224</sup> Indeed, when it comes to article 42(b)(ii), 'it is not so much th[e] wrongful act as the resulting situation' that is relevant to the assessment.<sup>225</sup> What is thus a requirement in article 42(b)(ii) as to the consequences of a breach effectively excludes from its scope breaches of obligations that are not of 'such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation'. In the absence of injury to a specially affected state under article 42(b)(i), this leaves breaches that do not 'radically' change the position of all the other states to be enforced in accordance with article 48.<sup>226</sup>

Two justifications for this drafting emerge from the work of the ILC. First, the Commission considered it 'desirable that [article 42(b)(ii)] be narrow in its scope'.<sup>227</sup> In its view, the class of 'interdependent obligations' was in practice limited and would 'usually arise under treaties establishing particular regimes'.<sup>228</sup> This desideratum is further evidenced by the fact that the text of the subclause is more restrictive than that initially proposed in an earlier draft, which referred to breaches 'of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned'.<sup>229</sup> In the view of the

<sup>224</sup> In contrast, draft article 43 of the ILC's 2000 draft articles referred in its chapeau to the state to which the obligation breached was owed rather than to the breach itself ('if the obligation breached is owed to ...'). ILC, Report of the International Law Commission on the Work of Its Fifty-Second Session, 1 May-9 June and 10 July-18 August 2000, UN Doc A/55/10, ILC Ybk (2000) II(2), 69.

<sup>225</sup> Riphagen's First Report, 120.

<sup>226</sup> Gaja, 'The Concept of an Injured State', 945.

<sup>227</sup> ARSIWA Commentary, 119.

<sup>228</sup> *ibid.* See also Statement of the Chairman of the Drafting Committee, 48; Crawford, *The International Law Commission's Articles on State Responsibility*, 260.

<sup>229</sup> ILC, draft article 42(b)(ii), Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading, UN Doc. A/CN.4/L.600, ILC Ybk (2000) II(2) 69. See also Crawford's Third Report, 31; Sicilianos, 'The Classification of Obligations', 1134.

Commission, moreover, 'it may not be the case that just any breach of the obligation has the effect of undermining the performance of all the other States involved'.<sup>230</sup> In other words, only some breaches will change the position of all the other states with respect to further compliance.

Second, the relatively limited scope of article 42(b)(ii), which uses language nearly identical to that of article 60(2)(c) of the VCLT, may be understood as arising from a desire for uniformity across the law of treaties and the law of state responsibility.<sup>231</sup> It is for this reason that the VCLT's approach to permissible responses to treaty breaches under article 60(2)(c) "spilled over" into subsequent attempts to formulate rules of standing' in the ARSIWA.<sup>232</sup> As one commentator explains, the use of the restrictive language of article 60(2)(c) of the VCLT in article 42(b)(ii) of the ARSIWA avoided '[the] risk of favouring the invocation of the (more flexible) law of state responsibility in order to justify responses (e.g. countermeasures) which were of more doubtful compatibility with (more exacting) treaty law'.<sup>233</sup> In short, the conditions for the invocation of responsibility under article 42(b)(ii) of the ARSIWA were tailored to coincide with the restrictive scope of permissible treaty-based responses in article 60(2)(c) of the VCLT.

### *B. The significance of the requirement as to the character of the breach*

What is the significance of limiting the application of article 42(b)(ii) to breaches that radically change the position of all the other states to which the obligation is owed with respect to the further performance of the obligation? Subsection i finds that the arguments for restricting the entitlement to standing in article 42(b)(ii) do not necessarily support restricting the application of the subclause only to breaches that 'radically' change the position of all the other states with respect to the further performance of the obligation. Instead, all breaches that change—radically or otherwise—the position of all the other states with respect to further performance should be addressed under article 42(b)(ii). Given the emphasis placed by the Commission on the character of the breach, and recalling the absence of a principled distinction between so-called 'interdependent obligations', on the one hand, and the wider set of obligations owed *erga omnes partes* and *erga omnes*, on the other,<sup>234</sup> Subsection ii demonstrates that article 42(b)(ii) may apply to breaches of obligations owed *erga omnes partes* and *erga omnes* other than those listed by the ILC and their close analogies in factual circumstances in which the breach 'change[s] the

<sup>230</sup> ARSIWA Commentary, 119.

<sup>231</sup> Statement of the Chairman of the Drafting Committee, 48.

<sup>232</sup> B Simma and CJ Tams, 'Reacting against Treaty Breaches' in D Hollis (ed), *The Oxford Guide to Treaties* (2<sup>nd</sup> edn, OUP 2020) 583.

<sup>233</sup> Sicilianos, 'The Classification of Obligations', 1135.

<sup>234</sup> Recall Section III.B.

position of all the other States ... with respect to the further performance of the obligation’.

*i. The requirement of a ‘radical’ change in the position of all the other states with respect to the further performance of the obligation*

Unless there is agreement to the contrary,<sup>235</sup> the law of state responsibility applies to all breaches irrespective of their seriousness or the intensity of their effects on the state or states to which the obligation is owed.<sup>236</sup> The ILC, while limiting treaty-based responses to ‘material’ breaches of multilateral treaties, made clear that the law of state responsibility continued to apply in respect of all manner of breaches.<sup>237</sup> What remains to be seen is whether, in cases in which there is no specially affected state with standing under article 42(b)(i), such breaches are divided, for the purpose of the invocation of responsibility, into those that ‘radically’ change the position of all the states to which the obligation is owed, addressed in article 42(b)(ii), and those that do not, addressed in article 48.<sup>238</sup> On close inspection, none of the arguments for restricting the entitlement to invoke responsibility under article 42(b)(ii), proposed by the ILC or otherwise, justifies limiting the application of the provision only to breaches that ‘radically’ change the position of all the other states with respect to the further performance of the obligation.

To begin with, the Commission, when it observed that not ‘just any breach of the obligation has the effect of undermining the performance of all the other States’, sought to clarify that not all breaches of relevant obligations are capable of changing the position of all the other states with respect to the further performance of the obligation.<sup>239</sup> This statement does not support any requirement of seriousness or intensity in relation to the change in the position of all the other states. As such, the statement, appearing alongside the Commission’s wish for article 42(b)(ii) ‘to be narrow in its scope’, does not suggest restricting its application only to breaches that ‘radically’ change the position of all the other states with respect to the further performance of the obligation.

<sup>235</sup> See ARSIWA art 55.

<sup>236</sup> M Fitzmaurice, ‘Material Breach of Treaty: Some Legal Issues’ (2001) 6 *Austrian Review of International and European Law* 3, 43; Crawford, *The International Law Commission’s Articles on State Responsibility*, 256-257.

<sup>237</sup> The applicability of article 60 of the VCLT being limited to material breaches, the law of treaties does not ‘exhaustively regulate responses to treaty breaches’. Simma and Tams, ‘Reacting against Treaty Breaches’, 572. See also Simma, ‘Reflections on Article 60 of the Vienna Convention on the Law of Treaties’, 59.

<sup>238</sup> Asada reads the requirement of a ‘radical’ change in the position of the other states in article 42(b)(ii) as a requirement of a ‘significant’ breach. M Asada, ‘Definition and Legal Justification of Sanctions’ in M Asada (ed), *Economic Sanctions in International Law and Practice* (Routledge 2020) 13-14. See also Gaja, ‘The Concept of an Injured State’, 945. A similar question arises in relation to article 60(2)(c) of the VCLT. Simma, ‘Reflections on Article 60 of the Vienna Convention on the Law of Treaties’, 77.

<sup>239</sup> ARSIWA Commentary, 119.

There is also a logical argument for questioning the requirement of a 'radical' change in the position of all the other states to which an obligation is owed with respect to the further performance of the obligation. One commentator makes the point using the example of obligations contained in the Antarctic Treaty (*n.b.* the terminology of 'integral obligations'):<sup>240</sup>

Logically, the nature of the legal position of those States to whom the integral obligation is owed, and hence the status of [sic] injured State, should not depend on the significance of the breach. It is difficult to see how the interests of States parties to the treaty would be affected in a qualitatively different manner in the case of a significant breach.<sup>241</sup>

In other words, the invocation of responsibility for all breaches of obligations that change the position of all the other states are qualitatively the same, whether such a change is radical or not, and should be treated the same, under article 42(b)(ii). Requiring a 'radical' change under article 42(b)(ii) calls for the drawing of a difficult line between qualitatively identical breaches.

Nor is the desire for consistency across article 60(2)(c) of the VCLT and article 42(b)(ii) of the ARSIWA a reason to restrict the applicability of the latter provision to breaches that 'radically' change the position of all the other states to which the obligation is owed with respect to the further performance of the obligation. The respective texts of article 60(2)(c) of the VCLT and article 42(b)(ii) of the ARSIWA, although similar, are materially different. The chapeau to article 60(2) limits the application of its subclauses to '[a] material breach of a multilateral treaty'.<sup>242</sup> Article 60(2)(c) further conditions permissible responses to a material breach on the character of the 'treaty' rather than the character of the 'obligation' or its 'breach'.<sup>243</sup> Accordingly, for a state party to 'suspend[] the operation of the treaty in whole or in part with respect to itself', the 'treaty' must be such that 'a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty'.<sup>244</sup> The application of article 42(b)(ii) of the ARSIWA, in contrast, is restricted to neither treaties nor material breaches, and depends on the 'character' of the 'breach'.<sup>245</sup> For a state to invoke responsibility under this subclause, the

<sup>240</sup> Recall Section II.C.

<sup>241</sup> Gaja, 'The Concept of an Injured State', 945.

<sup>242</sup> For an assessment of the requirement of a material breach in article 60 of the VCLT, see Fitzmaurice and Elias, *Contemporary Issues in the Law of Treaties*, 125-131; Simma and Tams, 'Reacting against Treaty Breaches', 574-575. Whether such a requirement is desirable in that context is beyond the scope of this article.

<sup>243</sup> See Crawford's Third Report, 31.

<sup>244</sup> VCLT art 60(2)(c). See further Simma, 'Reflections on Article 60 of the Vienna Convention on the Law of Treaties', 75-77; Gaja, 'The Concept of an Injured State', 946.

<sup>245</sup> As Crawford explained, '[t]he Vienna Convention is concerned with the treaty instrument as a whole, whereas the draft articles are concerned with particular obligations'. Crawford's Third Report, 31. For Gaja, moreover, '[t]his difference in focus can be explained by the fact that the

‘breach of the obligation’ must be ‘of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation’.

Further consideration of the distinct context in which article 60(2)(c) of the VCLT was drafted supports the conclusion that the provision’s requirement of a ‘radical’ change in the position of all the other states parties to a multilateral treaty is not warranted, in comparable form, under article 42(b)(ii) of the ARSIWA.<sup>246</sup> The restrictive application of article 60(2)(c) of the VCLT only to ‘material breaches’ that ‘radically’ change the positions of all the states parties is explained by the fact that the law of treaties is concerned with not only the protection of the interests of the states parties to a treaty in the event of a breach of its provisions by any one of them, but also the continued validity of the treaty.<sup>247</sup> The desire for treaties to endure supports restricting the circumstances in which a state party is entitled to suspend its treaty obligations towards the breaching state party. The restriction of the scope of article 60(2)(c) is additionally supported by the fact that the subclause permits states parties to suspend not just the obligation breached but the treaty in whole or in part.<sup>248</sup> This is especially relevant when it comes to multilateral obligations whose suspension vis-à-vis the breaching state party by definition involves suspension vis-à-vis all the other states parties.<sup>249</sup> Such considerations are not relevant under the law of state responsibility, which is unconcerned with the continued performance of primary obligations. The rules of state responsibility ‘take[] as given the existence of the primary rules’ and are only ‘concerned with the question whether conduct inconsistent with those rules can be excused and, if not, what the consequences of such conduct are’.<sup>250</sup> That the limits imposed on

obligation at issue for the ARSIWA can be customary in nature’. Gaja, ‘The Concept of an Injured State’, 946.

<sup>246</sup> Special Rapporteur Crawford, while noting that article 42 of the ARSIWA was ‘closely modelled on’ article 60 of the VCLT, acknowledged that ‘the scope and purpose of the two provisions is different’. Crawford, *The International Law Commission’s Articles on State Responsibility*, 256. Importantly, article 60 of the VCLT was drafted at a time when ‘the key concepts giving expression to collective interests were only beginning to be considered’, including the class of obligations *erga omnes*. Simma and Tams, ‘Reacting against Treaty Breaches’, 583.

<sup>247</sup> Much of the debate in the drafting of what was eventually the VCLT was about the ease with which multilateral treaties should be suspended or terminated. This called for a balance between the principle *inadimplenti non est adimplendum* and the stability of treaties. See VCLT Commentary, 254; Simma, ‘Reflections on Article 60 of the Vienna Convention on the Law of Treaties’, 59; Simma and Tams, ‘Article 60’, 1353-1354; Fitzmaurice, ‘Material Breach of Treaty’, 15, 21-24, 27, 36; Koskeniemi, ‘Breach of Treaty or Non-Compliance?’, 139-140.

<sup>248</sup> VCLT art 60(2)(c). But see VCLT art 44(1).

<sup>249</sup> Gaja, ‘The Concept of an Injured State’, 946; Simma and Tams, ‘Reacting against Treaty Breaches’, 582-583. Due to ‘the independent structure of the obligations, responses cannot be restricted to the relation between the defaulting and the responding party, as the responding party’s suspension would necessarily be a violation of its obligations vis-à-vis all other (non-defaulting) parties’. Simma and Tams, ‘Article 60’, 1365.

<sup>250</sup> Crawford’s Third Report, 87. See also Fitzmaurice, ‘Material Breach of Treaty’, 15-16; Fitzmaurice and Elias, *Contemporary Issues in the Law of Treaties*, 135; Whelan, *Reciprocity in Public International Law*, 191. As for unilateral countermeasures, Simma and Tams note that a countermeasure ‘has no effect on the continued existence of the norm as such’. Simma and Tams, ‘Article



treaty-based responses under article 60(2)(c) of the VCLT should not restrict permissible responses under the law of state responsibility was acknowledged by the Commission during the drafting of the VCLT.<sup>251</sup> In the context of the ARSIWA, the Commission noted further that, in the event of the breach of a treaty obligation, '[t]he other States parties may have no interest in the termination or suspension of such obligations as distinct from continued performance'.<sup>252</sup> Special Rapporteur Crawford, writing in his personal capacity, summed up the distinction as follows:

... article 60 [of the VCLT] is concerned exclusively with the right of a State party to a treaty to invoke a material breach of that treaty by another party as grounds for its suspension or termination. It is not concerned with the question of responsibility for breach of the treaty. This is why article 60 is restricted to 'material' breaches of treaties. Only a material breach justifies termination or suspension of the treaty, whereas in the context of state responsibility any breach of a treaty gives rise to responsibility irrespective of its gravity.<sup>253</sup>

While this statement addressed the need for the requirement in article 60(2)(c) of the VCLT, but not article 42(b)(ii) of the ARSIWA, of a 'material breach',<sup>254</sup> it is equally open to question whether the replication of the former provision's requirement of a 'radical' change was warranted in article 42(b)(ii) of the ARSIWA. All these considerations suggest that any 'formal resemblance' between the law of treaties and the law of state responsibility is not a sufficient justification for restricting the scope of article 42(b)(ii) of the ARSIWA to correspond to the scope of article 60(2)(c) of the VCLT.<sup>255</sup> The purpose of each provision is distinct. As one commentator observes, therefore, the reliance on article 60(2)(c) of the VCLT in the drafting of article 42(b)(ii) of the ARSIWA 'seems the result of expediency, rather than logical coherence'.<sup>256</sup>

Beyond the analogy with article 60(2)(c) of the VCLT, other arguments for limiting article 42(b)(ii) of the ARSIWA only to breaches that cause a 'radical' change in the position of all the other states with respect to the further performance of the obligation also do not withstand scrutiny. One such argument is a desire to restrict the entitlement of states to

60', 1354. A countermeasure is intended to enforce a right, while article 60 is 'a protective measure designed to restore a certain contractual balance'. Dawidowicz, *Third-Party Countermeasures in International Law*, 21.

<sup>251</sup> See VCLT art 73; Simma and Tams, 'Reacting against Treaty Breaches', 572.

<sup>252</sup> ARSIWA Commentary, 119. For an example having to do with the distribution of a shared resource, albeit between two states parties to a treaty, see *The Diversion of Water from the Meuse* (Dissenting Opinion of Judge Anzilotti), PCIJ Series A/B No 70, 49-50.

<sup>253</sup> Crawford, *The International Law Commission's Articles on State Responsibility*, 256-257.

<sup>254</sup> It is open to question whether it was necessary to restrict the scope of article 60(2)(c) of the VCLT to breaches that cause a 'radical' change in the position of all the other states, given the applicability of the subclause only to 'material' breaches. The superfluity of the requirement in this context is beyond the scope of this article.

<sup>255</sup> Fitzmaurice, 'Material Breach of Treaty', 43. See also *ibid* 44.

<sup>256</sup> Gaja, 'The Concept of an Injured State', 946.

unilateral countermeasures. General arguments for restricting states' use of countermeasures do not justify limiting the scope only of article 42(b)(ii) but extend to the entitlements of all injured states and, indeed, states other than injured states. The specific concern in respect of article 42(b)(ii) is presumably for the effect of a countermeasure by one injured state on all the others in a multilateral context.<sup>257</sup> It is true that, where the countermeasure preferred by an injured state involves the non-performance temporarily of the multilateral obligation breached, the non-performance of the obligation towards the breaching state necessarily amounts to non-performance towards all the other states to which the obligation is owed.<sup>258</sup> The point must not be overstated, however, since the fact of the breach under article 42(b)(ii) would have already, by definition, changed the position of all the states to which the obligation is owed with respect to the further performance of the obligation.<sup>259</sup> Nor does the law of state responsibility require that a countermeasure take the form specifically of the non-performance of the obligation breached.<sup>260</sup> Wider concerns about limiting the resort to countermeasures aside, there is thus no justification for specifically restricting the resort to countermeasures by the states to which an interdependent obligation is owed.<sup>261</sup>

For all these reasons, article 42(b)(ii) is better understood as including all breaches of obligations owed *erga omnes partes* or *erga omnes* that change the position of all the states to which the obligation is owed with respect to its further performance, rather than only those that cause a 'radical' change. A pragmatic way to reconcile this conclusion with the Commission's preferred wording of article 42(b)(ii), that is its

<sup>257</sup> Where a countermeasure involves the suspension of an interdependent obligation, the wrongfulness of the conduct is precluded vis-à-vis the breaching state but not the other states to which the obligation is owed. Whelan, *Reciprocity in Public International Law*, 210. Simma, writing in the context of the law of treaties, was similarly concerned with the 'codification of the principle "sauve qui peut" whose use by a major actor would probably bring the entire instrument tumbling down'. Simma, 'From Bilateralism to Community Interest in International Law', 352.

<sup>258</sup> The point is made in relation to the suspension of treaty obligations under article 60(2)(c) of the VCLT. In the event of the breach of 'disarmament treaties and treaties prohibiting the use of certain weapons', Simma notes, 'an injured party could not resort to suspension or termination vis-à-vis the defaulting State without at the same time violating its own obligations towards the rest of the parties'. Simma, 'Reflections on Article 60 of the Vienna Convention on the Law of Treaties', 75. See *ibid* 76, for a similar argument in relation to the Nuclear Test Ban Treaty.

<sup>259</sup> Not dissimilarly, as Special Rapporteur Fitzmaurice reasoned in respect of 'a general, or really fundamental breach by one party, amounting to a repudiation' of a multilateral treaty, the breach 'would ensure for all practical purposes an end of the treaty, but this would come to pass from force of circumstances rather than from any juridical act of the parties formally declaring the end of the treaty'. Fitzmaurice's Second Report, 54. See also Fitzmaurice's Third Report, 44. The same logic could apply in the present context.

<sup>260</sup> Simma and Tams, 'Article 60', 1354.

<sup>261</sup> If the preferred view is that states invoking responsibility for a breach under article 48 today are, like states acting under article 42, permitted the resort to countermeasures, the concern for restricting the resort to countermeasures by states acting under article 42(b)(ii) is even less persuasive.

requirement of a 'radical' change, is to assume that changing the position of all the other states is, by definition, a 'radical' change.<sup>262</sup>

*ii. The applicability of article 42(b)(ii) to breaches of obligations erga omnes partes and obligations erga omnes*

Which breaches could, on account of their factual circumstances, fall within the scope of article 42(b)(ii)? To begin with, there is no reason why the subclause's requirement as to the character of the breach could only be met by breaches of the handful of obligations suggested by the ILC and their close analogies.<sup>263</sup> The absence of a principled distinction between what are referred to as 'interdependent obligations', on the one hand, and obligations *erga omnes partes* and obligations *erga omnes*, on the other,<sup>264</sup> supports the applicability of article 42(b)(ii) to breaches of other obligations owed *erga omnes partes* or *erga omnes*. That being said, it is difficult to conceive of circumstances in which the breach by a state of an integral obligation will change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation. The objectives underlying such obligations call for continued performance by the states undertaking them even in the event of a breach by any one of them.<sup>265</sup>

Looking beyond the examples proposed by the ILC, it is possible to conceive of circumstances in which the breach of certain obligations *erga omnes partes* or *erga omnes* is of such a character as to 'change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation', thereby permitting the invocation of responsibility for the breach by each of the states to which the obligation is owed under article 42(b)(ii). This may be the case in respect of obligations for the preservation of shared resources or areas beyond national jurisdictions, such as an obligation restricting fishing on the high seas.<sup>266</sup> One commentator accepts, for example, that if 'a single State by its efforts alone fish[es] a particular stock almost to extinction', the breach could 'radically change the position of all the others regarding continued high-seas conservation efforts'.<sup>267</sup> Similarly, and again in the event of the breach of fishing quotas, another observes that all the states to which the obligation is owed 'eventually may be wholly estopped from exercising any right to fish on the high seas by virtue of the commercial extinction of stocks'.<sup>268</sup> While this is unlikely to 'occur quickly or as a

<sup>262</sup> A not dissimilar proposition is made vis-à-vis article 60(2)(c) of the VCLT. For Simma and Tams, the requirement of a 'radical' change in article 60(2)(c) is in practice superfluous since a 'material' breach of an obligation under the provision 'entails the "radical change" required by paragraph 2(c)'. Simma and Tams, 'Article 60', 1365-1366.

<sup>263</sup> Recall Section III.A.

<sup>264</sup> Recall Section III.B.

<sup>265</sup> Recall the discussion of integral obligations in Section III.B.ii.

<sup>266</sup> Recall the discussion of such obligations in Section III.B.ii.

<sup>267</sup> Guilfoyle, 'Interdicting Vessels to Enforce the Common Interest', 73.

<sup>268</sup> Rayfuse, 'Countermeasures and High Seas Fisheries Enforcement', 65.

result of one breach', this eventuality 'depend[s] on the state of the stocks concerned' and cannot be ruled out.<sup>269</sup> Others reason, using not dissimilar logic in the context of the law of treaties, that '[c]ontinuous and massive non-performance of the emission reduction commitments' in the Montreal Protocol on Substances that Deplete the Ozone Layer 'might clearly be seen as breach of provisions essential to the accomplishment of the object and purpose of the Protocol'.<sup>270</sup> Where this non-compliance takes place in such circumstances as to 'pose[] a serious threat to the ongoing viability of the ozone treaty regime', it could change the position of all the other states parties with respect to further performance.<sup>271</sup> Some of the literature discussing these examples understandably makes reference to the ILC's requirement in article 42(b)(ii) of a 'radical' change in the position of all the states to which the obligation is owed. Jettisoning the requirement of a 'radical' change in the position of all the other states with respect to further performance may not ultimately make much difference to the appreciation of the facts, but it avoids the burden of distinguishing radical changes from non-radical changes in the position of all the other states.

Without a principled distinction between interdependent obligations and other obligations owed *erga omnes partes* or *erga omnes*,<sup>272</sup> and given the emphasis in article 42(b)(ii) on the effect of the breach on the position of all the other states undertaking the obligation, there is no clear reason to exclude from the scope of article 42(b)(ii), in such exceptional cases as those illustrated above, breaches of obligations *erga omnes partes* and *erga omnes* of such a nature as 'to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation'.<sup>273</sup> Such breaches, depending as they do on exceptional factual circumstances, will be few. As the Commission itself noted, 'it may not be the case that just any breach of the obligation has the effect of undermining the performance of all the other States involved'.<sup>274</sup> Any such assessment will undoubtedly turn on a judicious assessment of the facts.

### C. Recapitulation

The textual emphasis on the character of the breach, rather than the character of the obligation, in article 42(b)(ii) of the ARSIWA suggests that there may be factual circumstances in which breaches of obligations *erga omnes partes* and obligations *erga omnes* beyond those suggested by the ILC and their close analogies entitle all the states to which the obligation is owed to invoke responsibility for the breach under article 42(b)(ii) rather than article

<sup>269</sup> *ibid.*

<sup>270</sup> Koskeniemi, 'Breach of Treaty or Non-Compliance?', 140.

<sup>271</sup> Peel, 'New State Responsibility Rules', 92.

<sup>272</sup> Recall Section III.B.

<sup>273</sup> ARSIWA art 42(b)(ii).

<sup>274</sup> ARSIWA Commentary, 119.

48. The permissibility of this conclusion is supported by the fact that there is, in reality, no sufficiently clear principled distinction between so-called interdependent obligations, on the one hand, and obligations owed *erga omnes partes* or *erga omnes*, on the other.<sup>275</sup>

When it comes to the requirement of a ‘radical’ change in the position of all the other states with respect to the further performance of the obligation, no convincing justification is found for restricting the scope of article 42(b)(ii) to exclude breaches that change the position of all the other states but do not do so ‘radically’. The better view is that article 42(b)(ii) applies to all such breaches, irrespective of whether the change in the position of all the other states is radical or not. The fact of changing the position of all the other states undertaking the obligation with respect to the further performance of the obligation is sufficient to justify the invocation of responsibility for such breaches under article 42(b)(ii) rather than article 48.

While supporting the application of article 42(b)(ii) beyond breaches of the handful of obligations suggested by the ILC, the combined effect of these arguments is not to substantially widen the scope of article 42(b)(ii). Indeed, the application of article 42(b)(ii) proposed here is largely consistent with the ILC’s stated desire for a limited scope for the subclause. When it comes to its applicability to breaches of obligations for the preservation of shared resources and areas beyond national jurisdictions, the entitlement to standing in article 42(b)(ii) will only apply to breaches that take place in factual circumstances in which, for example, a shared resource or area is under existential threat. If the term ‘interdependent obligations’ is to have any use in the application of article 42(b)(ii) proposed here, it is best reserved for use as descriptive shorthand for the kinds of breaches of obligations *erga omnes partes* and *erga omnes* addressed by the subclause.

## V. CONCLUSION

Building on the legal framework proposed by the ILC, attention is increasingly paid in practice and in the scholarship to the question of standing for the enforcement of multilateral obligations under article 48 of the ARSIWA. Like article 48, article 42(b)(ii) applies to breaches of obligations owed to a group of states or the international community as a whole. Yet current discussions of the availability and effectiveness of permissible routes to the enforcement of obligations *erga omnes partes* and obligations *erga omnes* take little notice of article 42(b)(ii). The use inconsistently or interchangeably of ‘interdependent obligations’ and ‘integral obligations’ to describe the obligations addressed by the subclause further obscures its applicability. Irrespective of how the scope of article 42(b)(ii) is best understood, the lack of attention to which breaches

<sup>275</sup> Recall Section III.B.

of which obligations are addressed by this subclause, rather than article 48(1)(a)-(b), leaves only a partial answer to the question of standing to invoke responsibility for breaches of multilateral obligations. This article has sought to clarify the scope of article 42(b)(ii) and, in turn, to contribute to a fuller understanding of the nature of multilateral obligations and the entitlement to standing to respond to breaches of such obligations within the framework proposed by the ILC.

The ILC's circumscription of a small set of 'interdependent obligations' whose breach is to be addressed under article 42(b)(ii) of the ARSIWA made pragmatic sense in the context of its work on the law of state responsibility. The use of examples to illustrate the application of the proposed rules was a distinctive feature of the Commission's methodological approach to the ARSIWA. Beyond the agreed examples from which limited analogies might be drawn, however, this approach lends limited assistance to the task of determining whether breaches of other obligations are capable of falling within the scope of article 42(b)(ii). At the same time, nor do the principled criteria proposed to date sufficiently distinguish interdependent obligations from other obligations owed *erga omnes partes* or *erga omnes*. Neither a requirement of reciprocity nor the *conditio sine qua non* of collective compliance to meet underlying objectives sufficiently performs this task. The first criterion, reciprocity, may be understood in different ways and, more to the point, the multilateral character of the performance of the ILC's examples of interdependent obligations makes it clear that they are obligations owed *erga omnes partes* or *erga omnes*. The only conclusion to emerge from the consideration of the latter criterion, that the breach of an interdependent obligation necessarily defeats its underlying objective, is that article 42(b)(ii) is unlikely to apply to breaches of integral obligations. The objectives underlying integral obligations call for maximal performance even in the event of a breach, implying, in turn, that breaches of such obligations are unlikely to ever change the position of all the states to which such obligations are owed 'with respect to the further performance of the obligation'.<sup>276</sup> Beyond the exclusion of integral obligations, weighing the importance of underlying objectives to determine the necessity or not of collective compliance with relevant obligations is a highly subjective and avoidable exercise. This exercise either risks excessively widening the scope of Article 42(b)(ii) or, to avoid this, requires the drawing of arbitrary distinctions based on the relative importance of underlying objectives.

While article 42(b)(ii) of the ARSIWA is and should be conceived of as having a narrow scope of application, this application extends beyond breaches of the handful of obligations envisaged by the ILC and their close analogies. What is ultimately a textual requirement as to the character of the breach and its consequences, rather than an entitlement to standing grounded in the identity of so-called 'interdependent

<sup>276</sup> ARSIWA art 42(b)(ii).

obligations', suggests that responsibility for breaches of other obligations owed *erga omnes partes* or *erga omnes* may be addressed under article 42(b)(ii). Further consideration of the reasons for a narrow scope of application reveals that none of them supports the exclusion from article 42(b)(ii) of breaches of relevant obligations that change the position of all the other states with respect to further performance but do not do so 'radically'. All such breaches should be addressed under the subclause. This might include breaches of obligations for the preservation of shared resources or areas beyond national jurisdictions, which may, in certain factual circumstances, cause a 'change in the position of all the other States to which the obligation is owed with respect to the further performance of the obligation'.<sup>277</sup> Even on this reading, the invocation of responsibility under article 42(b)(ii) is likely to remain limited. If, in the end, the term 'interdependent obligations' is to be used in relation to article 42(b)(ii), its most appropriate use is shorthand for breaches of obligations *erga omnes partes* or *erga omnes* that cause the relevant consequences, namely a change in the position of all the states to which the obligation is owed with respect to the further performance of the obligation.

What does this articulation of article 42(b)(ii) of the ARSIWA imply for the enforcement in practice of relevant obligations? Given the entitlement to standing on the part of each of the states to which the obligation breached is owed, the application of article 42(b)(ii) to a wider set of obligations than those proposed by the ILC might raise practical concerns. An unduly wide scope for article 42(b)(ii), it might be argued, upends the ILC's division between 'an injured State'<sup>278</sup> and 'a State other than an injured State',<sup>279</sup> in turn opening the floodgates to inter-state adjudication and the use of unilateral countermeasures by one or more injured states under article 42(b)(ii). Such concerns are mostly overstated. When it comes to inter-state adjudication, the invocation of responsibility under article 42 rather than article 48 does not imply any greater opportunity for litigation. If the existing case-law is any indication, the reality is that international courts are reluctant to subject the kinds of breaches addressed under article 42(b)(ii), which raise polycentric disputes, to adjudication.<sup>280</sup> In fact, clarity as to the applicability in relevant cases of article 42(b)(ii) may actually assist courts in explaining why certain disputes are unamenable to adjudication. The dismissal by the ICJ of the three *Nuclear Disarmament* cases, for instance, based on the overly strict construction given by the majority to the requirement of a dispute, might have been more convincing had the obligation to negotiate disarmament been construed as an obligation whose breach fell within the scope of

<sup>277</sup> ARSIWA art 42(b)(ii).

<sup>278</sup> ARSIWA art 42.

<sup>279</sup> ARSIWA art 48.

<sup>280</sup> On the polycentric nature of environmental disputes and the difficulties with adjudicating them, see Shams, 'Tempering Great Expectations', 199-200.

article 42(b)(ii).<sup>281</sup> Similar difficulties are seen in attempts to adjudicate breaches of fishing obligations.<sup>282</sup> In other cases still, states are themselves reluctant to subject relevant matters, such as claims to Antarctic sovereignty, to adjudication.<sup>283</sup> A better understanding of the limits of adjudication vis-à-vis article 42(b)(ii) may also prove valuable in the pending advisory opinions on climate change, in which obligations for the preservation of shared resources or areas beyond national jurisdictions are at issue.<sup>284</sup> Although no single reason fully explains why such breaches may be less amenable to adjudication, a better understanding of article 42(b)(ii) helps account for this difficulty. When it comes to unilateral countermeasures, the concern for their use by one or more of the states to which the obligation is owed, all of them being injured states under article 42(b)(ii), is reduced by the fact that a breach under article 42(b)(ii) has, by definition, changed the position of all the states to which the obligation is owed with respect to the further performance of the obligation. This change supports the entitlement to a unilateral response by each of them to induce the compliance of the state in breach of the obligation.

<sup>281</sup> But see *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (Separate Opinion of Judge Tomka) [2016] ICJ Rep 833, 898. On the polycentric nature of nuclear non-proliferation and its unamenability to adjudication before international courts, see Shams, 'Tempering Great Expectations', 198-200.

<sup>282</sup> *Southern Bluefin Tuna Cases*, 297-300. The case was subsequently dismissed by the arbitral tribunal, citing lack of jurisdiction under the UNCLOS in light of the parallel existence of the Convention for the Conservation of Southern Bluefin Tuna. A not dissimilar case was discontinued following an agreement between the parties. *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v EC)* (Order of 16 December 2009) ITLOS Reports 2008-2010, 13.

<sup>283</sup> The point is evidenced by two attempts to avoid litigating the matter of Antarctic sovereignty, with the prohibition on new sovereign claims to the territory being an obligation falling squarely within the scope of article 42(b)(ii) of the ARSIWA. For a detailed analysis, see SV Scott, 'National Encounters with the International Court of Justice: Avoiding Litigating Antarctic Sovereignty' (2021) 21 *Melbourne Journal of International Law* 2.

<sup>284</sup> Shams, 'Tempering Great Expectations', 200-201.



© The Author(s) 2024. Published by Oxford University Press. Available online at [www.bybil.oxfordjournals.org](http://www.bybil.oxfordjournals.org)  
This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial-NoDerivs licence (<https://creativecommons.org/licenses/by-nc-nd/4.0/>), which permits non-commercial reproduction and distribution of the work, in any medium, provided the original work is not altered or transformed in any way, and that the work is properly cited. For commercial re-use, please contact [permissions@oup.com](mailto:permissions@oup.com)  
The British Yearbook of International Law, 2024, 00, 1–48  
<https://doi.org/10.1093/bybil/bræ006>  
Article