OBLIGATIONS *ERGA OMNES* AS MULTILATERAL OBLIGATIONS IN INTERNATIONAL LAW

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ABSTRACT

So-called obligations *erga omnes*, owed to the international community as a whole, including all States, now form part of positive international law. These obligations protect some of the most basic values of present-day international relations. Examples include the obligations not to commit genocide or torture, to uphold the most basic human rights, to respect the self-determination of peoples, and so on.

However, there is little agreement as to what these obligations imply, how they have come about, and how to identify them. In the literature, at least, there is widespread agreement that obligations *erga omnes* are different in essence and in nature from obligations owed by one State to another State, so-called obligations *inter partes*. In turn, this —alleged— radical conceptual break severs obligations *erga omnes* from a wealth of norms that exist in present-day, general international law, but whose origins lie farther back in time.

This thesis attempts to reconcile obligations *erga omnes* with obligations arising in classic, general international law. It explores what it means to be owed an obligation and how it came to pass that most obligations were owed *inter partes*. The particular way in which sovereignty came to be conceived and the furtherance of sovereignty, at the expense of other values, forms the pattern that gave rise to obligations *inter partes*. But even at that time, exceptions to this pattern existed which brought about obligations analogous to those owed *erga omnes* today. Relevant state practice will be analysed.

If obligations *erga omnes* could have been created in classic international law, it is unjustified to maintain that obligations *erga omnes* represent so radical a break with the past. Obligations *erga omnes* are aggregates of bilateral, primary obligations. From this perspective, it is possible to identify these obligations, their consequences, and to discern their origins.

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ACHR	American Convention on Human Rights
AD	South African Law Reports (Appelate Division); also, Annual Digest (*see 'ILR', below*)
AdV	Archiv des Völkerrechts
AFDI	Annuaire Français de Droit International
AIDI	Annuaire de l'Institut de Droit International
AJIL	American Journal of International Law
AJIL Supp	American Journal of International Law Supplement
AJIL Sp Supp	American Journal of International Law Special Supplement
AJPIL	Austrian Journal of Public and International Law (*see ÖzöR, below*)
ASIL Proc	American Society of International Law Proceedings
Asian Ybk IL	Asian Yearbook of International Law
ASR	Articles on the Responsibility of States for Internationally Wrongful Acts (*Articles on State Responsibility*)
Austr Ybk IL	Australian Yearbook of International Law
BFSP	British and Foreign State Papers
BDGV	Berichte der Deutschen Gessellschaft für Volkerrecht
BYIL	British Yearbook of International Law
CACJ	Central American Court of Justice
Col L Rev	Columbia Law Review
CHS	Convention on the High Seas (1958)
CTS	Consolidated Treaty Series
CUP	Cambridge University Press
DADP	Draft Articles on Diplomatic Protection
DASR 1996	Draft Articles on State Responsibility provisionally adopted by the International Law Commission on First Reading (1996)
Decl	Declaration (*by judges*)
DO	Dissenting Opinion (*by judges*)
DRC	Democratic Republic of Congo (ex Zaïre)
DSU	WTO Dispute Settlement Understanding (*Annex II to the WTO Agreement; see 'WTO', below*)
ECHR	European Convention of Human Rights
EComHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports

EJIL	European Journal of International Law
EEZ	Exclusive Economic Zone
En	End note (*only used in footnotes*)
GABC 1885	General Act of the Conference of Plenipotentiaries of Austria-Hungary, Belgium, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, Sweden-Norway, and Turkey (and the United States) respecting the Congo (1885)
GABC 1890	General Act of the Brussels Conference relating to the African Slave Trade between Austria-Hungary, Belgium, Congo, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Persia, Portugal, Russia, Spain, Sweden-Norway, Turkey, the United States and Zanzibar (1890)
GB	United Kingdom of Great Britain and (Northern) Ireland (*also 'UK'*)
IACtHR	Inter-American Court of Human Rights
ICJ Rep	Reports of Judgments, Advisory Opinions, and Orders of the International Court of Justice
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ILC	International Law Commission
ILDC	International Law in Domestic Courts, a module in *Oxford Reports on International Law*, an online, OUP service)
ILR	International Law Reports
ILO	International Labour Organisation
Int Crim LR	International Criminal Law Review
ITLOS	International Tribunal for the Law of the Sea
Jap Ann Int L	Japanese Annual of International Law
JICJ	Journal of International Criminal Justice
JZ	Juristen Zeitung (Germany)
Keesings	Keesings's *Archiv der Gegenwart*
Rec Arb Int	A de la Pradelle, N Politis, *Recueil des Arbitrages Internationaux* (Paris 1957)
LGDJ	Librairie Générale de Droit et de Jurisprudence
LJIL	Leiden Journal of International Law
LNOJ	Official Journal of the League of Nations
LON	League of Nations
LTBT	Limited Test Ban Treaty (1963)
Moore Int Arb	JB Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington 1898)

MPEPIL	Max Planck Encyclopedia of Public International Law
MPUNLY	Max Planck United Nations Law Yearbook
NJIL	Netherlands Journal of International Law
Nord JIL	Nordic Journal of International Law
NZ	New Zealand
OED	Oxford English Dictionary
ÖZöR	Österreichische Zeitschrift für öffentliches Recht und Völkerrecht (*see 'AJPIL', above*)
OUP	Oxford University Press
Passim	Denotes that point supported in the text associated to the footnote on which it is used is extensively supported throughout the reference in the same footnote
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PUF	Presses Universitaires de France
RdC	Recueil des Cours de l'Académie de Droit International
RDI	Rivista di Diritto Internazionale
RDTAM	C Alphand, GC Gidel, *Recueil des Décisions des Tribunaux Arbitraux Mixtes, Institués par les Traités de Paix* (Sirey, Paris 1922)
REDI	Revista Española de Derecho Internacional
RGDIP	Revue Générale de Droit International Public
RJ	Repertorio de Jurisprudencia (*Aranzadi*) (Spain)
RICJ	Rules of the International Court of Justice (1978)
SO	Separate Opinion (*by judges*)
StICJ	Statute of the International Court of Justice
Sup Ct SA	Supreme Court of South Africa (1910–1996)
Supp	Supplement
Sp Supp	Special Supplement
UDHR	Universal Declaration of Human Rights (1948)
UKTS	United Kingdom Treaty Series
UN	United Nations
UNCh	Charter of the United Nations (1945)
UNCLOS	United Nations Convention on the Law of the Sea (1982)
UNGA	General Assembly (United Nations)
UNSC	Security Council (United Nations)
UNTS	United Nations Treaty Series

USA	United States of America (also '*US*')
YbUN	Yearbook of the United Nations
VCCR	Vienna Convention on Consular Relations
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation
Yale LJ	Yale Law Journal
YbECHR	Yearbook of the European Convention of Human Rights
YbILC	Yearbook of the International Law Commission
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

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NOTES ON STYLE

- State practice has been cited with accuracy, but informally, except for command papers. The relevant items do not feature in the bibliography or the tables above, but in every case every effort has been made so that they can be located (eg rather than cite to the full document, US protests to the Congo Free State for mistreatment of natives have been cited thus: (1909) 3 AJIL Supp 94; (1909) 3 AJIL Supp 140).
- The 'ILC Documents' listed above do not include reports by Special Rapporteurs. These have been cited in the bibliography, alongside the rest of the literature.
- In general, cases and other documents are quoted in their original or authentic language. This is especially the case of French sources.

GENERAL INTRODUCTION

This thesis will consider so-called obligations '*erga omnes*'. In its 1970 judgment in the *Barcelona Traction* Case, the ICJ made an 'essential distinction' between

> … les obligations des Etats envers la communauté internationale dans son ensemble et celles qui naissent vis-à-vis d'un autre Etat dans le cadre de la protection diplomatique. Par leur nature même, les premières concernent tous les Etats. Vu l'importance des droits en cause, tous les Etats peuvent être considérés comme ayant un intérêt juridique à ce que ces droits soient protégés; les obligations dont il s'agit sont des obligations *erga omnes*.[1] (emphasis added)

The Court thus drew a distinction between obligations owed by one State to another State (obligations *inter partes*)[2] and those owed by one State to all of the international community —ie all States, at least.[3] These are obligations *erga omnes* (ie owed 'towards all'[4] or 'as against all').[5] As examples of obligations *erga omnes*,

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1 *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (New Application: 1962)* (Judgment) [1970] ICJ Rep 3, 32 [33].

2 G Nolte, 'From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations' (2002) 13 EJIL 1083, 1097.

3 A-L Vers-Chaumette, 'The International Community as a Whole' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 1024.

4 W Riphagen, 'Sixth Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles); and "Implementation" (*Mise en Œuvre*) of International Responsibility and the Settlement of Disputes (Part 3 of the Draft Articles)' (UN Doc No A/CN.4/389, YbILC 1985-II(1)) 6 [1] (art 5); M Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford Monographs in International Law, Clarendon Press, Oxford 1997) 1 fn 1; C Annacker, 'The Legal Regime of Erga Omnes Obligations in International Law' (1994) 46 AJPIL 131, 131; M Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 Nord JIL 211, 229; ID Seiderman, *Hierarchy in International Law: The Human Rights Dimension* (School of Human Rights Research Series No 9, Intersentia-Hart, Antwerpen 2001) 123; 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, 1056; M Koskenniemi, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of General International Law' (UN Doc No A/CN.4/L.682, YbILC 2006) [378].

the Court identified the outlawing of acts of aggression and of genocide, as well as the principles and rules concerning '… les droits fondamentaux de la personne humaine', including the protection against slavery and racial discrimination.[6] In later cases, the Court added the right to self-determination[7] and obligations deriving from humanitarian law[8] to this list.

This 'essential distinction' between obligations *erga omnes* and obligations *inter partes* is the main problem that this thesis intends to grapple with. It will oppose the idea that obligations *erga omnes* are 'essentially different' from other types of obligations in international law. Obligations *erga omnes* are obligations like any other. Contrary to what the ICJ and most commentators believe, obligations *erga omnes* have not resulted from any change to the fabric of international law (eg from the bilateral to the multilateral, from the protection of individual State interests to the protection of community interests, etc). Invoking responsibility for breach of obligations *erga omnes* has been made possible by two changes in the law. **First**, the creation in modern, general international law of obligations that classic, general international law would never have created (eg obligations not to mistreat its own nationals, in general; obligations not to pollute 'global commons', such as the high seas; and so on). These are obligations *erga omnes*, full obligations with correlative

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5 Byers (n 4) 229; CJ Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge Studies in International and Comparative Law No 44, CUP, Cambridge 2005) 101.

6 *Barcelona Traction* (n 1) 32 [34].

7 *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90, 102 [29];*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, 199 [155].

8 *Wall* (n 7) 199 [155].

individual State rights, just like traditional obligations. This idea is rejected overwhelmingly by most legal authorities. This is the main thrust, in general terms, of **chapters 1-4**. **Second**, it is now possible to invoke responsibility for breach of obligations even where the invoking State has suffered no damage (eg despite the fact it has no title to the high seas, it is not the State of nationality of individuals). Although this is now a widely accepted norm in international law, few commentators highlight the consequences of this norm for obligations *erga omnes*. This second development will be discussed in **chapter 5**.

More concretely, this thesis will answer the following questions:

Who are obligations *erga omnes* owed to? Chapter 1 will explore what it means, in general international law, to be 'owed an obligation' and the consequences that follow from that status. Wesley N Hohfeld's 'fundamental legal conceptions' will be used in this respect. Hohfeld's conceptions usefully distinguish the notion of obligation from, say, the notion of the inability to enter into new legal relations or to alter existing legal relations. *Jus cogens* comprises the inability to modify legal relations, whereas obligations *erga omnes* do not. Likewise, Hohfeld conceives of all legal relations as bilateral. The same could be said about obligations *erga omnes*. As will be discussed in due course, many of the rules still existing in present-day, general international law are phrased in bilateral terms. It is still the case, for instance, that the entity to which an obligation is owed has standing to invoke responsibility for breach of that obligation. This suggests that an entity is owed an obligation by another entity. In turn, this suggests that the obligation in question is bilateral. Obligations *erga omnes* must be analysed against the backdrop of many such norms.

Chapter 1 will also consider legal relations that regulate: **1)** the conduct of States outside of the context of breach (primary legal relations; eg the obligation not to expropriate an alien with a nationality without paying compensation) and **2)** legal relations that arise after the breach of an obligation (secondary, tertiary legal relations; eg the obligation to afford reparation for breach of the primary legal relation). As will become clear in **chapter 5**, different views exist as to whether States' entitlements to obligations *erga omnes* (ie what exactly they are owed through an obligation *erga omnes*) fall at the primary level or at further levels.

That said, the issue of whether international organisations are owed obligations *erga omnes* will not be discussed for reasons of space. Treaties create these them, the principle of speciality restricts their actions, and, ordinarily —but not exclusively— any claim they present is functional. They normally protect their own agents because these agents act on their behalf. In principle, the violation of an obligation on the person of an individual who is not an agent of the organisation will give rise to no claim. But the interest in studying obligations *erga omnes* lies precisely on situations like this one: where a State claims on behalf of an individual who is not its national or is stateless. Accordingly, only States will be considered in this regard; the situation of individuals will be touched on briefly.

Chapter 2 will consider the question of **how it can be determined that a certain entity is owed an obligation, *erga omnes* or otherwise**. A complication in this regard is that international obligations are generally formulated in 'abstract terms': they do not identify the entity to which they are owed.[9] It is possible for a

[9] W Riphagen, 'Fourth Report on the Contents, Forms and Degrees of State Responsibility (Part 2 of the Draft Articles)' (UN Doc No A/CN.4/366, YbILC 1983-II(1)) 14 [77].

certain regime to designate the entities between which obligations exist,[10] but — especially— the sources of general international law rarely do this.[11] This makes the task doubly problematic. General international law (ie general custom and principles) is the source of obligations *erga omnes*. If such obligations are owed to all States in the international community, they are contained in the most general of rules: general custom.[12] In *Barcelona Traction*, the ICJ listed the customary prohibitions of torture[13] and genocide[14] as examples of obligations *erga omnes*, for instance.

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10 See, eg, references to 'sending' and 'receiving' States in Vienna Convention on Consular Relations (opened for signature 24 April 1963, entered into force 19 March 1967) 596 UNTS 261 (VCCR).

11 cf DJ Bederman, 'Article 40(2)(e) & (f) of the ILC Draft Articles on State Responsibility: Standing of Injured States under Customary International Law and Multilateral Treaties' (1998) 92 ASIL Proc 291, 293; J Crawford, 'Third Report on State Responsibility' (UN Doc No A/CN.4/507, YbILC 2000) [76].

12 See, eg, Dupuy 2002 (n 4) 1072; P-M Dupuy, 'Quarante Ans de Codification du Droit de la Résponsabilité Internationale des États. Un Bilan' (2003) 107 RGDIP 305, 333; F Voeffray, *L'Actio Popularis ou la Défense de l'Intérêt Collectif devant les Juridictions Internationales* (Publications de l'Institut Universitaire de Hautes Études Internationales, Genève, PUF, Paris 2004) 77; G Gaja, 'Obligations and Rights Erga Omnes in International Law (First Report)' (2005) 71 (I) AIDI 117, 123, 157 (Lady Fox), 170 (Degan); Tams (n 5) 128, 133 text associated to fn 75 (reasoning *a contrario*), 160–61, 256, 310 [2]. See also Byers (n 4) 212, 239. Principles do not impose obligations directly or, at least, not always. See ch 1, p 14, below.

13 See, eg, *Prosecutor v Anto Furundzija* (Judgment) ICTY-95-17/1, T Ch II (10 December 1998) [151], [155]; *Prosecutor v Zejnil Delalic et al* (Judgment) ICTY-96-21, T Ch II (16 November 1998) [454]; *Case of the Gómez-Paquiyauri Brothers v Peru* (Judgment) IACtHR Series C No 110 (8 July 2004) [111]–[112]; *Al-Adsani v UK* (App no 35763/97) (2001) 34 EHRR 273 (ECtHR) [60]–[61].

14 See, eg, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15 (*Genocide 1951*) 23; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Preliminary Objections) [1996] ICJ Rep 595 (*Genocide 1996*) 616 [31]. cf on genocide as *jus cogens Völkermordkonvention* BVerfGE, JZ 2001, 975 (Germany) 976; *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6, 31 [64]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 (*Genocide 2007*) 104–05 [147]–[149].

Chapter 2 will also explore the question of **how obligations *inter partes* became the paradigm in international law and why obligations owed *erga omnes* were as scarce as they were.** This is where the bulk of this thesis's original contribution to the field. Indeed, although general international law does not designate the entities to which obligations are owed, it is *automatically and reflexively* assumed that obligations are of the 'essentially bilateral'[15] kind, owed *inter partes*. And thus not only are these obligations by far more numerous, but they are also something of a paradigm in international law.

There was a pattern at work behind the creation of obligations *inter partes*. General international law only used to establish obligations concerning respect for a certain State's nationals, territories, agents, property, etc. These obligations were owed to that State only, and no other. Conversely, and in a general way, States were free to act except where their actions would compromise values held by another State (eg nationals, territories, property, agents, etc). Thus States could mistreat their own nationals and stateless individuals more or less at pleasure, but they could not do the same with respect to aliens with a nationality —ie *another State's* subjects. They could freely visit ships flying their flag or no flag in the high seas, but they could not visit ships flying *another State*'s flag without that State's consent. They were free to use their territories or the high seas as they saw fit, but they bore obligations over *another State's* territory, etc.

The idea that one's rights are only limited by those of others, expressed in many classic liberal texts,[16] captures the essence of this scheme well. Certainly, the

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15 *Barcelona Traction* (n 1) 47 [89] ('... esentiellement bilatéraux').

16 eg Déclaration des Droits de l'Homme et du Citoyen 1789, art 4.

idea that restrictions to the independence of States should not be presumed[17] was prevalent at the time; it has been qualified of late.[18] Prof Allott believes this scheme to establish 'relations of property owners'.[19] 'International law', he states, '… has been the minimal law necessary to enable State-societies to act as closed systems and to act as territory owners in relation to each other.'[20] This 'property-owner analogy' explains very well why States were as free to act as possible and obliged to act only when facing another State: another property owner. Thus the pattern described before has one main aim: to further the liberty of action of the respective property owners.

In synthesis, **chapter 2** will explore why keeping the number of States/entities owed an obligation to the minimum possible —ie one, in the case of obligations *inter partes*— furthers the property-owner analogy. Conversely, it will explore why adding an unlimited number of entities owed an obligation simultaneously —eg all States, in the case of obligations *erga omnes*— upsets the property-owner analogy.

Chapter 3 and **Chapter 4** will grapple with obligations *erga omnes* more directly. **Chapter 3** will consider the question of **what makes obligations *erga omnes* unique and distinguishes them from obligations *inter partes* and other notions (eg *jus cogens*)**. The starting point for this inquiry is that the mere fact that a rule or source of international law (eg treaties, custom) operates among multiple

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17 *The Case of the SS Lotus (France v Turkey)* (Judgment) PCIJ Rep Series A No 10, 18. See more references at RY Jennings and A Watts, *Oppenheim's International Law* (9th edn Longman, London 1996) 1278–79 fn 16.

18 *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213, 237 [48].

19 P Allott, *Eunomia: New Order for a New World* (OUP, Oxford 1990) 322.

20 Allott (n 18) 324.

parties does not entail that obligations which arise under that rule are owed to all such parties. A distinction should thus be drawn between these rules or sources and the obligations —or other legal relations— contained in them.[21] Again, obligations *inter partes* in *Barcelona Traction* were 'essentially bilateral' legal relations existing between Spain and Canada or Spain and Belgium; and yet they were contained in multilateral rules (ie general custom). This distinction between rule and obligation is crucial and should be borne in mind from this point on.

Chapter 4 will consider the same question, but from a different angle. **Chapter 4** will discuss explain certain features of modern international law which are said sufficiently to explain obligations *erga omnes* but which, in fact, do not explain these obligations. Chapter 4 will critique the lack of reciprocity of obligations *erga omnes*, the alleged departure from the system of 'bilateralism', and the alleged rise of community interests in international law. Legal authorities widely believe that these notions influence the structure of obligations *erga omnes*, which is incorrect.

Finally, **chapter 5** will explain the implications of this thesis's conception of obligations *erga omnes* more fully. It is submitted that States have primary rights that

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[21] See, eg, B Simma, 'From Bilateralism to Community Interest' (1994) 250 RdC 217, 337; A De Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (Kluwer Law International, The Hague 1996) 18; K Kawasaki, 'The "Injured State" in the International Law of State Responsibility' (2000) 28 Hitotsubashi Journal of Law and Politics 17, 22; Tams (n 5) 45; J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (CUP, Cambridge 2002) 161 [4] (part I, ch V); J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law relates to Other Rules of International Law* (Cambridge Studies in International and Comparative Law No 29, CUP, Cambridge 2003) 64–65, 67; J Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 RdC 325, 342–44; Koskenniemi (n 4) [402]. See also K Sachariew, 'State Responsibility for Multilateral Treaty Violations: Identifying the "Injured State" and its Legal Status' (1988) 35 NILR 273, 276, 278; Annacker (n 4) 135. See further, G Fitzmaurice, 'Third Report on the Law of Treaties' (UN Doc No A/CN.4/115 and Corr. 1, YbILC 1958-II) 38 [73] (art 16), distinguishing between conflicts of treaties and conflicts of obligations.

obligations *erga omnes* are observed. This idea will be defended throughout this thesis, but explained more fully in **chapter 5**. **Chapter 5** will also account for the features of conceptions advanced by other commentators —and States. A **general conclusion** will also be provided.

CHAPTER 1 THE CONCEPT (AND CONSEQUENCES) OF BEING OWED AN OBLIGATION IN INTERNATIONAL LAW

A INTRODUCTION

The purpose of this chapter is to explain what it means to be owed an obligation. Since obligations *erga omnes* are defined as obligations owed to the international community as a whole, including all States, at least, this question is unavoidable. An obligation is a legally required course of conduct. Obligations are correlatives of 'rights in the strict sense' or 'claim-rights'. And these rights are different from other types of 'rights'; for instance, the 'right' that a certain obligation is not changed by the actions of other States (eg *jus cogens*). In order to explain this concept, this thesis will make use of Wesley N Hohfeld's *Fundamental Legal Conceptions*. Although Hohfeld's legal relations do not explain the whole of international law, for the purposes of this thesis they are extremely useful.

Owing an obligation to an entity gives that entity standing to invoke responsibility, control over the content of the obligation in question, protection against countermeasures taken by another State, and some protection against the suspension of that —treaty— obligation in response to another State's material breaches. As stated in the introduction, this allows the State concerned some control over the ultimate fate of the individuals and objects over which obligations are established.

B OWING OBLIGATIONS

1 Introduction

(a) Hohfeldian Legal Analysis

Hohfeld observed that in legal discourse, the term 'right' was used indiscriminately to denote concepts which, on closer examination, should be treated separately.[22] Hohfeld argued that each of his entitlements **1)** had independent existence and **2)** that the existence of any one of these entitlements would not necessarily entail the existence of any other entitlement.[23] In simpler words, one could not adduce —or rule out— the existence of a legal relation merely by showing the existence of another.[24] Additional, suitable arguments must be marshalled in order to explain why each legal relation exists and how they relate to each other (eg that State practice and *opinio juris* support such a construction). This insight is important for this thesis. It will allow it to separate complex legal concepts into its constituent parts. As such, it will allow distinguishing obligations *erga omnes* from related notions (eg *jus cogens*).

More specifically, the equivocal term 'right' could be used to describe four types of 'Hohfeldian entitlements',[25] 'jural' relations or legal relations:[26]

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22 WN Hohfeld, *Fundamental Legal Conceptions as applied in Judicial Reasoning* (New edn Ashgate, Aldershot 2001) 11–12.

23 J Finnis, 'Some Professorial Fallacies about Rights' (1971–1972) 4 Adelaide Law Review 377, 379 ('logically independent'); J Finnis, *Natural Law and Natural Rights* (Clarendon Law Series, Clarendon Press, Oxford 1980) 201.

24 Finnis 1972 (n 23) 379 ('Nothing can be said about it by inference from … [another legal] relationship.')

25 NE Simmonds, 'Rights at the Cutting Edge' in MH Kramer, NE Simmonds and H Steiner (eds) *A Debate over Rights: Philosophical Enquiries* (Clarendon Press, Oxford 1998) 154. See also Finnis 1980 (n 23) 199 ('Hohfeldian rights'); MH Kramer, 'Rights without Trimmings' in MH Kramer, NE Simmonds and H Steiner (eds) *A Debate over Rights: Philosophical Enquiries* (Clarendon Press, Oxford 1998) 22 fn 8.

(1) That State B is entitled that State B carry out or forbear from carrying out conduct ϕ ('claim-right' or '**right**');

(2) That State A is permitted to undertake or not to undertake conduct ϕ in relation to State B ('privilege' or '**liberty**');

(3) State A is entitled to create or extinguish legal relations as a consequence of doing ϕ with respect to State B ('**power**');

(4) That State A is free from State B's ability to create or extinguish State A's legal relations by State B's doing of ϕ ('**immunity**');

The specific meaning of each of these relations (eg what a right is and how it differs from a liberty) will be clarified in due course. What is important to highlight now is why Hohfeldian analysis is useful for this thesis.

First, Hohfeldian analysis does not directly speak to the specific content of legal relations. Rather, it speaks to the legal consequences that attach to certain legal relations by reason of their character; that is, by reason of their consisting in, say, permissions, prohibitions, etc.[27] In simpler words, Hohfeldian analysis examines what it is that all obligations have in common that sets them apart from other legal relations, what it is that liberties or privileges have in common that sets them apart from other legal relations, and so on. However, Hohfeldian analysis does this at an abstract level, without exhaustively describing what the permissions or prohibitions consist of.

Second, Hohfeldian analysis is an ideal tool for the deconstruction of complex legal concepts, underpinned by several legal relations. Hohfeld considered his four

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[26] The four descriptions that follow are taken from Finnis 1980 (n 23) 199.

[27] Hohfeld (n 22) 11. cf WW Cook, 'Hohfeld's Contributions to the Science of Law' (1918–1919) 28 Yale LJ 721, 724; Kramer (n 25) 22; Simmonds (n 25) 146.

entitlements to be the '… lowest common denominators of the law'.[28] This claim is overbroad. There is more to the law than 'rights'[29] and not all of the law concerns legal relations. For instance, the principle of the 'unity of the State' would have it that all organs of the State are part of that State. Thus, all actions of State organs are actions of that State, regardless of the status of that organ in the relevant municipal legal system. Contracts entered into by one organ will bind the whole State.[30] Failure to apply the law by sub-units of a federal State (eg state authorities, provincial authorities, cantonal authorities) will engage the responsibility of the whole State;[31] and so on. This principle is part of positive law,[32] but it cannot be explained through Hohfeldian analysis. *Rather than addressing what a State does and the effects of what a State does* —ie what transposing Hohfeldian analysis to international law would explain—, *the principle of the unity of the State addresses what the State is*.

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28 Hohfeld (n 22) 30. See also Cook (n 27) 724; P Eleftheriadis, *Legal Rights* (OUP, Oxford 2008) 107–08.

29 cf NHB Jørgensen, *The Responsibility of States for International Crimes* (Oxford Monographs in International Law, OUP, Oxford 2000) 93 ('The effect of a legal norm is to create obligations … and rights'.); B Simma, 'From Bilateralism to Community Interest' (1994) 250 RdC 217, 231 ('At the basis of such a bilateralist view of international legal relationships appears to lie a theoretical understanding of the structure of international law according to which the law exhausts itself in correlative rights and obligations of its subjects.') (emphasis added). This thesis defends a bilateralist view of international law without thereby believing that the law 'exhausts itself' in claim-rights and obligations, as Simma would have it.

30 *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Libya* (1977) 53 ILR 389, 415–16.

31 *LaGrand (Germany v USA)* (Judgment) [2001] ICJ Rep 466, 507–08 [113]–[115], in light of *LaGrand (Germany v USA)* (Order : Provisional Measures) [1999] ICJ Rep 3, 16 [28].

32 J Crawford, 'First Report on State Responsibility' (UN Doc No A/CN.4/490, YbILC 1998) [158], [191].

The more correct statement is that Hohfeldian analysis purports to describe all of the law that is constituted of legal relations.[33] Consequently, Hohfeld intended precisely[34] to describe such aspects of the law as could be described in terms in legal relations. Hohfeldian analysis makes plain that concepts like, say, 'diplomatic protection', often —rightly and conveniently— treated as a unity, are actually composed of a myriad of discrete legal relations. Each of these relations uniquely and discretely contributes to the whole of the concept, but each of them may be considered separately. Thus, one legal relation concerns respect of international law by State B in the person of a State A's nationals;[35] another legal relation concerns reparation by State B for mistreatment of the nationals of State A; another legal relation concerns whether State A can request reparation from State B for such mistreatment;[36] another legal relation concerns the ability for State A to seise an international tribunal[37] against State B; and so on.

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33 CFH Tapper, 'Powers and Secondary Rules of Change' in AWB Simpson (ed) *Oxford Essays in Jurisprudence* (Clarendon Press, Oxford 1973) 244; AL Corbin, 'Jural Relations and their Classification' (1920–1921) 30 Yale LJ 226, 229; Cook (n 27) 724. cf Finnis 1980 (n 23) 199, arguing that most —but not all— legal relations are describable in Hohfeldian terms.

34 Finnis 1980 (n 23) 201.

35 *Mavrommatis Palestine Concessions (Greece v UK)* (Jurisdiction) PCIJ Rep Series A No 2, 12; *Panevezys-Saldutiskis Railway (Estonia v Lithuania)* (Judgment) PCIJ Rep Series A/B No 76, 16; *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (New Application: 1962)* (Judgment) [1970] ICJ Rep 3, 46 [87]. See also *Nottebohm Case (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJ Rep 4, 24.

36 *Mavrommatis 1924* (n 35) 12 ('En prenant … cause pour l'un des siens').

37 *Mavrommatis 1924* (n 35) 12 ('… en mettant en mouvement … l'action judiciaire internationale').

(b) Hohfeldian Analysis only addresses the Character of Legal Relations

All of this will allow this thesis to distinguish *obligations erga omnes* from, say, *disabilities* such as *jus cogens*, with which they are often associated or even identified.[38]

As stated above, Hohfeldian analysis addresses the character of a legal relation rather than its content. It is important to clarify this. Hohfeldian analysis does not determine, by itself, that any arguments advanced in this thesis are correct. *Hohfeldian analysis is the way in which these arguments are described and presented*. Hohfeldian analysis is ideologically promiscuous, as it were. It can be used to describe any conception of obligations *erga omnes* or any other concept which features legal relations.

This point is best explained by way of example. Legal relation λ springs from this passage: '[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity … of any state'.[39] To determine the content of legal relation λ requires making use of interpretation; that is, of legal technique and perhaps of legal theory. Hohfeldian analysis is no substitute for interpretation. But what Hohfeldian analysis can do very well is to explain the outcome of the process of interpretation. Thus, legal relation λ regulates '…threat[s] or use[s] of force'. Therefore, legal relation λ regulates **conduct**, which conduct is **prohibited** ('…shall refrain'). Legal relations that regulate conduct belong to

38 See ch 3, pp 205–15, below.

39 Charter of the United Nations (opened for signature 26 June 1945, entered into force 24 October 1945) 39 AJIL Supp 190 (UNCh) art 2(4).

Hohfeld's first order of legal relations,[40] among which only obligations or duties establish prohibitions.[41] Therefore, legal relation λ is an obligation, and obligations entail certain legal consequences that other legal relations do not entail.

Likewise, the content of legal relation λ, an obligation *erga omnes*, depends on interpretation. Hohfeldian analysis is no substitute for it. But if Hohfeldian analysis is relevant to international law, and if by interpretation it is determined that legal relation λ is an *obligation* *erga omnes* (ie a prohibition of conduct), *the legal consequences germane to all obligations or 'duties' should*[42] *also follow obligations erga omnes*. Conversely, if by interpretation it is determined that legal relation λ is a liberty, the legal consequences germane to all liberties should also follow that legal relation; and so on.

It remains to be shown whether any consequences 'should' follow from obligations in international law which do not follow from other legal relations. That is partly the purpose of this chapter.

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40 See pp 25–48, below.

41 The other first-order legal relations, liberties, establish permissions. See pp 41–44, below.

42 cf Kramer (n 25) 22–23, 28, for whom the relevance of Hohfeld's analysis does not need to be empirically demonstrated (ie it does not have to conform to positive law). This is not entirely incorrect, but this thesis would rather agree with Eleftheriadis (n 28) 110–11, advancing the opposite point.

(c) Hohfeldian Analysis deconstructs Complex Legal Relations

(i) Introduction

As stated before, Hohfeldian analysis breaks down complex legal concepts into its basic components.[43] Hohfeld does this in three ways: **1)** by describing all legal relations as bilateral, **2)** by grouping all legal relations into two orders, and **3)** by positing that all entitlements have only one correlative and only one opposite within the same order to which they belong.

(ii) All Legal Relations are Bilateral

Hohfeld insisted that all legal relations intervene between two **subjects** of law[44] with respect to only one of what this thesis will call '**object**' (the activity[45] or 'thing'[46] ϕ). To this extent, Hohfeld was indeed '… concerned to reduce legal relations to a single form' —viz 'bilateral relations'.[47] These two subjects will be called the **entitlement-holder** (eg right-holder),[48] or the subject that enjoys the advantages[49] conceded by the

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43 See pp 13–15, above.

44 Tapper (n 33) 243; LW Sumner, *The Moral Foundation of Rights* (Clarendon Press, Oxford 1987) 24; Kramer (n 25) 22 fn 8; Simmonds (n 25) 142; Eleftheriadis (n 28) 109. cf Finnis 1980 (n 23) 201 ('two-term').

45 Finnis 1972 (n 23) 377 fn 1, 379.

46 Finnis 1980 (n 23) 201.

47 cf J Crawford, 'Third Report on State Responsibility' (UN Doc No A/CN.4/507, YbILC 2000) [84].

48 cf Eleftheriadis (n 28) 72.

49 cf p 49 nn 208–210 and associated text, 81 n 378 and associated text, below.

entitlement, and the **entitlement-bearer** (eg obligation-bearer),[50] who generally procures or suffers the other subject's entitlements.

The claim advanced here is that all legal relations, even those existing in international law, present bilateral 'structures'. The **structure** of a legal relation is a concept that is often employed[51] but seldom defined. It concerns the way the legal relation is to be carried out.[52] In a nutshell, the structure is the way in which the subject(s) of a legal relation relate to the object(s) of that relation. Thus, in *Barcelona Traction*, the obligation not to deny justice to Canadian nationals, beneficiaries of this obligation, was owed by Spain to Canada only. The obligation not to deny justice to Belgian nationals, beneficiaries of this obligation, was owed by Spain to Belgium only; and so on. In schematic form, the structure of these obligations can be represented thus:

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50 cf Eleftheriadis (n 28) 72.

51 K Sachariew, 'State Responsibility for Multilateral Treaty Violations: Identifying the "Injured State" and its Legal Status' (1988) 35 NILR 273, 276–77; G Arangio-Ruiz, 'Third Report on State Responsibility' (UN Doc No A/CN.4/440 and Add.1, YbILC 1991-II(1)) 35 [121] ('… so structured'); G Arangio-Ruiz, 'Fourth Report on State Responsibility' (UN Doc No A/CN.4/444, YbILC 1992-II(1)) 34 [92]–[93]; C Annacker, 'The Legal Regime of Erga Omnes Obligations in International Law' (1994) 46 AJPIL 131, 135 ('Erfüllungstruktur'); Simma (n 29) 336; K Zemanek, 'New Trends in the Enforcement of Erga Omnes Obligations' [2000] 4 MPUNLY 1, 8; ID Seiderman, *Hierarchy in International Law: the Human Rights Dimension* (School of Human Rights Research Series No 9, Intersentia-Hart, Antwerpen 2001) 126; CJ Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge Studies in International and Comparative Law, CUP, Cambridge 2005) 61 ('… structural analysis'), 131, 133; I Feichtner, 'Community Interest' (MPEPIL) <http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1677&recno=1> accessed 22 July 2009, [47] ('... bilateralist structure of public international law').

52 See, eg, Simma (n 29) 336 ('… pattern of performance'); Annacker (n 51) 135 ('Erfüllungstruktur'); Zemanek (n 51) 8 ('… performance structure'); Tams (n 51) 61 ('… a structural analysis of the underlying patterns of performance').

(1) Spain owes Canada certain treatment of Canadian nationals;

(2) Spain owes Belgium certain treatment of Belgian nationals;

(3) Spain owes, eg, Ethiopia certain treatment of Ethiopian nationals; and so on.

This claim will be maintained throughout this thesis. Objections to this conception will be answered in due course. For now, suffice it to state that some rules in international law lend indirect support to the notion that legal relations are bilateral in structure. For instance, a bilateral treaty lapses when one of its parties disappears without successor,[53] with a few, concrete exceptions, not relevant here.[54] This suggests that at least two parties are needed so that the obligations contained in the treaty remain in force. Furthermore, state responsibility never occurs 'in the air'; it is always incurred with respect to someone.[55] State responsibility attaches to the breach of all of the so-called 'primary'[56] obligations without distinction.[57] It creates new

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53 Harvard Draft Convention on the Law of Treaties (1935) 29 AJIL Supp 653 (Harvard on Treaties) 1161 (art 33(b)), 1165, 1167–68; H Lauterpacht, *International Law: A Treatise* (7th edn Longmans, Green and Co, London 1952) vol 1, 851; American Law Institute, *Restatement of the Law (Second): Foreign Relations Law of the United States* (St. Paul 1965) 487–88 (§159). See also ADM McNair, *The Law of Treaties* (Clarendon Press, Oxford 1961) 592–93. See further ILC, 'Draft Articles on Succession of States in Respect of Treaties with Commentaries' (26 July 1974) UN Doc A/9610/Rev1 (YbILC 1974-II(1)) 239 [12] (art 23), in light of pp 236–37 [2]–[3] (art 23).

54 See, eg, Vienna Convention on Succession of States in respect of Treaties (opened for signature 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3, arts 11–12.

55 Crawford, 'Responsibility III' (n 47) [84]. See also W Riphagen, 'Third Report on the Contents, Forms and Degrees of State Responsibility (Part 2 of the Draft Articles)' (UN Doc No A/CN.4/354, YbILC 1982-II(1)) 34 [78]; J Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 RdC 325, 436; G Gaja, 'The Concept of an Injured State' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 941.

56 See pp 74–80, below.

57 See pp 56–82, below.

entitlements for the entity to which the 'primary' obligation breached is owed.[58] In turn, this suggests that both the 'primary' obligations and legal relations connected with state responsibility are owed by one entity to another entity.[59] This is a critical insight for obligations *erga omnes*.[60]

(iii) All Legal Relations fall within Two Distinct Orders

Moreover, Hohfeld divided legal relations into two discrete orders. First-order legal relations —ie obligations/rights and liberties/no-rights— permit or forbid/command **conduct**.[61] By contrast, legal relations of the second order —ie powers/liabilities and immunities/disabilities— concern the ability or inability to create or extinguish legal relations **through conduct**;[62] eg by making a promise, by ratifying a treaty or by breaking the law.[63] Therefore the scopes of first- and second-order legal relations differ considerably. Whereas first-order relations allow or forbid conduct, second-

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58 *Barcelona Traction* (n 35) 32 [34], citing *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 181–82. See pp 56–82, below.

59 And see Riphagen, 'Fourth Report on the Contents, Forms and Degrees of State Responsibility (Part 2 of the Draft Articles)' (UN Doc No A/CN.4/366, YbILC 1983-II(1)) 13 [73] ('Normally, international obligations … are owed towards a specific State.').

60 See ch 4, pp 258–69, below.

61 Tapper (n 33) 244, 250; Eleftheriadis 2008 (n 28) 114.

62 Tapper (n 33) 244; Sumner (n 44) 27. See also Finnis 1980 (n 23) 200.

63 See pp 48–54, below.

order legal relations allow or forbid conduct only indirectly;[64] that is, only when they create or extinguish first-order legal relations. [65]

That legal relations fall within discrete orders is important for this thesis. Obligations *erga omnes* are first-order legal relations. By contrast, *jus cogens* is composed of second-order legal relations. Obligations *erga omnes* forbid conduct. But as will be discussed in time,[66] *jus cogens* voids treaties which 'conflict' with *jus cogens* at the time of conclusion or after a new *jus cogens* norm attains that status.[67] Some obligations are derogable and others are not (ie the so-called *jus dispositivum*). Therefore, the concept of obligation cannot sufficiently explain the concept of non-derogation. Furthermore, acting in a way contrary to what an obligation requires does not by itself extinguish [68] or derogate from the obligation breached. Infringing obligations *erga omnes* and 'infringing' *jus cogens* are different concepts. Finally, there is no reason to suppose that only obligations can attain *jus cogens* status. Any other legal relation (eg a permission or liberty) could be regarded as so fundamental that its derogation is forbidden.

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64 Sumner (n 44) 27–28.

65 Second-order entitlements can also create further second-order entitlements. See p 49 nn 208–210 and associated text, below.

66 See pp 53–54, below; ch 2, pp 205–15, below.

67 See Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) arts 53, 64.

68 Annex, UNGA Res 56/83 (12 December 2001) UN Doc A/Res/56/83 (ASR) art 29.

Hohfeldian analysis can explain why obligations *erga omnes* and *jus cogens* are different notions, despite how they undeniably —but only occasionally— overlap. Distinguishing both concepts is a perennial problem in dealing with obligations *erga omnes*.

(iv) All Legal Relations have a Correlative and an Opposite

Finally, Hohfeldian analysis places legal relations in *correlation* and *opposition* to legal relations of the same order.

For Hohfeld, there necessarily exists one —but only one— **correlative** for every entitlement of each of his orders.[69] A correlative is a 'logical equivalent'[70] or 'logical converse'[71] of something else: the same relation, considered from a different vantage point.[72] Thus a Hohfeldian entitlement could be described from the point of view of any of the subjects that participate in the relevant legal relation.[73] If A owes B ten pounds, B is entitled that A pays it ten pounds. If State A has the power to alter the entitlements of State B, State B is liable to have its entitlements so altered; if State

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69 Kramer (n 25) 22; Simmonds (n 25) 150; Eleftheriadis (n 28) 108–09.

70 P Mullock, 'The Hohfeldian Jural Opposite' (1971) 13 Ratio 158, 159; Sumner (n 44) 25, 32. See also Hohfeld (n 22) 13 ('… correlative (and equivalent)').

71 Hohfeld (n 22) 13; Mullock (n 70) 159.

72 Kramer (n 25) 26–27.

73 Eleftheriadis (n 28) 109; Sumner (n 44) 25.

A lacks that power (ie bears a disability), State B is immune from any of State A's purported exercises of that power; and so on.[74]

Conversely, Hohfeld posited the existence of one —but only one— **opposite** of the same order for every one of his entitlements. The mere existence of an entitlement implies the denial of its opposite.[75] Accordingly, the mere existence of State A's power to alter State B's entitlements by doing ϕ rules out the possibility that State A is not able (ie bears a disability) to alter State B's entitlements by doing ϕ. Likewise, if State B is liable to have its entitlements so altered, State B is not immune from such alteration; and so on. Hohfeldian opposites '… taken together … exhaust the relevant field (the universe of discourse).'[76] In other words, either a subject has one entitlement or its opposite: it cannot have both —or neither—[77] with respect to the same subject and to the same object. No middle ground is possible. Consequently, it is more precise to speak of legal 'contradictories'[78] rather than legal 'opposites'. Some 'opposites' (eg 'tall' and 'short') do admit of middle terms (eg 'average

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74 Tapper (n 33) 243.

75 Tapper (n 33) 243; RWM Dias, *Jurisprudence* (5th edn Butterworths, London 1985) 28 ('… cancel each other out'); Kramer (n 25) 8; Eleftheriadis (n 28) 109–10. See also Finnis 1972 (n 22) 377.

76 G Williams, 'The Concept of Legal Liberty' (1956) 56 Col L Rev 1129, 1135.

77 Tapper (n 33) 244.

78 Williams (n 76) 1135; Mullock (n 70) 159; Sumner (n 44) 25; Kramer (n 25) 12. cf Corbin (n 33) 229 fn 3.

height'). Contradictories (eg 'tall', 'not tall') are the types of opposites that exhaust the relevant 'universe of discourse' between them.[79]

2 First-Order Legal Relations

(a) Introduction

As stated before, Hohfeld noted that the concept of 'right' was overused in legal discourse.[80] It described concepts that, although related to each other, should be considered separately. Again, Hohfeld created a system of four 'rights' or 'Hohfeldian entitlements':

(1) State A must carry out or forbear from carrying out conduct ϕ in relation to State B ('claim-right',[81] or '**right**');
(2) State A is permitted to undertake or not to undertake conduct ϕ in relation to State B ('privilege'[82] or '**liberty**');
(3) State A is entitled to create or extinguish legal relations as a consequence of doing ϕ with respect to State B ('**power**');[83]
(4) State A is free from State B's ability to create or extinguish State A's legal relations by State B's doing of ϕ ('**immunity**').[84]

Each Hohfeldian entitlement only features one correlative and one contradictory, both of the same order.[85] The purpose of this section is to explain more

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79 IM Copi and C Cohen, *Introduction to Logic* (Prentice Hall, Upper Saddle River 2005) 187.

80 See p 12–23, above.

81 Hohfeld (n 22) 13.

82 Hohfeld (n 22) 14.

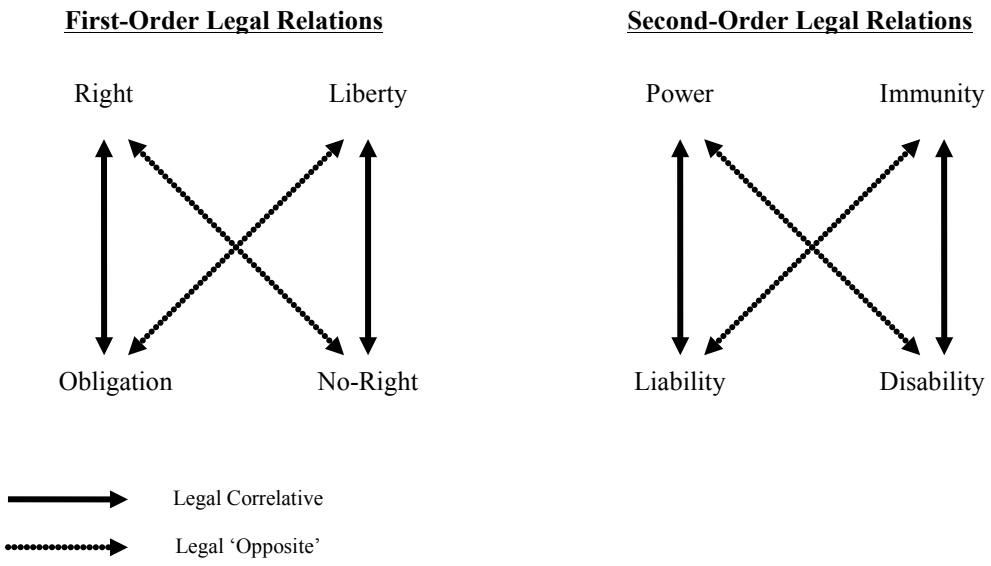
83 Hohfeld (n 22) 21.

84 Hohfeld (n 22) 28.

85 See pp 23–25, above.

clearly the nature of each Hohfeldian entitlement, their opposites, and correlatives. It will also explain why Hohfeldian entitlements are relevant to international law, a controversial proposition.[86] The ultimate object of this chapter is to explain what owing an obligation (eg to the international community as a whole) means and what it entails. As obligations *erga omnes* are defined by being *owed to* the international community as a whole, this subject could hardly be ignored. Hohfeld explains this well.

In sum, Hohfeld's correlatives and opposites can be arranged, in simplified form, as follows:[87]



(b) Inviolability and Permissibility in International Law

As stated before, first-order legal relations concern the existence or absence of a norm commanding or forbidding that their object is carried out or not.[88] Within this first

[86] cf Crawford, 'Responsibility III' (n 47) [84]–[85].

[87] Williams (n 76) 1135.

order, there are two types of entitlements: 'rights' and 'liberties'. For Hohfeld, they represented that which is **inviolable** and that which is **permissible**,[89] respectively. This is a significant[90] —but not original—[91] feature of Hohfeldian legal analysis. It is important to bear this in mind because in international law, 'wrongfulness'[92] occurs and responsibility ensues only when an inviolable legal relation has been infringed.[93] Standing to invoke responsibility and the consequences of wrongful acts are the key to identifying the entity to which obligations *erga omnes* are owed.

The same is not true for merely permissible legal relations. They can be interfered with:[94] 'violated', as it were. A liberty does not entail the imposition of a duty on anyone else.[95] For example, every State is at liberty to occupy *terra nullius*.[96]

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88 See pp 21–23, above.

89 Simmonds (n 25) 170. cf Hohfeld (n 22) 14.

90 Finnis 1980 (n 23) 200.

91 Kramer (n 25) 12; Eleftheriadis (n 28) 5–6, 116.

92 M Koskenniemi, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of General International Law' (UN Doc No A/CN.4/L.682, YbILC 2006) [151].

93 ASR (n 68) art 2(b).

94 Kramer (n 25) 10–11; Simmonds (n 25) 156, 183. See also HLA Hart, 'Bentham on Legal Rights' in AWB Simpson (ed) *Oxford Essays in Jurisprudence* (Clarendon Press, Oxford 1973) 180. cf P Allott, *Eunomia: New Order for a New World* (OUP, Oxford 1990) 161.

95 Sumner (n 44) 35; Kramer (n 25) 14–15; Simmonds (n 25) 156. It should be remembered that no-rights are liberties' correlatives. See pp 25–26, above.

96 I Brownlie, *Principles of Public International Law* (6th edn OUP, Oxford 2003) 168; G Fitzmaurice, 'The General Principles of Law Considered from the Standpoint of the Rule of

However, only the first peaceful, lawful, continuous occupant of *terra nullius* acquires title to that territory,[97] to the exclusion of all other States.[98] Therefore, if State A successfully occupies *terra nullius*, State B's analogous entitlement disappears.[99] Nevertheless, State A would not be responsible to State B for occupying *terra nullius* or for causing State B's entitlements to disappear. If State B's entitlement was inviolable for State A, State A's responsibility would follow from such occupation. In short, State A is permitted to occupy *terra nullius* by international law even if State A extinguishes State B's analogous permission in doing so.

A further example: under article 2(4) UNCh, States must '… refrain … from the threat or use of force against the territorial integrity or political independence of any state.' In the event of an 'armed attack', States retain, among others, an '… inherent right of individual … self-defence', under article 51 UNCh.[100] A clear comprehension of Hohfeldian analysis explains why the entitlement in article 2(4) UNCh is of a different nature than the entitlement in article 51 UNCh. The former legal relation speaks to inviolability whereas the latter speaks to permissibility.

Law' (1957) 92 RdC 1, 141. See also *Affaire concernant l'Île Clipperton (Mexico v France)* (1931) II RIAA 1105, 1110.

97 *Island of Palmas Case (Netherlands v US)* (1928) 2 RIAA 829, 846; *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, 39. This is a **power** to alter entitlements by occupying *terra nullius* peacefully, lawfully, and continuously. On powers, see pp 49–50, below.

98 Fitzmaurice (n 96) 141; *Clipperton Island* (n 96) 1109 ('…il faudrait … conclure à l'illégitimité de l'occupation … par la France'). See also *Island of Palmas* (n 97) 838–40 (holdings on territorial sovereignty), 857.

99 Therefore, a power is involved here, one State A is at liberty to exercise. See p 49 fn 208 and associated text, below,

100 UNCh (n 39) art 51.

Indeed, article 2(4) UNCh establishes that States '…shall refrain' from using force in their international relations. This imperative language clearly speaks to inviolability; 'State B must not use force against State A' would be a correct statement of the law on this matter. And, for sure, when article 2(4) is infringed state responsibility ensues.[101]

But article 51 UNCh is a different type of legal relation. The 'right' to use force in self-defence is a 'right-permissible', not a 'right-inviolable'. State B's soldiers are organs of State B.[102] Thus, were State A's entitlement to use of force in self-defence inviolable for State B, State B's soldiers would commit a wrongful act by resisting State A's soldiers. It is arguable that if State A's entitlement to use force in self-defence is inviolable for State A, State B must submit to any measure State A takes in self-defence. However, this is an incorrect statement of the law.[103] State B's soldiers are permitted to repel the attacks of the soldiers of State A, just like State A is permitted to carry out attacks in self-defence against State B itself. This is significant, because State A's 'right' to use force in self-defence is conditioned[104] on State B's

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101 See, eg, *Armed Activities on the Territory of the Congo (DRC v Uganda)* (Judgment) [2005] ICJ Rep 168, 227 [165], 254 [251], 257 [259].

102 See, eg, *Ugandan Armed Activities* (n 101) 242 [213], 252 [245].

103 Lauterpacht (n 53) vol 1, 265–66, 278 [1] (especially).

104 Therefore, State B has the power to alter State A's entitlements by breaking article 2(4) UNCh. On powers, see pp 48–50, below; on a similar power to alter entitlements by breaking the law, see p 81 n 378 and associated text, below.

infringing article 2(4) UNCh.[105] Therefore, State B is permitted to defend its soldiers despite breaking the law.

Positive law corroborates this interpretation. In *Corfu Channel*, the UK sent a force of minesweepers to clear a minefield located in Albanian territorial waters. Two British warships had previously been struck mines there. The minesweeping operation, carried out without Albanian consent, was deemed a wrongful use of force.[106] However, the UK had deployed a sizable covering force to protect the minesweepers. Albania argued that the covering force violated its sovereignty.[107] The UK argued that this was not the case. The covering force only sought to ensure that the minesweeping operation was not interrupted and to deter the occurrence of further incidents.[108] *Thus the covering force did not seek to impair Albanian sovereignty, but forcefully to deter Albania from interfering with the minesweeping operation*. The UK stated that its forces would defend themselves from Albanian attacks, if

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105 Provided that State B's use of force rises to the level of 'armed attack'; see, eg, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14, 103–04 [195]; *Oil Platforms (Iran v USA)* (Judgment) [2003] ICJ Rep 161, 186–87 [59]; *Ugandan Armed Activities* (n 101) [143].

106 *Corfu Channel (UK v Albania)* (Preliminary Objection) [1948] ICJ Rep 15, 35–36.

107 See *Corfu Channel (UK v Albania)* ICJ Pleadings, vol II, 119–22 (Albania, Counter-Memorial).

108 *Corfu Pleadings* (n 107) vol II, 300–01 [107] (UK, Reply).

needed.[109] The Court agreed that the deployment of the covering force was not illegal in light of the facts of the case.[110]

This is illuminating. Although the UK broke the law by sweeping Albanian waters for mines, *it could forcefully protect the minesweepers used to carry out what was later deemed a wrongful act*. That the UK only threatened to do so does not change this. The ICJ clarified in a —much— later case, that a threat to use force is illegal when the intended use of force is itself illegal.[111] Had Albania's 'right' of self-defence been inviolable for the UK, the UK's threat to destroy Albanian forces exercising this 'right' would be wrongful.

Further indirect evidence of how the 'right' of self-defence is merely a 'right-permissible' can also be found in *jus in bello*. *Jus in bello* applies to all parties to an armed conflict regardless of the legality of their actions under *jus ad bellum*.[112] It regulates the way all parties may target military objectives.[113] This suggests that *jus*

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109 *Corfu Pleadings* (n 107) vol I, 153–54 (UK, Memorial, ann 17); vol II, 288 [84(f)] (UK, Reply), on the role to be played by aircraft deployed in the area.

110 *Corfu Channel (UK v Albania)* (Merits) [1949] ICJ Rep 4, 35.

111 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 (*Nuclear Weapons II*) 246 [47].

112 Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (CUP, Cambridge 2004) 4–5; Y Dinstein, *The International Law of Belligerent Occupation* (CUP, Cambridge 2009) 10; C Greenwood, 'Historical Development and Legal Basis' in D Fleck (ed) *The Handbook of International Humanitarian Law* (2nd edn OUP, Oxford 2009) 1, 10–11.

113 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (opened for signature 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3 (Protocol I, Geneva Conventions) art 48. This is customary law on the matter. See *Nuclear Weapons II* (n 111) 257 [78]–[79]; Dinstein 2004 (n 112) 82.

in bello expects that State B, unlawful invader, can target State A's soldiers, which is an interference with State A's —*jus ad bellum*— 'right' to self-defence. It follows that State B is permitted to target State A's soldiers and vice versa. By contrast, one will not find regulations on the more humane methods of, say, committing genocide, the object of an inviolable legal relation.[114]

To all of this it could be replied that State B will be responsible to State A for property targeted and destroyed in the course of the unlawful invasion. Therefore, a wrongful act occurred where permission to target and destroy existed. Indeed, a State that uses force in breach of article 2(4) UNCh is responsible for the ensuing damage.[115] Thus in *Armed Activities Uganda*, even if it could be argued that Uganda was permitted to interfere with the DRC's 'right' to self-defence,[116] Uganda owed the DRC reparation for, among others, illegal uses of force.[117] However, it is not the destruction of property (eg military hardware) itself that entails State B's responsibility. If State B destroyed the same property, say, in anticipatory self-defence, as in the *Caroline Case*,[118] State A would have no 'demand for redress'[119]

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114 See pp 25 ff, above.

115 See p 29 n 101 and associated text, above.

116 The ICJ found that Uganda had unlawfully targeted civilians and non-combatants, not that Uganda could not target altogether. See *Ugandan Armed Activities* (n 101) 239–41 [206]–[208], [211]. What has been stated for *jus in bello* and *Corfu Channel* above should also apply to this case well. See pp 30–33, above.

117 See *Ugandan Armed Activities* (n 101) [259].

118 See (1841) 29 BFSP 1129, 1137–38; (1842) 30 BFSP 195, 195–96.

119 'National Jurisdiction: Its Legal Effects' II Moore Digest of Intl Law § 217, 410; (1838) 26 BFSP 1376, 1377.

against State B. *Caroline* arguably reflects the state of customary law on the matter.[120] In both cases, State B's conduct is the same: it destroys State A's property. However, State B must provide reparation only when it actually infringes the prohibition to use force. In a *Caroline*-type scenario it would not. In simpler words, it is not because State B is permitted to defend its soldiers that it must compensate State A, but rather because State B has broken an obligation owed to State A. This is further evidence that State B's 'right' to repel State A's attacks is the object of a permissible legal relation, rather than an inviolable one.

This exemplifies how distinguishing between the permissible and the inviolable, along Hohfeldian lines, is useful even in international law.[121]

(c) Rights and Obligations

(i) Concept

The Hohfeldian first-order entitlement that deals with inviolability is a **right**. *Obligations erga omnes fall within this category of Hohfeldian entitlements*. Hohfeld termed this entitlement a 'claim' or 'claim-right' for convenience[122] —viz in that one could say 'X has a … claim that Y'.[123] However, the word 'claim' hints at the

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120 See, eg, E Wilmshurst, 'Principles of International Law on the Use of Force by States in Self-Defence' (2005) 4 ('Article 51 preserves'), 5; TD Gill, 'The Temporal Dimension of Self-Defence: Anticipation, Pre-Emption, Prevention and Immediacy' (2006) 11 Journal of Conflict & Security Law 361, 367. See also TM Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (CUP, Cambridge 2002) 97–98.

121 cf the confusing use of 'right' in Lauterpacht (n 53) vol 1, 265.

122 See Hohfeld (n 22) 13, 53 text associated to fn 15.

123 Hohfeld (n 22) 14.

availability of judicial processes.[124] In international law, such processes are not always available. A further objection to Hohfeld could be that, after all, his analysis addresses '*Fundamental Legal Conceptions*' as they were '*Applied in Judicial Reasoning*'.[125]

Indeed, Hohfeldian analysis is 'judicial', but only in two respects. **First**, Hohfeld indeed sought to name his concepts in accordance with then-current judicial usage.[126] This is evident from his frequent use of case-law to explain his entitlements.[127] **Second**, Hohfeldian entitlements '… signify what a winning party wins in a court case, in the form of a remedy.'[128] If State B owed State A an obligation to treat State A's national in a given way and State B infringed that obligation, State A would indeed be entitled to reparation from State B and thus — loosely— to a 'remedy'. *But Hohfeld did not explain why the infringement of an entitlement would beget a remedy*.[129] Indeed, two different levels[130] of legal relations are at play in this example: **1)** State B's obligation to treat of State A's national in a

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124 cf BA Garner and HC Black, *Black's Law Dictionary* (9th edn West, St. Paul 2009) 281 ('claim', 1).

125 (n 22).

126 Corbin (n 33) 228; Kramer (n 25) 22–23; Hohfeld (n 22) xiii (N Simmonds). See also Cook (n 27) 724; Sumner (n 44) 19. And see Hohfeld (n 22) 30.

127 cf Hohfeld (n 22) 13, 16–17, 19–21, 26–30, passim.

128 Eleftheriadis (n 28) 5. See also Sumner (n 44) 32.

129 Finnis 1972 (n 23) 380; Eleftheriadis (n 28) 7.

130 On which see pp 55–84, 72 fn 320 and associated text (especially), below.

certain way and **2)** State A's entitlement to obtain reparation from State B —ie to obtain a 'remedy'. Now, this remedy redresses the infringement of the primary[131] obligation of treatment of nationals; therefore, it would come into existence only when this obligation has been infringed.[132] Furthermore, the obligation owed to State A has meaningful existence even before it is breached.[133] The obligation can be understood without looking to what remedies would be available after an eventual breach of that obligation.[134] Consequently, although Hohfeld's analysis is relevant to the issues of remedies and judicial processes, Hohfeld's entitlements are not conditioned on the availability of either the remedy or the judicial process.

Accordingly, it would be convenient to refer to a 'claim-right' simply as a 'right'. Hohfeld would not oppose this. He regarded a claim-right as a '… right in the strict sense'[135] and believed that limiting the overused word 'right' in this way gave it '… a definite and appropriate meaning'.[136] Thus a **right** —so-limited— consists of either **1)** the entitlement to receive something *from someone else*, or **2)** the entitlement to be free from the interference or (mis)conduct of *someone else*.[137] That is, the right-

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131 On which see pp 74–80, below.

132 On which see pp 75–76, below.

133 And see Finnis 1972 (n 23) 382 ('... even in the absence of … secondary rights to reparation').

134 And see Hohfeld (n 22) 89 text associated to fn 113.

135 Hohfeld (n 22) 12, 53 text associated to fn 14 ('In its narrowest sense').

136 Hohfeld (n 22) 13.

137 Cook (n 27) 724; Finnis 1980 (n 23) 200; Kramer (n 25) 9.

holder is entitled to the observance of certain conduct by the obligation-bearer —eg the international community as a whole is entitled to observance of obligations *erga omnes*. Logically, the opposite or contradictory of having a right to ϕ from someone else is having no right (ie a **no-right**) to ϕ from someone else. A right protects a subject's legal position *by making it obligatory that someone else* (ie another subject of law) procures —or does not interfere with— the object of that legal relation. Therefore, a **right** is the legal situation that results from creating an obligation or 'duty' on someone else.[138] Right and 'duty'[139] are correlatives. And since 'duty' and 'obligation' are interchangeable concepts in a Hohfeldian[140] and non-Hohfeldian sense alike,[141] **obligation** is a preferable term to describe Hohfeldian duties. Hohfeld may have approved of this.[142] After all, this thesis ultimately deals with *obligations erga omnes*.

(ii) The Correlation of Rights and Obligations in International Law

The correlation of rights and obligations has important implications for all obligations, obligations *erga omnes* included. If all obligations entitle/bind between

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138 Kramer (n 25) 9, 109. See also Finnis 1972 (n 23) 380; Finnis 1980 (n 23) 199 [(a)]; Dias (n 75) 25, 33; Sumner (n 44) 25; Simmonds (n 25) 170; Eleftheriadis (n 28) 6, 108.

139 Hohfeld (n 22) 12.

140 Williams (n 76) 1146; Sumner (n 44) 24 fn 12; M Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford Monographs in International Law, Clarendon Press, Oxford 1997) 133; Eleftheriadis (n 28) 86, 108, 114, equating duty and obligation through a middle term: an O-norm. But cf Sumner (n 44) 24 text associated to fn 11.

141 University of Oxford, 'Oxford English Dictionary: The Definitive Record of the English Language' <http://www.oed.com/> accessed 17 November 2009 (OED) ('duty', 4a); ('obligation', n; 3a, 3b).

142 See Hohfeld (n 22) 14 text associated to endnote 34 ('A duty or legal obligation').

two subjects only, all obligations, including those owed *erga omnes*, arguably create individual rights for the right-holder. This 'bilateralisable' [143] conception of obligations *erga omnes* brings clarity to a subject mired in terminological imprecision and unwarranted generalisations.

For now, it should be noted that there is considerable international legal authority that expressly or implicitly adopts the correlation of rights and obligations. Some commentators endorse this correlation [144] or something to that effect, [145] although not all of them would agree with all aspects of Hohfeldian analysis —or apply it correctly. For others, the correlation of rights and obligations does apply to

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143 On the meaning of this concept, see ch 4, p 264, below.

144 See R Ago, 'Deuxième Rapport sur la Responsabilité des États' (UN Doc No A/CN.4/233, YbILC 1970-II) 206 [46]; R Ago, 'Troisième Rapport sur la Responsabilité des États' (UN Doc No A/CN.4/246, YbILC 1971-II) 232 [65]; R Ago, 'Cinquième Rapport sur la Responsabilité des États' (UN Doc No A/CN.4/291, YbILC 1976-II(1)) 4 [3]; DN Hutchinson, 'Solidarity and Breaches of Multilateral Treaties' (1988) LIX BYIL 151, 151, 160; Sachariew (n 51) 275; G Gaja, 'Obligations and Rights Erga Omnes in International Law (First Report)' (2005) 71 (I) AIDI 117, 135. See also S Villalpando, *L'Émergence de la Communauté Internationale dans la Responsabilité des Etats* (Publications de l'Institut Universitaire de Hautes Études Internationales, PUF, Paris 2005) 265, 294, advancing the opposite point, and at p 300 fn 1058, citing to Hohfeld.

145 For 'corresponding' rights, see M Mohr, 'The ILC's Distinction between "International Crimes" and "International Delicts" and its Implications' in B Simma and M Spinedi (eds) *United Nations Codification of State Responsibility* (Oceana, New York 1987) 136–37; G Arangio-Ruiz, 'Responsibility IV' (n 51) 44 [134]; M Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 Nord JIL 211, 232 ('corresponding'). See futher W Riphagen, 'Second Report on the Contents, Forms and Degrees of State Responsibility (Part 2 of the Draft Articles)' (UN Doc No A/CN.4/344, YbILC 1981-II(1)) 83 [36]. Some believe this thesis's secondary entitlements are correlatives of primary obligations. See W Riphagen, 'Preliminary Report on the Contents, Forms and Degrees of State Responsibility (Part 2 of the Draft Articles on State Responsibility)' (UN Doc No A/CN.4/330, YbILC 1980-II(1)) 113 [33], 128 [96]; Ragazzi (n 140) 176; A De Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (Kluwer Law International, The Hague 1996) 11, 22, 24–25.

some international obligations, but not to obligations *erga omnes*, among others.[146] In *Barcelona Traction*, the ICJ considered together an obligation owed to Belgium and a right of Belgium's when discussing obligations *inter partes*.[147] Thus at least obligations *inter partes*, more numerous in international law, feature correlative rights. In turn, this means that the correlation of rights and obligations is relevant to international law.

That said, the correlation of rights and obligations features in judicial decisions.[148]

Thus, the correlation of rights and obligations has been expressly adopted in *Asylum*[149] and in *Right of Passage*[150] (although neither decision describes Hohfeldian categories —or any equivalent system— with precision). *Asylum* concerned a 'right' of Colombia unilaterally to qualify as 'political' the offence on whose ground asylum was granted to Mr Raúl Haya de la Torre, a Peruvian political figure.[151] In turn, this

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146 See RY Jennings and A Watts, *Oppenheim's International Law* (9th edn Longman, London 1996) vol I, pt I, 503; cf, eg, at p 385, text associated to fn 1; Annacker (n 51) 142; J Crawford and S Olleson, 'The Nature and Forms of International Responsibility' in MD Evans (ed) *International Law* (2nd edn OUP, Oxford 2006) 473–74; E Katselli Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (Routledge, London 2010) 12. See also Simma (n 29) 270–71, in light of pp 231–32.

147 *Barcelona Traction* (n 35) 32–33 [35]–[36]. See further at p 46 [86].

148 See, especially, *Prosecutor v Anto Furundzija* (Judgment) ICTY-95-17/1, T Ch II (10 December 1998) [151].

149 *Colombian-Peruvian Asylum Case (Colombia/Peru)* (Judgment) [1950] ICJ Rep 266, 276.

150 *Case Concerning Right of Passage over Indian Territory (Portugal v India)* (Merits) [1960] ICJ Rep 6, 40, 43.

151 *Asylum* (n 149) 273.

exempted Colombia from certain obligations[152] and would have given rise to new legal relations between Colombia and Peru.[153] Therefore, the Colombian 'right' was actually a power; Peru's correlative 'obligation',[154] a liability.[155] *Right of Passage* concerned a Portuguese right of passage over Indian territory and a 'correlative' obligation of India to respect Portugal's right of passage.[156] The Court conflated two Hohfeldian entitlements into one. Passage is conduct that Portugal itself is entitled to carry out. Accordingly, Portugal's 'right' of passage is a liberty.[157] Indeed, India would break no obligation if *Portugal* did not pass through Indian territory. Therefore, India bears no obligation correlative to Portugal's liberty. However, Portugal's entitlement that India —ie someone else— did not interfere with Portugal's liberty of passage was a proper right, for Portugal.[158] Thus Portugal's liberty is not really correlative to India's obligation, although both complement each other.

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152 For example, the obligation not to interfere with Peru's exercise of enforcement jurisdiction in Peruvian territory; see *Asylum* (n 149) 274–75.

153 See, for instance, Convención fijando las Reglas que Deben observarse para la Concesión de Asilo (opened for signature 20 February 1928) 132 LNTS 323, art 2.

154 *Asylum* (n 149) 286 ('…obligation juridique pour 1'Etat territorial de reconnaître la validité d'un asile').

155 On powers and liabilities, see pp 48–54, below.

156 See, eg, *Right of Passage 1960* (n 150) 28.

157 On which see pp 43–44, below.

158 *Right of Passage 1960* (n 150) 28 ('…a right possessed by Portugal and which must be respected by India.').

Despite their lack of precision, the decisions above support the correlation of the positions of the entitlement-bearers and entitlement-holders. Paradoxically, however, the correlation of rights and obligations is more forcefully supported where it is adopted indirectly. In the 1966 decision in the *South West Africa Cases*, the ICJ equated the questions of whether the applicants '… *legal right* or interest' in the way the mandate was administered and whether the mandatory had '… any direct *obligation* towards … [them] individually'.[159] This suggests that the 'legal right' and the 'direct obligation' are identical or very closely related.

That said, the correlation of rights and obligations is sometimes arrived at indirectly, by using middle terms. Thus it has been stated that the breach of — indistinctly— a right or an obligation constitutes a wrongful act or gives rise to responsibility;[160] the wrongful act and responsibility being the middle terms. Thus, say, in *Chorzów Merits*, the PCIJ held that the wrongful act infringes the rights of the State of nationality when individuals suffer loss. *Reparation* (the middle term) seeks to redress the *rights* infringed[161] and reparation is also the indispensable complement of the breach of an *obligation*.[162] In *Canadian Fisheries*, the ICJ defined a wrongful

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159 *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Second Phase)* (Judgment) [1966] ICJ Rep 6, 22 [14].

160 cf references to those terms in *Affaire des Biens Britanniques au Maroc Espagnol (Spain v UK)* (1925) II RIAA 615 (British Claims in Morocco) 641; *Phosphates in Morocco (Italy v France)* (Preliminary Objections) PCIJ Rep Series A/B No 74, 25–26, 28; *Case Concerning the Factory at Chorzów (Germany v Poland)* (Jurisdiction) PCIJ Rep Series A No 9, 21, 25–26.

161 *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) PCIJ Rep Series A No 17, 27–28.

162 *Chorzów Merits* (n 161) 29.

act as one **1)** attributable to a State and **2)** infringing the rights of another State.[163] This is a good description of the two elements that comprise wrongful acts, except that element **2)** is normally phrased in terms of obligation.[164] The Court later went on to discuss obligations, rather than rights.[165] All of these decisions suggest that the right and the obligation are either identical or, at least, that they are impaired at the same time[166] and their infringement is redressed in the same way.

(d) Liberties

(i) Concept

On another order of thought, the first-order entitlement that that deals with permissibility is a **liberty**, the 'right-permissible' referred to before.[167] Hohfeld called this legal relation a 'privilege'[168] for convenience.[169] However, commentators have objected that the term 'privilege' denotes a favour bestowed on a few.[170] To say that State A is 'privileged' to occupy *terra nullius* may imply that State A has been

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163 *Fisheries Jurisdiction (Spain v Canada)* (Jurisdiction) [1998] ICJ Rep 432, 456 [56].

164 cf ASR (n 68) art 2(a).

165 *Canadian Fisheries* (n 163) 460 [68], 468 [78]–[79] (especially) (Spain's characterisation of Canadian conduct as a violation of UNCh (n 39) art 2(4)).

166 And see Riphagen, 'Responsibility Preliminary' (n 145) 113 [30] ('… a "right" which has been taken away by the wrongful act.'), [31], [33].

167 Sumner (n 44) 31 ('I have the liberty to do something … [if] it is permissible to me'); Simmonds (n 25) 149 ('…permissibility of action'). See p 29, above.

168 Hohfeld (n 22) 14.

169 Hohfeld (n 22) 20–21.

170 Williams (n 76) 1131–32. See also OED (n 141) ('privilege, n'; 2–3, 7–8)

authorised to occupy this territory *ex gratia*. Saying State A is 'at liberty' to occupy *terra nullius* does not imply this. Likewise, State A is not 'privileged' —in this sense— to use force in self-defence; this liberty[171] is not granted to States *ex gratia*, as it is 'inherent'[172] in them. Furthermore, Hohfeld himself equated the notions of 'privilege' and 'liberty'.[173] Therefore, it is possible to term 'privileges' as 'liberties' without upsetting Hohfeld's analytical scheme.

A **liberty**, then, exists in '… any occasion on which an act or omission does not constitute a breach of duty.'[174] Put another way, a liberty is the latitude enjoyed by the liberty-holder that results from not having **(1)** to carry out or **(2)** to abstain from carrying out the object of that liberty.[175] However, the liberty *to carry out conduct* ϕ is the absence of an obligation *to forbear from carrying out conduct* ϕ. The true opposite of, say, a State's 'right' (liberty) *to exploit* the resources in its EEZ[176] is the obligation *to refrain from exploiting* those resources. Likewise, the opposite of a State's liberty *not to extradite* an individual is a State's obligation *to extradite* that individual. Hence a liberty *to do* ϕ is not the legal contradictory of the obligation to

171 See pp 28–33, above.

172 UNCh (n 29) art 51.

173 Hohfeld (n 22) 17, 20 text associated with fn 61.

174 Hohfeld (n 22) 14, 18. See also Williams (n 76) 1129; Finnis 1972 (n 23) 377; G Marshall, 'Rights, Options, and Entitlements' in AWB Simpson (ed) *Oxford Essays in Jurisprudence* (Clarendon Press, Oxford 1973) 231; Finnis 1980 (n 23) 200; Simmonds (n 25) 155.

175 Cook (n 27) 724; Kramer (n 22) 10, 109.

176 United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) art 56(1)(a).

do ϕ, but of the obligation *to <u>abstain</u> from* doing ϕ. The liberty to *<u>abstain</u> from doing* ϕ is the legal opposite of the obligation *to <u>do</u>* ϕ.[177] Furthermore, asserting State A's liberty *to do* ϕ implies denying its opposite —viz State A's obligation *not to do* ϕ and denying the opposite's correlative, State B's right that State A *does not do* ϕ. It follows that asserting State A's *liberty to do* ϕ implies asserting —as correlative— that State B has no right (ie a **no-right**) that A *<u>does not</u> do* ϕ.[178]

That said, in Hohfeldian analysis, rights and obligations are always analysed through the *actions of the obligation-bearer*.[179] What a right expresses is that it is mandatory on someone else that the object of the entitlement is carried out or not.[180] However, what a liberty expresses is that *the liberty-holder* is free from obligation. Liberties are gauged by reference to the actions of the liberty-holder.[181] Banal as it may seem, this insight is important. No State has a 'right in the strict sense' *to do* anything.[182] When the object of a first-order entitlement is carried out by actions or forbearances of the party entitled, this entitlement is always a liberty. A 'right-that-I-

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177 Hohfeld (n 22) 14. See also Williams (n 76) 1131, 1135–36, 1138; Sumner (n 44) 25–26, 30–31; Kramer (n 25) 13; Simmonds (n 25) 155.

178 Cook (n 27) 725; Williams (n 76) 1137; Finnis 1972 (n 23) 381. cf Hohfeld (n 22) 16.

179 Williams (n 76) 1145; Finnis 1980 (n 23) 200; Sumner (n 44) 25; Kramer (n 25) 13; Eleftheriadis (n 28) 108.

180 See p 35–36, above.

181 Williams (n 76) 1145; Finnis 1980 (n 23) 200; Sumner (n 44) 26; Kramer (n 25) 13, 29; Simmonds (n 25) 156; Eleftheriadis (n 28) 108.

182 Finnis 1972 (n 23) 380; Sumner (n 44) 25–26.

do' is always a liberty. 'Rights in the strict sense' (ie being owed an obligation) are always 'rights-that-someone-else-does'.

Indeed, as discussed above, State A is at liberty to occupy *terra nullius*; [183] this is an entitlement for State A that State A itself carries out conduct: a 'right-that-I-do'. State A is also at liberty to use force in self-defence in certain circumstances. [184] This is an entitlement for State A that State A carries out conduct, another 'right-that-I-do' from State A's viewpoint. However, State A has a right that force is not used against it; [185] ie that another State does not use force. This is a proper Hohfeldian right, as it is a 'right-that-someone-else-does' from State A's viewpoint.

(ii) Protective Perimeter of Obligations

Finally, it might be objected to the concept of liberty that it does not explain why some liberties appear to be inviolable. For instance, State A is entitled to exploit the resources found in its territory. To exploit resources is to engage in conduct; therefore, this entitlement is of the first order. State B breaks no obligation by State A's exploiting or refusing to exploit its resources; therefore, this legal relation is one of permissibility. Indeed, this is an entitlement for State A *that State A* itself[186] exploit resources in its territory. Consequently, the '… inalienable right of all States freely to

183 See pp 27–28, above.

184 See pp 28–33, above.

185 See p 28, above.

186 Permanent Sovereignty over Natural Resources, UNGA Res 1803 (XVII) (14 December 1962) UN Doc A/Res/1803, [5] ('... exercise of sovereignty of … nations over their resources') (emphasis added); Charter of Economic Rights and Duties of States, UNGA Res 3281 (XXIX) (14 December 1974) UN Doc A/Res/3281, art 2(1). This expresses customary law on the matter. See *Ugandan Armed Activities* (n 101) 251–52 [244].

dispose of their natural … resources'[187] is actually a liberty.[188] However, if State B does extract resources from State A's territory without State A's consent, State B commits a wrongful act.[189] The concept of liberty seemingly fails to explain this situation. Some commentators use the inviolability of certain liberties to object to Hohfeldian analysis.[190]

Hohfeld can account for these situations. While liberties do not *by themselves* guarantee freedom from interference with their exercise, some liberties are rendered inviolable *in practice* by what Hart has called a 'perimeter of obligations'.[191] These obligations aim to ensure that the liberty they protect is exercised free from interference by the liberty-holder. This 'perimeter of obligations' is important for obligations *erga omnes*. Obligations *erga omnes* arose as a derogation of liberties that existed in classic, general international law. These liberties were protected by a perimeter of obligations that would make them more or less absolute. The purpose of these obligations was to ensure the supremacy[192] of States with respect to certain

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187 UNGA Res 1803 (n 186) preamble.

188 And cf *Mavrommatis 1924* (n 35) 18 ('…la *faculté* d' accorder des concessions') (emphasis added).

189 UNGA Res 1803 (n 186) [7]–[8].

190 See, eg, Sumner (n 44) 39. cf Eleftheriadis (n 28) 74–75, on 'legal rights'.

191 Hart 1973 (n 94) 176, 180; HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press, Oxford 1982) 171. See also Finnis 1972 (n 23) 378; Sumner (n 44) 35; Simmonds (n 25) 182.

192 See ch 2, pp 99–101, below.

objects (eg their own nationals, territories, property, agents, etc.). The manner in which these liberties have been displaced is what gave rise to obligations *erga omnes*.

Returning to the example discussed above, international law creates at least two obligations/rights that render State A's liberty to exploit natural resources found in its territory inviolable *in practice*. **First**, State B has an obligation not to exercise enforcement jurisdiction ('exercise acts of sovereignty') in the territory of State A,[193] where the resources lie. What is the same, State A has a right that State B does not exercise enforcement jurisdiction in State A's territory. Such an exercise of enforcement jurisdiction would supplant the territorial State's sovereignty.[194] Thus, State B would breach this obligation by exploiting resources that lie in State A's territory without State A's consent. **Second**, article 2(4) UNCh[195] forbids State B to use force against State A,[196] as discussed before.

These two obligations ensure that State B's agents cannot physically extract State A's natural resources without State A's consent without breaking the law. It is in this sense that State A's liberty to exploit its resources is inviolable *in practice*. However, rather than detract from Hohfeldian analysis, these obligations confirm it. This 'perimeter' of two obligations comprises legal relations whose objects differ from that of the liberty they protect. The object of the liberty is the exploitation of

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193 See ch 2, pp 129–36, 134–35 fn 561 and associated text (especially), below.

194 M Akehurst, 'Jurisdiction in International Law' (1972–1973) XLVI BYIL 145, 147–48.

195 (n 39).

196 On the relationship between this prohibition and State sovereignty, see, eg, Jennings and Watts (n 146) 386 fn 6 and associated text, in light of pp 385–90.

natural resources; the object of the obligations that form the perimeter are, respectively, **1)** exercises of enforcement jurisdiction and **2)** uses of force. Furthermore, State A can allow State B (or its agents or nationals) liberties of exploitation [197] of its resources [198] without displacing the obligations of the 'perimeter' —eg vis-à-vis States C, D … Z. Therefore, the legal relations comprising this 'perimeter of obligations' are different from the liberty they protect. Furthermore, this 'perimeter of obligations' may provide only imperfect protection against interferences with the liberties protected.[199] For instance, if State A does not have the technology to exploit these resources, State B's liberty to deny State A such technology will render State A's liberty pointless (ie it would 'interfere' with these liberties), but will not break State B's obligations, in principle. State B's obligations not to exercise enforcement jurisdiction in State A's territory and not to use force against State A do not protect State A from this interference.

It follows that the protective 'perimeter of obligations' is a series of legal relations independent from the existence of the protected liberty.[200] The point is well taken that most liberties would or should receive some degree of protection of this kind.[201] Hohfeld would not deny this. He would rather point out that although this is

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197 This is a power, which replaces some of State B's obligations with liberties. On powers, see pp 48–50, below.

198 eg through mining concessions.

199 Hart 1973 (n 94) 180; Hart 1982 (n 191) 171; Kramer (n 25) 11.

200 Hohfeld (n 22) 16. See also Dias (n 75) 29–30 ('…two different ideas'); Finnis 1980 (n 23) 200–01; Kramer (n 25) 11–12; Simmonds (n 25) 183; Eleftheriadis (n 28) 108.

201 Sumner (n 44) 35.

not impossible, this is not logically necessary, either.[202] *Therefore, the existence of the perimeter of obligations cannot be asserted simply by proving the existence of the liberty in question*. When State B commits a wrongful act by interfering with State A's liberty to exploit its natural resources it does so only by violating the obligations that protect the liberty in question, as opposed to the liberty itself.

(e) Preliminary Conclusion

The picture that arises here is that rights/obligations and liberties are different legal relations with different consequences. The distinction between these entitlements is relevant for international law, as well.[203] This thesis will treat them differently. State sovereignty mainly comprises liberties. Obligations *erga omnes* are a particular way of derogating from these liberties. Therefore, maintaining the distinction between liberties and rights/obligations is important for this thesis.

3 Second-Order Legal Relations

As stated before, first-order legal relations regulate **conduct**; second-order legal relations concern the creation or extinction —and protection against the creation or extinction— of new legal relations **through conduct**.[204] Indeed, second-order relations have aptly been described as '… rules about rules'.[205] Understanding second-order legal relations will be important when separating obligations *erga*

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202 Finnis 1972 (n 23) 379; Finnis 1980 (n 23) 201.

203 See pp 26–33, 36–41, above.

204 See pp 21–22, above.

205 Eleftheriadis (n 28) 109.

omnes from the concept of *jus cogens*, an unavoidable question in this field.[206] The first type of second-order entitlements is a **power**, or the ability[207] to produce a change in any given legal relation.[208] Powers can change the power-holder's own legal relations or another subject's legal relations.[209] Powers can create any relations of the first or the second order. [210] Thus the exercise of a power may bring about or extinguish rights/obligations, liberties, other powers or immunities, as the case may be.

Many of the legal relations that underpin the entry into force of treaties are examples of powers. The signature of the treaty gives rise to the obligation not to defeat the object and purpose of the treaty.[211] Thus, by signing a treaty, a State creates an obligation for itself. This is a power, viz the power to create the obligation not to defeat the purpose of the treaty *by signing* that treaty. State A's and State B's later

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206 See ch 3, pp 205–15, below.

207 Hohfeld (n 22) 21 text associated to fn 67.

208 Hohfeld (n 22) xiv (N Simmonds), 21; Dias (n 75) 36; Sumner (n 44) 28; Eleftheriadis (n 28) 6, 109. It can be exercised as of liberty or as of obligation. cf Tapper (n 33) 244–45.

209 Dias (n 75) 33 text associated to fn 20.

210 Tapper (n 33) 246–47. See also Cook (n 27) 726 ('…liability … to have … conferred upon him a new legal power').

211 VCLT (n 67) art 18(a).

ratification[212] of their common treaty is another power. This power makes the legal relations contained in that treaty[213] binding on those States; and so on.

The correlative of a power is a **liability**. A liability describes the legal position of a subject whose legal relations may be altered by the power-holder.[214] Hohfeld's use of the term liability may be counter-intuitive in certain circumstances. Generally, a liability denotes subjection to some form of burdensome or negative legal regime.[215] However, a power could create any entitlement of either the first or second orders. Therefore, a liability may actually be beneficial to the subject who bears it; eg if the correlative power allows the liability-bearer to exercise consular functions beyond the area it is normally authorised to do so.[216]

Conversely, when a subject lacks the ability to alter the legal relations of another, it bears a **disability**. Disabilities are the negations of powers and, therefore, their legal contradictories.[217] By the same token, subjects exempted from the disability-bearer's powers are immune (ie entitled to **immunity)** from them.[218]

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212 VCLT (n 67) art 14(1).

213 VCLT (n 67) art 24.

214 Hohfeld (n 22) 26.

215 Cook (n 27) 725–26. See, eg, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, 81 [151] ('… liable to pay compensation').

216 Vienna Convention on Consular Relations (opened for signature 24 April 1963, entered into force 19 March 1967) 596 UNTS 261 (VCCR) art 6.

217 Hohfeld (n 22) 28.

218 Hohfeld (n 22) 28. See also Sumner (n 44) 29.

Immunities are the legal opposite of liabilities. An example of an immunity is the maxim *pacta tertiis nec nocent nec prosunt*, whereby treaties cannot create obligations for a third State without the latter's consent.[219] Thus States A and B have have no power (ie they bear a disability) to create treaty obligations binding on State C; or, what is the same, State C is immune from the effect of the obligations States A and B purport to create against it.

Like a liability, a Hohfeldian immunity is a somewhat counter-intuitive concept in international law. 'Jurisdictional immunities' are not Hohfeldian immunities *in the international sphere*,[220] whereas in the *municipal legal sphere*, they can be considered true immunities. It is not uncommon that international and municipal law confront the same situation through different Hohfeldian entitlements; this is why both 'spheres' are distinguished here. 'Fraud' voids treaties (ie it is a disability) in international law. [221] But fraud may also involve the commission of criminal offences (ie the infringement of criminal obligations) in municipal law. Likewise, arrest warrants issued on this respect would only bind a State's own agents through municipal law. Since municipal courts cannot exercise jurisdiction over persons that benefit from immunities, jurisdictional immunities negate the legal relations brought about by the start of judicial processes in municipal law; these legal relations result from powers.[222] But in the sphere of international law proper, what

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219 VCLT (n 67) arts 34–35.

220 cf Allott (n 94) 161.

221 VCLT (n 67) art 49.

222 Dias (n 75) 39 ('… power of action').

'jurisdictional immunities' prevent is that certain individuals are subjected to the enforcement[223] or adjudicative jurisdiction[224] of a given State. A plea of jurisdictional immunity does not shield the State concerned from the legal effects of the agent's conduct —eg state responsibility—, [225] as a Hohfeldian immunity would. Jurisdictional immunities prevent, say, the physical apprehension of an individual, the imposition of fines, etc. Therefore, the object of jurisdictional immunities in the international sphere actually concerns conduct, which makes them legal relations of the first order.[226] Concretely, they are an entitlement for a State that *another State* (ie someone else) does not exercise enforcement jurisdiction on some of the former State's agents. Therefore, in the international sphere, jurisdictional immunities are obligations/rights[227] rather than immunities.[228]

That said, powers mirror liberties to the extent that they entitle *the power-holder* to modify the legal relations of the liability-bearers.[229] By contrast, immunities

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223 H Fox, *The Law of State Immunity* (Oxford International Law Library, 2nd edn OUP, Oxford 2008) 35.

224 *Case Concerning the Arrest Warrant of 11 April 2000 (DRC v Belgium)* [2002] ICJ Rep 3 22 [55]; *Gadaffi*, Crim, 14 mars 2001; Bull Crim 2001 N° 64 p 218; 125 ILR 490 (France) ('…faire l'objet de poursuites devant les juridictions pénales d'un Etat étranger'). See also State Immunity Act 1978 (UK) s 1(1).

225 Fox (n 223) 33.

226 See pp 21–22, above.

227 *Arrest Warrant* (n 224) 29–30 [70]–[71], 33 [78(2)].

228 Dias (n 75) 39, distinguishing between immunities and (claim-)rights precisely in this situation.

229 Williams (n 76) 1145; Sumner (n 44) 29 ('… that is possible for <u>*me*</u>') (emphasis added); Eleftheriadis (n 28) 109. cf pp 43–44, above.

mirror rights in that they entitle *immunity-holders* to protection against the purported powers of the disability-bearer.[230] Where powers represent the 'affirmative control'[231] of the power-holder, immunities represent freedom from *someone else*'s attempted control over the immunity-holder's legal relations.[232] Thus in the example above, State A's legal relations vis-à-vis State B are modified after State A ratifies the treaty with State B. From the point of view of State A, this can only be a Hohfeldian power, since State A is both the party entitled to modify legal relations and the party whose actions modify legal relations. It was also discussed how State A's and State B's cannot impose treaty obligations on State C; or, what is the same, that State C is free from the exercise of *someone else*'s purported powers. Thus 'rights-that-I-change-legal-relations' are always powers and 'rights-that-no-one-else-changes-my-legal-relations' are always immunities.

Finally, contravening a disability —ie purporting to exercise a power one is not entitled to exercise— results in **invalidity**,[233] whereas violating an obligation results in wrongfulness.[234] Distinguishing both types of legal consequences is

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230 Eleftheriadis (n 28) 109. cf pp 35–36, 43–44, above.

231 Hohfeld (n 22) 28.

232 Hohfeld (n 22) 28. See also Sumner (n 44) 30–31

233 Dias (n 75) 39; Sumner (n 44) 29. cf Hart, *The Concept of Law* (Clarendon Law Series, 2nd edn Clarendon Press, Oxford 1994) 34–35.

234 J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law relates to Other Rules of International Law* (Cambridge Studies in International and Comparative Law No 29, CUP, Cambridge 2003) 277; Villalpando (n 144) 387–88. See p 20 n 68 and associated text, above. And see I Brownlie, *System of the Law of Nations: State Responsibility (Part I)* (Clarendon Press, Oxford 1983) 26–31, 29–30 (especially), holding that illegal exercise of 'no-powers' (at p 30) does not engage responsibility. See also Riphagen, 'Responsibility III'

important. *Jus cogens* is a disability in article 53 VCLT. 'Infringing' *jus cogens* results in invalidity. Infringing an obligation *erga omnes* results in wrongfulness (responsibility). Furthermore, the occurrence of wrongfulness presupposes the existence of a valid obligation.[235] However, the validity or otherwise of an obligation can be discussed without additionally inquiring whether the same obligation has been breached. In simpler words, all discussions about wrongful acts imply a position on (in)validity of the obligation in question; the converse is not true.

(n 55) 42 [118], distinguishing between treaties laying down borders (powers, (in)validity) and treaties creating obligations (responsibility, wrongfulness).

[235] cf ASR (n 68) art 13.

C THE CONSEQUENCES OF BEING OWED AN OBLIGATION IN GENERAL INTERNATIONAL LAW

1 Introduction

In general international law, holding a 'right in the strict sense' (ie being owed an obligation) entails:[236]

(1) **Entitlement to make claims**. The State to which an obligation is owed has standing to invoke the responsibility of the State that breaks that obligation. The former becomes right-holder to all obligations that ensue from the wrongful act; it can also waive the claim, in whole or in part;
(2) **Powers to contract in or out of obligations and immunities against other States' similar powers which they purport to exercise over the right-holder**. A treaty obligation is only binding on States that consent to them. Furthermore, *jus cogens* permitting, a State may contract out of any international obligation;
(3) **Protection against countermeasures directed at other States.** States are entitled to demand that no obligation owed to them is suspended when countermeasures are taken against third States;[237] and
(4) **Protection against suspension/termination of obligations by reason of material breaches committed by other States**. Treaties may only be suspended or terminated by the victim of a material breach '…in the relations between itself and the defaulting State',[238] in principle.[239]

For this thesis, the entitlement to make claims is the most important of these consequences. Obligations *erga omnes* are interesting mainly because they give standing to invoke responsibility for their breach to every State. Because of this, a separate sub-section will be devoted only to the entitlement to make claims. Another sub-section will briefly consider the consequences that follow from holding a right in general international law. Certain aspects of these other consequences will recur

236 And see Pauwelyn (n 234) 53–54.

237 ASR (n 68) art 49(1).

238 VCLT (n 67) art 60(2)(b).

239 cf VCLT (n 67) art 60(2)(c).

throughout this thesis. There is no need to dwell very deeply on them at present; they will be commented on later, as and when it is necessary to do so.

2 Entitlement to make Claims for Breaches of (Primary) Obligations

(a) Introduction

The purpose of this section is to distinguish the notions of **1)** owing an obligation *erga omnes*, **2)** the notion of standing to invoke responsibility for breach of that obligation, and **3)** the (in)ability of States to implement responsibility (eg through counter-measures or through international tribunals). Indeed, many believe that standing to invoke responsibility or to seise a tribunal is one the main implications of the concept of obligations *erga omnes*.[240] And, again, obligations *erga omnes* are defined by being owed to the international community as a whole.[241]

The notion of being owed an obligation will recur throughout this thesis. However, the judicial 'implementation' of responsibility for breach of obligations

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240 See, eg, Ago, 'Responsibility V' (n 144) 30 [89]; P Weil, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 413, 430, 432; H Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989' (1989) LX BYIL 1, 93–94; Simma (n 29) 295; Byers (n 145) 211, 230, 232–33, 238; R Kolb, *Théorie du Ius Cogens International: Essai de Relecture du Concept* (Publications de l'Institut universitaire de hautes études internationales, PUF, Paris 2001) 172; Seiderman (n 51) 124–25, 135–36; B Stern, 'Et si on utilisait le Concept de Préjudice Juridique? Retour sur une Notion Delaisée à l'Occasion de la Fin des Travaux de la CDI sur la Responsabilité des États' [2001] AFDI 3, 17; E Wyler, 'From "State Crime" to Responsibility for "Serious Breaches of Obligations under Peremptory Norms of General International Law"' (2002) 13 EJIL 1147, 1155; Gaja (n 144) 157 (Lady Fox), 161 (Tomuschat), 181 (Skubiszewski); Tams (n 51) 99, 197, 310 [6]; Crawford 2006 (n 55) 412–13; Koskenniemi (n 92) [380], [389]; Picone P, 'La Distinzione tra Norme Internazionali di *Jus Cogens* e Norme che producono Obblighi *Erga Omnes*' (2008) XCI RDI 5, 19, 26–27. See also ASR (n 68) art 48; International Law Institute, 'Obligations *Erga Omnes* in International Law' <http://www.idi-iil.org/idiE/resolutionsE/2005_kra_01_en.pdf> accessed 20 July 2010, arts 2, 3. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, 216 [37] (SO Higgins).

241 See introduction, p 1, above.

erga omnes or implementation through countermeasures will not be considered in this thesis.

There are many reasons for this. Whereas the breach of an obligation or wrongful act[242] is always followed by responsibility,[243] responsibility alone does not guarantee the availability of means to make state responsibility effective. The mere fact that a State is owed, say, compensation for breach of an obligation does not mean that the same State will be entitled to invoke the jurisdiction of the ICJ or some other tribunal to compel the wrongdoer into compliance with that obligation. Furthermore, the greater problem with obligations *erga omnes* is to determine whether —and in what way— States are owed obligations *erga omnes* themselves or whether in invoking responsibility, States represent some other entity (eg true victims of human rights abuses). Since responsibility follows from every breach of an obligation, determining who can invoke state responsibility will be a helpful, indirect indication of who is owed the obligation breached. In general international law, the entities owed obligations are States and, in some cases, international organisations, rather than individuals.

The position of individuals will be considered almost at the end of this thesis, when rival conceptions of obligations *erga omnes* are replied to.[244] For now, suffice it to draw a distinction between legal relations that regulate State conduct outside the

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242 ASR (n 68) art 2(b).

243 ASR (n 68) art 1.

244 See ch 5, pp 345–51, below.

context of breach (primary legal relations), responsibility or legal relations that seek to redress the breach of these primary *obligations* (secondary legal relations) and implementation of responsibility, through which secondary legal relations are made effective (eg through tribunals, countermeasures) [245] (tertiary legal relations). Separating between these types of legal relations will be especially helpful when discussing the different conceptions of obligations *erga omnes* that exist in the literature.

(b) Importance of the Entitlement to make Claims for this Thesis

Ordinarily, the entity that is entitled to make claims for breach of an obligation is the same entity to which the obligation is owed. Conventional law aside, [246] it is the State to which an obligation is owed that is entitled to invoke responsibility for breach of that international obligation. [247] This is the rule of standing that exists in general international law. At the very least, the rules of standing that exist in general international law today bear the stamp of this rule. Therefore, the entity that holds secondary entitlements (eg to reparation) will generally be the entity owed the

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245 On countermeasures as tertiary legal relations, see Annacker (n 51) 138. Note similar statement at J Crawford, 'Overview of Part Three of the Articles of State Responsibility' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 932 text associated to fn 1. cf W Riphagen, 'Sixth Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles); and "Implementation" (*Mise en Œuvre*) of International Responsibility and the Settlement of Disputes (Part 3 of the Draft Articles)' (UN Doc No A/CN.4/389, YbILC 1985-II(1)) 4 [2] (art 1), listing them essentially as secondary legal relations.

246 See *Barcelona Traction* (n 35) 33 [36] ('En l'absence d'un traité'); *Dickson Car Wheel Co (USA) v United Mexican States* (1931) IV RIAA 669 (n 246) 678 ('… apart from any convention'), 679.

247 *Barcelona Traction* (n 35) 32 [34], citing *Reparations* (n 58) 181–82. See also Riphagen, 'Responsibility IV' (n 14) 21 [114].

primary obligation is owed. Primary rights and secondary entitlements ordinarily mirror each other.[248] Again, since obligations *erga omnes* are defined on the basis of who they are *owed to* (ie the international community) what this insight tells is quite useful. And what it tells is that it is very unlikely that individuals are owed obligations *erga omnes*, at least at present. Therefore, those conceptions of obligations *erga omnes* that support the notion that individuals hold human rights in general international law, are mistaken on this point.[249]

In the ASR, for instance, the general rule of standing is introduced through the concept of the 'injury'. As will be explained in chapter 5, injury consists in the impairment of a right through a wrongful act. To draw a parallel with Hohfeld's analysis of correlatives, injury is the same situation as a wrongful act. However, the wrongful act emphasises the breach of the obligation; injury, the breach of the correlative right. 'Injured State' is thus the State to which an obligation is owed: the right-holder. The ASR include two categories of States with standing to invoke responsibility. The influence of the traditional rule of standing to invoke responsibility can be seen in both categories.

Thus, there are 'injured' States,[250] of which there are three kinds: **1)** States owed obligations individually[251] and **2)** 'specially affected States',[252] and **3)** States

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248 And see Gaja (n 144) 944 ('… the obligation breached is bilateral in the sense specificed, and the legal relationship created as a result of the breach is equally bilateral.') (emphasis added).

249 See ch 5, pp 345–51, below.

250 ASR (n 68) art 42(a).

251 ASR (n 68) art 42(a).

parties to regimes containing 'interdependent' obligations (eg disarmament obligations).[253] As for **2)**, a State is specially affected by the breach of an obligation owed to a group to which it belongs if the wrongful act causes loss on this State over and above the mere breach of the obligation. The legal positions of States owed obligations individually and of 'specially affected States' are said to differ.[254] However, breaches of collective obligations 'specially affect' States if they impair objects over which States held rights in classic, general international law. Thus, States are specially affected when breaches of collective obligations affect, for instance, their territory or their nationals.[255] This mirrors the traditional rule of standing. The State of nationality was classically regarded as right-holder in general international law when its nationals were mistreated.[256] Finally, injury also occurs when the breach of an obligation '… 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.'[257] These are the so-called 'interdependent' obligations, a notion derived from Sir Gerald Fitzmaurice's work as Special Rapporteur on the Law of Treaties in the ILC[258] (eg

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252 ASR (n 68) art 42(b)(i).

253 ASR (n 68) art 42(b)(ii).

254 In short, this occurs because obligations 'owed to a group of States' are owed collectively to the group or to specific beneficiaries (eg individuals, where human rights are concerned), rather than to States individually. See, eg, Crawford, 'Responsibility III' (n 47) [9] text following from fn 27, [84], [106] ('… not individually'), [294], [400]. And see ch 5, pp 334–35, 338–39, below.

255 See ch 5, pp 328 nn 1365–66 and associated text, below.

256 See p 15 n 35 and associated text, above.

257 ASR (n 68) art 42(b)(ii).

disarmament obligations). Interdependent obligations feature correlative, individual rights and allow States to make individual claims,[259] as occurs for other types of injured State. Interdependent obligations also mirror the traditional rule of standing.

A further indication that the ASR mirror this traditional rule of standing is that the State invoking responsibility for breach of an obligation owed to a group must belong to that group.[260] Although all States which meet this requirement are right-holders, the requirement does rule out that *some* States *not owed obligations* under those regimes acquire standing. This requirement applies, *inter alia*, to the 'State other than an injured State'.[261] Under the ASR, these States have standing to invoke responsibility only when the obligation concerned is collectively[262] owed either to the international community as a whole[263] (obligations *erga omnes*) or to the a group of States to which the State concerned belongs.[264] (obligations *erga omnes partes*) [265]

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258 And cf VCLT (n 67) art 60(2)(c).

259 cf ch 4, p 246, below.

260 ASR (n 68) art 42(b) (emphasis added).

261 ASR (n 68) art 48(1).

262 This is incorrect. cf ch 2, p 93–122, below.

263 ASR (n 68) art 48(1)(b).

264 ASR (n 68) art 48(1)(a).

265 See ch 3, pp 192–204, below.

Finally, a State entitled to make a claim can waive the claim, modify it (eg through a lump-sum agreement), choose to present the claim or not, and so on.

(c) Separating Obligations, Responsibility and the Implementation of Responsibility

Again, a distinction should be drawn between **1)** substantive obligations, **2)** responsibility (and related legal relations) which *always* arise after the breach of those obligations, and **3)** the legal relations that *occasionally* allow States to implement responsibility through, say, international tribunals. As this thesis understands this notion, the entitlement to present claims comprises elements **1)** and **2)** only.

Associating substantive obligations and responsibility is justified. It is a principle of international law that all wrongful acts of a State engage the responsibility of that State.[266] Again, a wrongful act consists in the breach of an obligation. Responsibility ensues after every wrongful act, regardless of the source — eg custom or treaties— that contains the obligation breached.[267] Of all the legal relations that the concept of 'responsibility' comprises, the main ones are the obligations to provide reparation for the wrongful act. [268] Stern goes so far as to suggest that '… responsibility *is* the obligation to make reparation'.[269] Others would

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266 ASR (n 68) art 1.

267 This is well-known. See, eg, *Barcelona Traction* (n 35) 46 [86]; *Rainbow Warrior (New Zealand v France)* (1990) XX RIAA 215, 251 [75].

268 D Shelton, *Remedies in International Human Rights Law* (2nd edn OUP, Oxford 2005) 50.

269 B Stern, 'The Elements of an Internationally Wrongful Act' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 194.

have it that reparation is the 'indispensable complement' of misapplying an international obligation.[270] Others would have it that, if state responsibility is engaged, it would be superfluous to enquire whether the defaulting State owes reparation.[271] Yet others would simply state that reparation is the consequence of responsibility.[272] In sum, the responsibility of the wrongdoer State is engaged *every time* it breaches an obligation. Responsibility —mainly— consists of the obligation to repair the wrongful act. Therefore, at least as far as international law is concerned, the breach of an obligation will *always* entail an obligation to repair the breach of the obligation.

A **second** step of analysis is the widely accepted notion that the obligations to afford reparation for breach of an obligation are new legal relations.[273] Accordingly, the obligations to afford reparation are different from the obligation whose breach they intend to redress. Many would assert that reparation is the way in which

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270 *Chorzów Jurisdiction* (n 160) 21; *Chorzów Merits* (n 14) 29. See also Riphagen, 'Responsibility III' (n 55) 28 [35] ('inseparable).

271 *Corfu Channel Merits* (n 110) 23–24.

272 *British Claims in Morocco* (n 160) 641; *Armstrong Cork Co Case—Decision No 18 (United States v Italy)* (1953) XIV RIAA 159, 163; *Interpretation of Peace Treaties (Second Phase)* (Advisory Opinion) [1950] ICJ Rep 221 (*Peace Treaties II*) 228; *Rainbow Warrior* (n 267) 251 [75].

273 See, eg, Ago, 'Responsibility II' (n 144) 193 [15] ('…qui naissent'), 196 [22], 198 [25], 204 [41]; Ago, 'Responsibility III' (n 144) 216 [32]; Ago, 'Responsibility V' (n 144) 4[1]; R Ago, 'Sixième Rapport sur la Responsabilité des États' (UN Doc No A/CN.4/302, YbILC 1977-II(1)) 24 [52]; Riphagen, 'Responsibility Preliminary' (n 145) 111 [12], [16], 112 [28], passim; Riphagen, 'Responsibility IV' (n 14) 4 [8]–[9], 8[36], 13 [70], 14 [75]; J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (CUP, Cambridge 2002) 78 [3] (art 1), 194 [2] (art 29). See also CF Amerasinghe, *Diplomatic Protection* (Oxford Monographs in International Law, OUP, Oxford 2008) 282 ('… causes the legal relationship … to change').

international law defends the inviolability of obligations.[274] But the obligation to afford reparation and the obligation whose breach constitutes the wrongful act should not be confused. That State A is under obligation not to use force against State B except in cases of self-defence can be understood without additionally enquiring how State A will redress the breach of that obligation. That is, reparation and the obligation whose breach it redresses are separate concepts, comprised of different legal relations.[275]

In sum, responsibility and 'substantive' obligations can be considered together, although both notions are ultimately different. As is now customary in this thesis, it is convenient that concepts which, though closely related, are different one from the other should be termed differently and studied separately, when necessary. The obligation whose breach constitutes the wrongful act will —unoriginally— be termed a '**primary obligation**'. Furthermore, the legal relations whose function it is to redress the breach of primary obligations will be called **secondary legal relations**.

By contrast, **thirdly**, the mere fact that, say, a State is entitled to be afforded reparation due to a wrongful act does not mean that it will be entitled to implement responsibility through, say, international tribunals. For one, all international tribunals are created by treaty. This is uncontroversial. No international tribunal derives

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274 B Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Grotius Classic Reprint Series vol 2, Grotius Publications, Cambridge 1987) 170. See also Ago, 'Responsibility II' (n 144) 192 [13]; Ago, 'Responsibility III' (n 144) 216 [31]; Crawford, 'Responsibility I' (n 32) [132]; Gaja (n 144) 138 text associated to fn 62. See further Villalpando (n 144) 229, on sanctions in general.

275 See, eg, Riphagen, 'Responsibility III' (n 55) 25 [21] ('… the new obligations … arising from … [the] internationally wrongful act … [are] generally irrelevant towards which State or States the primary obligation existed') (emphasis added). But cf p 28 [35].

jurisdiction from customary law. Thus the compromissory clause in the Genocide Convention, designed as it is to solve disputes '… relating to the interpretation, application or fulfilment of the … Convention'[276] only extends to obligations arising under the Genocide Convention.[277] The compromissory clause does allow the ICJ to adjudge on identical[278] obligations to those contained in the treaty that exist in customary law,[279] or over obligations that serve a similar purpose and which may be owed *erga omnes*.[280]

This is a problem for obligations *erga omnes*. These obligations exist in general international law.[281] Treaties may confirm, or crystallise,[282] or be interpreted through[283] general international law. But treaties may also depart from general

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276 Convention on the Prevention and Punishment of the Crime of Genocide (opened for signature 1 January 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) art IX.

277 *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v Rwanda)* (Order : Provisional Measures) [2002] ICJ Rep 219, 245 [71] ('…dans les limites stipulées par celle-ci'); *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6, 32 [65].

278 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Preliminary Objections) [1996] ICJ Rep 595 (*Genocide 1996*) 616 [31]; *Rwandan Armed Activities* (n 277) 31–32 [64].

279 *Rwandan Armed Activities* (n 277) 32 [64].

280 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 (*Genocide 2007*) 104 [147].

281 See introduction, p 5, above.

282 VCLT (n 67) art 38.

283 VCLT (n 67) art 31(3)(c).

international law.[284] This is why being entitled to invoke responsibility (eg through general international law) does not determine that responsibility could be implemented through all means laid down in conventional international law.

Indeed, it is possible that a State owed primary obligations[285] and entitled to reparation for breach of those obligations[286] cannot seise a tribunal to make effective these entitlements. This is as true for obligations *erga omnes* as it is for any other obligation. Having standing to invoke responsibility for breaches of obligations *erga omnes* does not in itself guarantee that the jurisdictional rules of any forum (eg the rule of consent to jurisdiction of the tribunal in question) will allow the claim to be aired.[287] In short, the *erga omnes* character of an obligation does not by itself give jurisdiction to, say, the ICJ, to entertain disputes involving these obligations, [288] despite how they bind all States.[289] The ICJ has rightly held that the rule of consent to jurisdiction and the *erga omnes* character of an obligation are 'two different

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284 This is well-known. For a recent statement on this, see *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213, 21 [35]–[36].

285 *Rwandan Armed Activities* (n 277) 53 [127]; *Genocide 2007* (n 280) [148].

286 *Canadian Fisheries* (n 163) 455–56 [54]–[56], 456 [55] (especially); *Rwandan Armed Activities* (n 277) 53 [127]. See also *Genocide 2007* (n 280) [148]. See further *Peace Treaties II* (n 272) 228–29.

287 *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90, 102 [29]; *Rwandan Armed Activities* (n 277) 32 [64]; *Rwandan Armed Activities Order* (n 277) 245 [71]. See also *Genocide 2007* (n 280) [147].

288 *East Timor* (n 287) 102 [29].

289 *Genocide 2007* (n 280) [147]; *Rwandan Armed Activities* (n 277) 32 [64]; *Rwandan Armed Activities Order* (n 277) 245 [71].

things'.[290] But, again, this does not exempt these States from compliance with the 'substantive' [291] (read, primary) aspects of those obligations.[292] Therefore, ICJ jurisdiction, the 'substantive' aspects of obligations *erga omnes* and the obligation to afford reparation for their breach are different concepts.

The same could be plausibly argued of the jurisdiction of other tribunals. The WTO's Panels and the Appellate Body have jurisdiction to entertain cases pertaining to WTO Agreement[293] 'rights'[294] and obligations.[295] Their jurisdiction may also be engaged by breach of covered agreements.[296] Therefore, whether State A has standing to invoke responsibility for breach by State B of the Genocide Convention[297] or of the obligation *erga omnes* not to commit genocide[298] is not relevant before these tribunals. It is hard to see how the breach of these obligations could impinge on WTO

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290 *East Timor* (n 287) 102 [29].

291 *Rwandan Armed Activities* (n 277) 32 [67].

292 See pp 74–75, below.

293 Marrakesh Agreement establishing the World Trade Organization (with Final Acts, Annexes and Protocols) (opened for signature 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3 (WTO Agreement).

294 ie nullification or impairment of benefits; see General Agreement on Tariffs and Trade (opened for signature 30 October 1947, entered into force 1 January 1948) 55 UNTS 187 (GATT) art XXIII(1).

295 WTO Agreement (n 293) annex I, art 1(1).

296 WTO Agreement (n 293) annex I, art 1(2).

297 (n 276).

298 See introduction, pp 1–2, above.

rights and obligations or on those contained in covered agreements.[299] Likewise, the obligation not to use force illegally is also —allegedly— owed *erga omnes*.[300] But it is hard to see how ITLOS's jurisdiction could be engaged as a result of a land-borne invasion of a landlocked State that does not change any maritime boundaries or affect maritime traffic in any way. ITLOS's jurisdiction is limited to applying UNCLOS and other rules of international law 'not incompatible' with it.[301] Where UNCLOS regulates the use of force, it does so in the context of innocent passage,[302] transit passage,[303] etc. There are other somewhat analogous provisions, eg those concerning the enforcement of warships of measures concerning the protection and preservation of the marine environment.[304] None of these provisions would seem to apply to land-borne invasions. That the obligations involved may be owed *erga omnes* does not alter this.

In sum, a distinction could be made between **1)** the primary, 'substantive' obligation *erga omnes* whose breach constitutes the wrongful act, **2)** the secondary

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299 However, countermeasures taken in response to similar events may include the suspension of WTO obligations. Thus, in 1996, several East African States suspended —perhaps involuntarily— some such obligations in response to a military coup in Burundi. This may be regarded as countermeasures (Tams (n 51) 221–22, 222 (especially)), which may engage the jurisdiction of WTO dispute settlement bodies.

300 *Barcelona Traction* (n 35) 32 [34] ('… actes d'agréssion'). But cf conclusion, pp 359–60, below.

301 UNCLOS (n 176) arts 288(1), 293(1); annex VI, arts 21, 23.

302 UNCLOS (n 176) art 19(2)(a).

303 UNCLOS (n 176) art 39(1)(b).

304 UNCLOS (n 176) Part XII, art 224 (especially).

legal relations whose purpose it is to wipe out the consequences of the wrongful act, **3)** and the legal relations that allow for responsibility to be implemented.[305] This last kind of legal relations is what Willem Riphagen called **tertiary legal relations**.[306] As was the case when distinguishing between primary and secondary legal relations, the fact that they are different does not mean that tertiary legal relations are wholly unrelated from primary or secondary legal relations. Indeed, tribunals have historically been assigned the task of redressing perceived wrongful acts.[307] In redressing wrongful acts, tribunals may also consider general international law[308] and thus, the norms that general international law establishes for redress of wrongful acts. In fact, there is support for the notion that a tribunal's ability to pronounce on redress are implied even in compromissory clauses that do not expressly give them such powers, as these powers are indispensable for the settlement of disputes.[309] And the

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305 And see Koskenniemi (n 92) [480] text associated to fn 183; Villalpando (n 144) 131, 132 text associated with fn 445, 133 text following fn 447. cf similar statements in Crawford 2010b (n 245) 931.

306 See, eg, Riphagen, 'Responsibility IV' (n 14) 8 [33], 16 [49]. See also Annacker (n 51) 137–38, 156 ff.

307 See, eg, Treaty of Amity, Commerce, and Navigation (US–UK) (opened for signature 19 November 1794, entered into force 29 February 1796) 52 CTS 243 (Jay Treaty) arts 6–7; General Claims Convention of September 8, 1923 (Mexico–USA) (opened for signature 8 September 1923, entered into force 1 March 1924) IV RIAA 9 (US-Mexican Claims Convention) art I; Convention between Great Britain and the United Mexican States (opened for signature 19 November 1926, entered into force 8 March 1928) V RIAA 7 (GB-Mexico Claims Convention) art 3. cf WTO Agreement (n 293) annex 2, arts 2(1), 11.

308 See, eg, Statute of the International Court of Justice (opened for signature 26 June 1945, entered into force 24 October 1945) (StICJ) arts 36(2)(d), 38(1)(b).

309 *Chorzów Jurisdiction* (n 160) 24–25. See also *LaGrand* (n 31) 485 [48]; *Avena and Other Mexican Nationals (Mexico v USA)* (Judgment) [2004] ICJ Rep 12, 33 [34].

settlement of disputes, at least for the ICJ,[310] is the main purpose of a tribunal's contentious jurisdiction.[311] What is more, *Barcelona Traction* treated obligations *erga omnes* in the context of judicial standing, but it discussed much more than tertiary legal relations. '*Jus standi*' or '*qualité*'[312] was precisely what the ICJ joined to the merits at a previous stage[313] and the essence of what *Barcelona Traction* stands for.[314]

In sum, tertiary legal relations (eg the rules of jurisdiction of a tribunal) are closely related to primary and secondary legal relations, but are ultimately different from them and do not always follow from the breach of primary obligations.[315] Consequently, it is possible to maintain a distinction between them to the extent that the distinction is useful; that the same distinction may be imperfect for other purposes is beside the point.

For instance, the distinction is useful in separating *actio popularis* from the notion of obligations *erga omnes*. The ICJ defined an *actio popularis* (pl. *actiones*

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310 But see *Chorzów Jurisdiction* (n 160) 24, on the functions of conventions providing for arbitration.

311 *Border and Transborder Armed Actions (Nicaragua v Honduras)* (Jurisdiction and Admissibility) [1988] ICJ Rep 69, 91 [52]. See also StICJ (n 308) art 38(1) ('whose function is to decide … such disputes as are submitted to it').

312 'Qualité à agir' also refers to an applicant's aptitude —eg— to seise a Court. C Lefort, *Procédure Civile* (Cours Dalloz, série Droit privé, Dalloz, Paris 2005) 55–56.

313 *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (New Application: 1962)* (Preliminary Objections) [1964] ICJ Rep 6, 44–45.

314 See p 56 n 240 and associated text, above.

315 And see Riphagen, 'Responsibility III' (n 55) 38 [98].

populares) as a '… right resident in any member of a community to take legal action in vindication of a public interest.'[316] *Actiones populares* are a judicial action and consequently presuppose the existence of a judicial forum.[317] They are tertiary legal relations, arguably the main focus of the best and most thorough study of obligations *erga omnes*.[318] Moreover, the rules of standing may differ from tribunal to tribunal.[319] It would be vacuous to speak of '*actio popularis* in international law' without discussing specific statutes of specific tribunals. Thus, fully considering *actiones populares* would represent too great a digression from the main topic of this thesis.

The notion of *actiones populares* will not be discussed further.

(d) Levels of Legal Relations (and Hohfeldian Analysis)

(i) Introduction

The distinction between primary and secondary is quite established in other areas of the law, but not so the distinction between tertiary legal relations and secondary ones. The distinction was made by Willem Riphagen, as ILC Special Rapporteur on State Responsibility. His analysis adds a new layer of depth to Hohfeldian analysis. Hohfeld described with precision different types of legal relations. Riphagen —and

316 *South West Africa 1966* (n 159) 47 [88].

317 Seiderman (n 51) 135–36; D Alland, 'Countermeasures of General Interest' (2002) 13 EJIL 1221, 1235 ('... universal judicial action'); F Voeffray, *L'Actio Popularis ou la Défense de l'Intérêt Collectif devant les Juridictions Internationales* (Publications de l'Institut Universitaire de Hautes Études Internationales, Genève, PUF, Paris 2004) 262, 321; Tams (n 51) 161.

318 viz Tams (n 51) chs 5–7 (especially).

319 *Genocide 2007* (n 280) 92 [119].

others— described different 'levels'[320] at which these legal relations intervene: primary, secondary, and tertiary. At the same time, Riphagen's analysis helps discuss the consequences that flow from the breach of an international —primary— obligation. Thus, while each level is conceptually distinct,[321] each level is related to the others. Furthermore, the status of being owed an obligation at primary level has consequences at secondary level,[322] which is why it is important to discuss both levels. That said, Riphagen's classification does not explain every aspect of the law. Riphagen's scheme —contrary to Hohfeld's— does not explain validity: how a legal relation acquires 'legal force'.[323] Riphagen does not explain other instances of law which are not legal relations, such as principles.[324] But for the limited purpose of explaining the law of responsibility —and entitlements to present claims—, Riphagen's scheme is quite useful.

It is noteworthy that Riphagen's predecessor, Ago, made the distinction between primary and secondary rules.[325] For Ago, secondary rules were 'secondary'

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320 Riphagen, 'Responsibility IV' (n 14) 14 [75]. See also Hart 1994 (n 233) 94.

321 Hart 1994 (n 233) 94. Hart's secondary rules (explained at pp 94–97) are different from Riphagen's (or Ago's similar work; see Pauwelyn (n 234) 149 fn 196; A Pellet, 'The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 76 text associated to fn 7).

322 See pp 56 ff, below.

323 VCLT (n 67) art 69(1), reasoning *a contrario*. See also *Genocide 2007* (n 280) [148] ('… validity and legal force.').

324 cf pp 13–14, above.

325 eg Ago, 'Responsibility III' (n 144) 212 [5].

insofar as they concerned the consequences of the breach of primary rules.[326] As was the case with Riphagen, Ago's definition of secondary rules —ie state responsibility 'proper'—[327] also concerned the existence and consequences of the wrongful act.[328] Ago did not expressly separate tertiary legal relations from secondary ones, but he envisioned the *option* of including a discrete part to what later became the ASR dealing with the implementation of responsibility.[329] Therefore, the methodology followed by Ago suggests that the rules of state responsibility proper —Riphagen's secondary rules— could be considered separately from the rules for the implementation of state responsibility —Riphagen's tertiary rules.

Finally, combining Hohfeld's and Riphagen's analysis oversteps the bounds of Hohfeldian analysis. Hohfeld only considered municipal law's equivalents of Riphagen's primary legal relations, at least not in any detail.[330] But Hohfeldian analysis does have some bearing on 'remedies'.[331] Remedies would be secondary legal relations, for Riphagen. Indeed, Hohfeldian entitlements exist beyond the primary level, as will be shown below.

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326 Ago, 'Responsibility III' (n 144) 212 [5].

327 Ago, 'Responsibility III' (n 144) 211 [6], 259 [143].

328 Ago, 'Responsibility II' (n 144) 190 [8]; Ago, 'Responsibility III' (n 144) 211 [6].

329 Ago, 'Responsibility II' (n 144) 190 [8].

330 cf secondary rights and duties, in Hohfeld (n 22) 80 [e], 81 [f].

331 See pp 33–36, above.

(ii) Primary Legal Relations

Riphagen defined primary legal relations as rules of conduct [332] 'imposing obligations'.[333] This definition is problematic, as there also exist legal relations at secondary level that regulate 'conduct' and 'impose obligations'.

The distinction between primary and secondary legal relations is best explained by way of example. It has been discussed before how, from a Hohfeldian viewpoint, 'diplomatic protection' is a complex notion, which classically involved **1)** obligations of treatment of aliens, **2)** obligation to redress mistreatment of aliens, and **3)** the possibility to present a claim to seek such redress. The obligation of treatment of aliens would be the primary obligation here.[334] As further examples of primary obligations, Riphagen cited the obligation to respect the self-determination of peoples[335] or the prohibition of the use of force.[336]

Ago also distinguished between *règles primaires* and that state responsibility comprises.[337] He likened primary legal relations[338] to *règles de fond* —'substantive

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332 Riphagen, 'Responsibility IV' (n 144) 8 [33], [35]. See also Villalpando (n 144) 266; E David, 'Primary and Secondary Rules' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 29 ('… concerning behaviour'), 31 text following fn 39. See further Hart 1994 (n 233) 81.

333 Riphagen, 'Responsibility IV' (n 14) 7 [23]. See also Hart 1994 (n 233) 81 ('… impose duties'); Katselli Proukaki (n 146) 57.

334 Ago, 'Responsibility II' (n 144) 208 [53] ('... règles de fond relatives au traitement des étrangers').

335 Riphagen, 'Responsibility IV' (n 14) 13 [69].

336 Riphagen, 'Responsibility IV' (n 14) 13 [69].

337 Ago, 'Responsibility III' (n 144) 212, [15], 230 fn 83, 259 [143]; Ago, 'Responsibility V' (n 144) 55 [47].

rules' [339] or 'main rules'— of international law. [340] Ago's definition is also problematic because secondary obligations can also be considered as 'substantive' — as opposed to perhaps 'procedural' obligations. Again, secondary legal relations (ie state responsibility) may exist despite the lack of formal, centralised (eg judicial) procedures for their implementation. As examples of primary obligations, Ago cited the obligation to settle disputes by peaceful means [341] and the obligation not to expropriate aliens' property without compensation,[342] among others.

Some precisions are called for. **Primary legal relations** (eg primary obligations) spring from primary rules[343] —hence their name. All further levels of legal relations concern redress for breach of primary obligations. These further levels are thus 'parasitic'[344] or 'complementary'[345] to primary obligations and only come

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338 cf cross-reference at Ago, 'Responsibility III' (n 144) 259 fn 253 and associated text.

339 And see David (n 332) 27 text associated to fn 3.

340 R Ago, 'Premier Rapport sur la Résponsabilité des États' (UN Doc No A/CN.4/217, YbILC 1969-II) 138 [56](2), 143 [89]. See also Ago, 'Responsibility V' (n 144) 4 [1].

341 Ago, 'Responsibility V' (n 144) 35 [103].

342 Ago, 'Responsibility III' (n 144) 258–59 [143].

343 Crawford, *Commentaries* (n 273) 124 [2] (ch III) ('… content of primary rules … obligations thereby created').

344 Hart 1994 (n 233) 81.

345 Ago, 'Responsibility III' (n 144) 230 [61]; Ago, 'Responsibility V' (n 144) 4 [1].

into existence as a consequence[346] of their breach. Prosaically put, then, primary legal relations regulate States' conduct outside of any context of breach.

Indeed, the notion that primary legal relations are 'rules of conduct' 'that impose obligations'[347] needs clarification in three respects.

Firstly, *primary legal relations are not the only category of 'rules of conduct'*. Secondary —and tertiary— legal relations may also regulate conduct. Thus, among the secondary legal relations —those that seek to redress the breach of primary obligations—[348] that exist in international law, there is the obligation to provide redress for the primary norm infringed; that is, an entitlement for the victim State that the wrongdoing State —*someone else*— redresses the wrongful act. This is a true obligation. Just to name a few examples, in *Avena*, the ICJ determined that the US had an obligation to provide of review and reconsideration of convictions wrongful under article 36(1) VCCR[349] as a form of reparation.[350] From the point of view of Mexico, this is an entitlement that the US —*someone else*— provide it with reparation. Furthermore, the obligation of review and reconsideration in *Avena*, required conduct on the part of the US; namely: **1)** that review and reconsideration procedures were initiated, and **2)** that US courts took into account the alleged

346 Pellet (n 321) 76 ('… consequential').

347 See p 74 nn 332–333 and associated text, above.

348 See pp 80–82, below.

349 (n 216).

350 *Avena* (n 309) 72 [9].

breaches of article 36(1) VCLT and their effect on the wrongful convictions at issue.[351] Consequently, these secondary entitlements bore all the hallmarks of Hohfeldian obligations. It is not far-fetched to say that Mexico had a right[352] that the US afforded Mexico the reparation ordered by the Court. In the *Wall* advisory opinion, it would not be hard to see how the obligation —physically— to cease construction and dismantle parts of the barrier regulates Israeli conduct. Had this advisory opinion bound Israel, Israel would have had to comply with it as a consequence of a previous breach of international law.[353] Indeed, the purpose of these obligations was to ensure that the *status quo ante* the wrongful act was restored.[354] This makes them secondary obligations in Riphagen's scheme, despite how they also 'regulate conduct' and 'impose obligations'.

Secondly, *building on the above, the difference between primary and secondary legal relations concerns their purpose, rather than their object —ie what they consist of*. By defining primary legal relations on the basis of what they consist of —'rules of conduct' 'that impose obligations'—, Riphagen missed the point. At a general level, the object of an obligation to compensate 'financially assessable damage' that results from a wrongful act[355] is identical to the object of the obligation

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351 *Avena* (n 309) 60 [122], 62 [131] (especially).

352 Mexico believed itself 'entitled' to this. *Avena* (n 309) 19 [12(2)], 21[1], 22 [e], 23[4].

353 *Wall* (n 240) 197–98 [151], 201 [163(2)(A)].

354 *Wall* (n 240) 197 [150].

355 ASR (n 68) art 36.

to repay a US$40 million loan:[356] both require disbursements of money.[357] Nevertheless, the obligation to compensate is a secondary obligation and the obligation to repay a loan is a primary obligation. Besides specific differences between them —eg the modalities or the amount of payment of each, etc—, only their respective purposes tell them apart. Primary legal relations regulate the conduct of States outside any context of breach. They are created for a myriad of reasons —eg, in this case, providing Pakistan with financial means and providing the US with adequate legal protection against non-payment, etc. By contrast, the sole *raison d'être* of *secondary legal relations* is the redress of a breach of *primary obligations*.[358]

Thirdly, from this thesis's perspective, Riphagen's definition of primary rules as 'imposing obligations'[359] is misguided because it excludes primary liberties. In actual fact, Riphagen discussed the relationship between '"primary rules" imposing obligations' and secondary rules.[360] Therefore, it may be conceded that for Riphagen

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356 Loan Agreement for the Fauji-Agrico Fertilizer Project (with Annex) (US–Pakistan) (opened for signature 1 April 1977) 1115 UNTS 103 (Fauji-Agrico) ss 1.01, 3.02.

357 And cf case study in Riphagen, 'Responsibility II' (n 145) 94 [118]–[119].

358 See pp 75–76, above. See also Ago, 'Responsibility I' (n 340) 138 [56](2) ('manquement aux obligations'), 143 [89]; Ago, 'Responsibility II' (n 144) 190 [7] ('obligations dont la violation'); Ago, 'Responsibility III' (n 144) 211 [6]. See further R Ago, 'Quatrième Rapport sur la Résponsabilité des États' (UN Doc No A/CN.4/264, YbILC 1972-II) 107 [69] ('manquement … de ses propres obligations').

359 See p 74 n 333 and associated text, above.

360 Riphagen, 'Responsibility IV' (n 14) 7 [23].

it was sufficient to discuss these relations in this way.[361] The same could be said for the final Special Rapporteur on State Responsibility, Prof Crawford.[362]

This thesis will consider broader issues. As discussed above, if what sets a primary legal relation apart from others is that it regulates state conduct outside of the context of breach, primary liberties should also be taken into account. State conduct is not only regulated there where the law lays down an obligation. Riphagen's definition of primary obligations as 'rules of conduct' implies as much. However, to describe liberties is to make a correct statement of the law, when they exist.[363] Describing States as being at liberty to use force in self-defence in response to an armed attack[364] or at liberty to exercise enforcement jurisdiction within the confines of their territory[365] is a correct statement of the law on these matters. Furthermore, primary liberties and obligations are often found together and may enhance one another. In those instances, they could rightly be considered as a coherent —if imperfect and imprecisely defined— whole.[366]

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361 And see Pellet (n 321) 76, remarking the same with respect to Ago's similar approach on this matter.

362 J Crawford, 'Fourth Report on State Responsibility' (UN Doc No A/CN.4/517, YbILC 2001) [14] ('… those laying down obligations'), [15] ('… primary rule or obligation').

363 Williams (n 76) 1130.

364 David (n 332) 30 text following fn 29, considering this a primary legal relation. See also pp 26–31, above.

365 See pp 44–47, above.

366 See pp 44–48, above.

All of this also suggests that Hohfeldian analysis is relevant beyond primary legal relations, the only level he addressed directly.[367] It has even been claimed that Hohfeld came to this realisation.[368]

(e) Secondary Legal Relations

As stated before, secondary legal relations are new, different legal relations that always arise after a wrongful act takes place.[369] That is, after the breach of a primary obligation.

'Reparation' comprises the most important types of secondary legal relations. '[I]n a narrow sense', reparation is sometimes understood as compensation.[370] Furthermore, 'reparation' is at times contrasted with the obligation to cease continuing wrongful conduct.[371] However, this thesis will consider as secondary all obligations whose purpose it is to wipe out the consequences of the wrongful act as far as possible[372] or to make good the loss suffered through the wrongful act by an equivalent act (eg through compensation). For instance, like all secondary legal relations, the obligation of cessation only arises in the event of a —continuous—

367 See pp 33–35, above.

368 Tapper (n 33) 268.

369 No position will be taken on the question of state responsibility for non-wrongful conduct.

370 Shelton (n 268) 50.

371 ASR (n 68) arts 30–31, 34–38; *Wall* (n 240) 197 [150], 198 [152], where the Court 'f[ound] further' to reparation that cessation was forthcoming.

372 *Chorzów Merits* (n 162) 47. See also *Gabčíkovo* (n 215) 82 [149]–[150]; *Arrest Warrant* (n 224) 31–32 [76]; *Wall* (n 240) 198 [152]; *Avena* (n 309) 59 [119]; *Genocide 2007* (n 280) [460].

wrongful act[373] and seeks to restore the state of affairs that existed before the wrongful act.[374] Satisfaction may redress moral damage caused by the wrongful act;[375] and so on. Another useful term to describe secondary obligations to afford reparation might be 'remedies'.[376] But this term gives these obligations a judicial connotation,[377] which is problematic if the distinction between secondary and tertiary legal relations is maintained.

It should also be noted that the obligations to afford reparation are not the only kind of secondary legal relations. There are also secondary powers. Thus, the commission of a wrongful act also brings about new legal relations. It involves *a power to create new entitlements by breaking the law: as an effect of breaching an obligation*.[378] Of course, this is not a *power to break the law*, as some would have it.[379] There can thus be no power to break the law, as powers do not directly regulate

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373 Crawford, *Commentaries* (n 273) 197 [6] (art 30).

374 Crawford, *Commentaries* (n 273) 197 [5], [7] (art 30).

375 *Rainbow Warrior* (n 267) 272–73 [122].

376 See, eg, Amerasinghe (n 273) 282 ('remedial measures').

377 Garner and Black (n 124) 1407 ('remedy', 2). cf pp 33–35, above.

378 Kramer (n 25) 103–04. And see ASR (n 68) arts 1(2) ('There is an internationally wrongful act of a State when conduct … [c]onstitutes a breach of an international obligation') 12 ('... [the breach of an obligation is an] act of a State … not in conformity with what is required of it'), 28 ('… [responsibility] entailed by an internationally wrongful act') (emphasis added).

379 cf Ago, 'Responsibility III' (n 144) 235–36 [78]–[79], on delictual capacity; Tapper (n 33) 242, 245.

conduct. Powers rather create or extinguish entitlements *through conduct* (eg by infringing obligations).[380]

There is also a liberty for the *victim State* to make a claim against the wrongdoing State. The wrongdoing State breaks no obligation when the victim State does not make a claim, which suggests that this is a permissible legal relation. Furthermore, the wrongdoing State can interfere with the other State's claim —eg by questioning it—; an obligation cannot be interfered with in this way without infringing it. This entitlement is thus a secondary liberty.

3 Other Consequences of Owing a (Primary) Obligation

As stated above, there are more consequences to holding a primary right than being able to make claims.[381]

Thus, primary rights cannot be created or extinguished without the consent of the primary-right-holder.[382] As treaties have relative effect, in principle,[383] treaties cannot create rights[384] for 'third States'[385] without their consent.[386] Conversely, '… whatever may be the right construction of a treaty, it cannot be interpreted as

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380 See pp 48–50, above.

381 See pp 55–56, above.

382 cf VCLT (n 67) art 64.

383 cf 'objective regimes' in ch 3, pp 182–84, below.

384 But cf VCLT (n 67) art 36(1) ('Its assent shall be presumed').

385 ie non-parties. cf VCLT (n 67) art 2(1)(h).

386 VCLT (n 67) art 34.

disposing of the rights of independent third Powers.'[387] Perhaps the best way to express this situation is that a treaty cannot 'adversely affect'[388] third parties by *imposing* rights[389] or obligations[390] on them.

Likewise, countermeasures can only be taken against the State that commits a wrongful act.[391] Countermeasures consist of the suspension of an obligation[392] in order to induce compliance with another obligation. Therefore, the fact that countermeasures can only be taken against States that commit the wrongful act means that only obligations due to that State can be suspended as a form of countermeasure. Put another way, countermeasures cannot consist in the suspension of obligations due to any State other than the defaulting State.

Finally, State B cannot suspend obligations due to State C in response to material breaches committed by State A. In principle, State B can only suspend these

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387 *Island of Palmas* (n 97) 842. See also *Case of the Free Zones of Upper Savoy and the District of Gex (France/Switzerland)* (Judgment) PCIJ Rep Series A/B No 46, 140–42, 141 (especially).

388 *Pablo Nájera (France) v United Mexican States* (1928) V RIAA 466, 472 ('nuire'). See also IM Sinclair, *The Vienna Convention on the Law of treaties* (Melland Schill Monographs in International Law, 2nd edn Manchester University Press, Manchester 1984) 99 text associated to endnotes 68–69.

389 ILC, 'Draft Articles on the Law of Treaties: Text as finally adopted by the Commission on 18 July 1966' (18 July 1966) UN Doc A/CN.4/190 (YbILC-1966(II)) 228 [1] (art 32) ('The parties to a treaty cannot, in the nature of things, effectively *impose* a right on a third State because a right may always be disclaimed or waived.'); Sinclair (n 381) 99.

390 VCLT (n 67) art 35.

391 ASR (n 68) art 49(1).

392 ie '… non-performance for the time being'. ASR (n 68) art 49(2).

obligations in its relations with State A.[393] Thus, the State owed a primary obligation is protected against this kind of suspension by other States. Exceptions to this rule do exist in articles 60(2)(a)(i) and 60(2)(c), but they apply in very specific circumstances[394] and do not detract from the general rule explained before.

[393] See, eg, VCLT (n 67) art 60(2)(a)(ii).

[394] On interdepdendent obligations, arising under art 60(2)(c), see ch 4, pp 242–48, below.

D CHAPTER CONCLUSION

This chapter has explained terms that will allow for a precise description of all legal relations that underlie obligations *erga omnes* and those that are closely related to it —or not. It will also facilitate discussion of the different conceptions of obligations *erga omnes* available in the literature. The chapter has explained four types of legal relations (right/duty-obligation, liberty/no-right, power/liability, and immunity/disability) that intervene at three different levels (primary, secondary, and tertiary), at least. Each of these legal relations is conceptually different from any of the others and entails different legal consequences from all others.

It has also been discussed that since obligations *erga omnes* require or forbid conduct, they belong to the right/duty-obligation type of legal relations. That they are duties or obligations is not so controversial an issue. However, this chapter has hinted at two controversial traits of obligations *erga omnes*. The first trait is that all obligations, obligations *erga omnes* included, entail a correlative, individual right held by another subject. The second trait is that obligations *erga omnes* represent particular derogations of principles underlying the notion of sovereignty in international law.

It is now time to defend these assertions. The next chapter will consider the creation of obligations *inter partes* and the creation of obligations of obligations analogous to obligations *erga omnes*. All of them are perfectly describable in bilateral terms, as will be seen in due course.

CHAPTER 2 OBLIGATIONS *INTER PARTES*

A INTRODUCTION: SOVEREIGNTY AS INDEPENDENCE AND SUPREMACY

1 Introduction

This chapter will explore the nature of obligations *inter partes*. Basically put, this chapter will attempt to answer the following question: *why was it the case in classic, general international law that State A did not also owe State C an obligation to treat State B's nationals/property in a certain way?* By classic international law it is meant the law as existed from the second half of the 19th Century till the end of World War II. The starting point is chosen because international law assumed a recognisable form around that time (eg the law on nationality took definitive shape around this time, the issuance of letters of marque fell into disuse, etc.). The end point is chosen because it is arguably after 1945 that obligations which are now deemed *erga omnes* (ie human rights standards, broadly conceived, and the prohibition of the use of force) became part of general international law (ie general custom and principles).[395]

Now, it is historically accurate that State A owed State B obligations concerning the treatment of State B's nationals (ie the international minimum standard), State B's property (eg diplomatic premises, bags), State B's agents (eg to observe jurisdictional immunities), and so on. State A owed State C identical obligations, but not over the same individuals/things. Obligations owed to State B concerned State B's nationals, agents, property, etc. Obligations owed to State C concerned State C's nationals, agents, property, etc. Thus, barring cases of, say, double nationality, State B's nationals and State C's nationals would not be the same

[395] See introduction, p 5, above.

person. Consequently, mistreatment of State B's national would only impair State B's primary rights. In schematic form, these obligations —*inter partes*— would look thus:

(1) State A owes State B not to mistreat State B's nationals;
(2) State A owes State C not to mistreat State C's nationals;
(3) State A owes State D not to mistreat State D's nationals (…)
(25) State A owes State Z not to mistreat State Z's nationals.

Indeed, except where a special treaty was concluded to that effect, State C had no primary right that State A treat State B's national in any given way. This could be represented thus:

(1) State A owes State B not to mistreat **State B's** nationals;
(2) State A owes State C not to mistreat **State B's** nationals;
(3) State A owes State D not to mistreat **State B's** nationals **(…)**
(25) State A owes State Z not to mistreat **State B's** nationals.

It is noteworthy that in the representation immediately above, should State A mistreat John Doe, a national of State B, the rights of every other State would be infringed. That is, each of States B, C … Z is owed an obligation that none of State B's nationals, including Mr Doe, is mistreated by State A. This is at least a plausible way of representing an obligation *erga omnes*. Literally, the standard of treatment to be observed on Mr Doe is owed to all the States concerned, rather than to State B alone. Thus, an obligation *inter partes* actually concerns the treatment of different individuals/things vis-à-vis different States, even if these different individuals/things must be treated according to the same standard. The rights of one State could be infringed without infringing the rights of other States. By contrast, an obligation *erga omnes* requires that the same treatment (eg prohibition of genocide) is observed on the exact same individuals/things vis-à-vis any one State. In this way, obligations

erga omnes are composed of aggregates of bilateral, primary obligations with individual, correlative, primary rights.

This way of representing obligations *erga omnes* is not universally accepted. It will be defended in chapters 4 and 5. For now, the focus will be on obligations *inter partes*: on why State C (or M or Z) had no right that State A (mis)treated State B's national in any given way. Indeed, State B's exclusive right that its own nationals were treated a certain way by State A (or C or M or Z, as the case may be) is not only historically accurate, but it is the 'traditional',[396] 'paradigmatic',[397] or 'classic'[398] way in which international obligations were conceived. By contrast, '… no … obligations *erga omnes*, traditionally, exist[ed]'.[399]

The starting point, again, is that in international law, obligations are created 'abstractly', as they seldom indicate the entity to which they are owed.[400] Nevertheless, it is commonly and automatically supposed that obligations respecting

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396 G Arangio-Ruiz, 'Fourth Report on State Responsibility' (UN Doc No A/CN.4/444, YbILC 1992-II(1)) 43 [130]; C Annacker, 'The Legal Regime of Erga Omnes Obligations in International Law' (1994) 46 AJPIL 131, 134; B Simma, 'From Bilateralism to Community Interest' (1994) 250 RdC 217, 232; M Koskenniemi, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of General International Law' (UN Doc No A/CN.4/L.682, YbILC 2006) [388]. See also Picone (n 240) 5, 18.

397 J Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 RdC 325, 426.

398 DN Hutchinson, 'Solidarity and Breaches of Multilateral Treaties' (1988) LIX BYIL 151, 153; Annacker (n 396) 155.

399 P Weil, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 413, 431.

400 See introduction, pp 4–5, above.

individuals/things connected to a State (eg through nationality, property, etc) are somehow owed to that State.

It is surprising that, lacking a generally agreed theory of international rights, international lawyers can identify the State to which most obligations are owed. That this is an intuition —ie an automatic, spontaneous assumption— is a good indication that either principles are at work here or, at the very least, that a significant pattern exists that brought about obligations *inter partes*. When explaining obligations *erga omnes*, many commentators and legal authorities project these intuitions onto the analysis of obligations *erga omnes*. This is problematic because obligations *erga omnes* arose through displacing the foundations on which these intuitions rested.

A further step of analysis is the observation that the individuals/things over which a State is owed obligations in general international law used to be connected to that State in some way. Even now, many commentators insist on the need to 'link' a State with an individual/thing (eg through nationality, property, agency, etc) in order to consider that State as 'injured';[401] ie owed a primary obligation.[402] A 'special link',[403] a 'special relationship'[404] must exist between the State and these

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401 W Riphagen, 'Fourth Report on the Contents, Forms and Degrees of State Responsibility (Part 2 of the Draft Articles)' (UN Doc No A/CN.4/366, YbILC 1983-II(1)) 14 [75].

402 See ch 5, p 291, below.

403 R Provost, 'Reciprocity in Human Rights and Humanitarian Law' (1994) LXV BYIL 383, 430.

404 cf Hutchinson (n 398) 180.

individuals/things. The State in question must occupy a 'special position'[405] vis-à-vis that individual/thing; and so on. Another way of putting this is that standing always follows from the impairment 'sovereign rights'.[406] As standing ordinarily depends on holding primary rights,[407] primary rights are thus linked with sovereignty under this view.

So the question remains: why were State rights pegged to these 'special links'? The answer is the particular way in which sovereignty has come to be conceived in general international law. Two aspects of sovereignty will be of interest here: 'independence' and 'supremacy'. In general international law, obligations *inter partes* only concerned the treatment of an object connected to one State that was affected by the conduct of another State, the obligation-bearer. Conventional law aside, States were free to act on, say, their own nationals or stateless individuals, ships flying their flag or reputed to be stateless, their own territories or *terra nullius* or the high seas, and so on. In this respect, then, States were at liberty —and were thus 'independent'— so to act. At the same time, States had supremacy over certain individuals/things 'linked' to them. Supremacy is the ability to act over individuals/things found within a State's territory without hindrance or, in some cases, extraterritorially. Supremacy existed, for instance, over a State's territory, individuals found therein, and over individuals bearing the State's nationality. Thus,

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405 G Gaja, 'Obligations and Rights Erga Omnes in International Law (First Report)' (2005) 71 (I) AIDI 117, 133.

406 Riphagen, 'Responsibility IV' (n 401) 21 [114]; CJ Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge Studies in International and Comparative Law, CUP, Cambridge 2005) 46.

407 See ch 1, pp 56–82, above.

conventional law aside, States only assumed obligations with respect to another State's nationals, vessels flying another State's flags, territory over which another State had title, and so on. That is obligations only arose in general international law where actions were taken by one State against individuals/things submitted to another State's supremacy.

Additionally, only these two States and no other would participate from these and related legal relations. Holding a primary right gave the right-holder certain control over the content of that right and its enforcement.[408] Extinguishing or otherwise modifying these entitlements also requires the consent of every individual primary-right-holder. Consequently, the more entities held rights that these individuals were treated in a certain way, the less the fate of these individuals/things would be left to the control of the two States concerned. If State C is also entitled that State A treats State B's national a given way, any modification between States A and B of the primary obligation concerned would have no effect vis-à-vis State C. A treaty between States A and B to this effect would be valid between them. However, the same treaty may conflict with State A's obligation towards State C, left untouched by this treaty. State C's consent would be necessary so that the A/B treaty can deploy its full effects. Conversely, then, leaving the primary obligation of treatment of State B's nationals by State A in the hands of these two States only furthered their ability to decide the fate of these individuals/things. The more right-holders are added to this relationship, the less these States would be able so to control the relationship and its consequences.

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[408] See ch 1, pp 55–84, above.

The pattern thus created can be summarised in this way:

(1) States were at liberty to act in relation to individuals/things over which they alone —or no other State— had supremacy;

(2) States were under an obligation to act[409] or not to act in certain ways only over individuals/things over which other States had supremacy; and

(3) Only the acting State (obligation-bearer) and the State(s) with supremacy (right-holders) were parties to the relevant legal relationships.

It is submitted that obligations *erga omnes* or analogous obligations arise when this pattern is broken. Obligations assumed by a State over **1)** individuals/things over which it alone or no other State has supremacy or **2)** where States' respective supremacies play no role at all, will tend[410] to be owed *erga omnes*. Elucidating on the pattern and the way States handled its exceptions is the purpose of this chapter.

2 Two Aspects of Sovereignty

(a) Introduction

As hinted above, the main culprit behind the creation of obligations *inter partes* is the particular way in which sovereignty has come to be conceived in international law.[411] By **sovereignty** this thesis will only consider some of the aspects of legal sovereignty: loosely, the legal ability to exercise supreme authority (*summa*

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409 eg diligently protecting aliens with a nationality from a mob.

410 cf the obligation of the State of nationality to accept one of its nationals expelled by another State, pp 143–44, below.

411 And see Riphagen, 'Responsibility IV' (n 401) 21 [114] ('… most obligations under general customary law are simply a reflection of the right of sovereignty of another State'); S Villalpando, *L'Émergence de la Communauté Internationale dans la Responsabilité des Etats* (Publications de l'Institut Universitaire de Hautes Études Internationales, PUF, Paris 2005) 234.

potestas)[412] with respect to certain matters. This thesis will avoid discussing the ability to exercise supreme authority unhindered *as a matter of fact*. Thus a State may be legally entitled to depreciate its currency, but factors such as pressure by the markets or by public opinion may factually deter it from doing so. Factors like these will not he considered here.

More specifically, when considering 'sovereignty', this thesis will focus on certain legal relations closely related to it rather than on the concept itself. Sovereignty is an elusive, equivocal concept. Justice could not be done to the whole of the concept in one thesis. The legal relations of interest to this thesis concern certain 'substantive'[413] —read primary— aspects of the notion of sovereignty. They have been identified before: independence and supremacy.[414]

(b) Independence

The first substantive or primary aspect of legal sovereignty is '**independence**'. The concept can best be introduced through Max Huber's now classic award in the *Island of Palmas Case*.[415] This case concerned a dispute between the US and the Netherlands over title to the Island of Palmas or Miangas Island, located south of

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412 This phrase taken from *Customs Regime between Germany and Austria* (Advisory Opinion) PCIJ Rep Series A/B No 41 (*Customs Regime*) 57 (SO Anzilotti), 77 (DO Adatci, Rolin-Jaequemyns, Hurst, Schücking, van Eysinga, and Wang).

413 *Island of Palmas Case (Netherlands v US)* (1928) 2 RIAA 829, 838.

414 And see RY Jennings and A Watts, *Oppenheim's International Law* (9th edn Longman, London 1996) 382, end of § 117.

415 *Island of Palmas* (n 413).

Mindanao (Philippines) and north-east of Sulawesi (Celebes) (Indonesia), ultimately awarded to the Netherlands.

For Huber, '[s]overeignty in the relations between States signifies independence.'[416] More concretely, it consists of the exercise by sovereign State A of the functions of the State '… in regard to its own territory … to the exclusion of any other State'.[417] If this passage is analysed through the lens of Hohfeldian analysis, it will be seen that 'independence' pushes the law in two directions. As discussed before, the exclusive exercise of an entitlement generally involves two legal relations: **1)** the entitlement itself and **2)** the legal relation(s) that protect it and make it exclusive.[418] Along these lines, two types of entitlements can be discerned here.

First, there are liberties. The exercise of the functions of the State is an entitlement for State A, territorial State, that *State A itself* exercises these functions. Therefore, these entitlements can only be liberties[419] or powers (eg of legislation) that States are at liberty to exercise.[420] The former are especially apposite for obligations *erga omnes*, since liberties and obligations are contradictories. Indeed, it bears

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416 *Island of Palmas* (n 413) 838. See also *R v Christian* [1924] AD 101 (Sup Ct SA) 123 (Kotzé JA); H Lauterpacht, *International Law: A Treatise* (7th edn Longmans, Green and Co, London 1952) vol 1, 115; Jennings and Watts (n 414) 122; E Lauterpacht, 'Sovereignty—Myth or Reality?' (1997) 73 International Affairs 137, 140 ('… sovereign, in the sense that each was independent'); MN Shaw, *International Law* (5th edn CUP, Cambridge 2003) 189.

417 *Island of Palmas* (n 413) 838.

418 cf, eg, the legal relations protecting States' liberties to exploit resources located within their territory, at ch 1, pp 44–48, above.

419 See ch 1, pp 43–44, above.

420 Powers can be exercised as of liberty or as of obligation. cf ch 1, p 49 n 208, above.

remembering that State A's liberty to do ϕ vis-à-vis State B is correlative to State B's having no right —ie a no-right— that State A abstain from doing ϕ. In turn, this leads to State A's lack of obligation to abstain from doing ϕ and State B's lack of any correlative right that State A does ϕ.[421] Thus, so long as 'independent' State A is at liberty to do ϕ, States B, C … Z will have no right that State A abstain from doing ϕ; and State A will have no correlative obligation —*erga omnes* or otherwise— to do ϕ.

In this sense, then, independence mostly concerns liberties, although the concept is relevant for other areas of the law. For instance, 'independence' is impaired when a State cannot —legally— take decisions on, say, its financial affairs, without another State's consent.[422] In this sense, independence may concern more than liberties —more than law, even. And the more extensive a State's independence is, the less obligations —*erga omnes* or otherwise— it will bear. This is an important point, related to the notion of supremacy.[423]

Second, 'independence' features obligations/rights that protect these liberties and which *only in some cases* make them exclusive.[424] The exercise of the functions of the State the same functions of the State can be exercised **by every State** —ie not

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421 See ch 1, pp 34–35, above.

422 See, eg, *Customs Regime* (n 412) 45–46, 58 (SO Anzilotti).

423 See pp 99–101, below.

424 A liberty can be protected imperfectly or insufficiently by a perimeter of entitlements. See ch 1, pp 44–48, 47 (especially), above.

exclusively— in areas such as the high seas or 'lands without a master'.[425] Since these liberties are not always exclusive, the obligations/rights that complement them and make them exclusive cannot be regarded as essential to them. Hohfeld would decidedly agree. Nevertheless, *Island of Palmas* rightly holds that the exercise of the functions of the State is exclusive when exercised in the territory of the State concerned.[426] Where this is the case, the territorial State is entitled that other States — ie *someone else*— does not exercise those functions. As such, these entitlements can only be rights or immunities.[427] *And indeed, as hinted above, the entitlements that complement sovereign liberties are obligations inter partes*.

Third, *Island of Palmas* also held that the way in which these liberties and the perimeter of legal entitlements that protected them were arranged applied *by default* in international law. Thus:

> The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.[428] (emphasis added)

The underlined passage does not directly constrain or permit conduct or sanction its legal effects. That is, it does not concern legal relations,[429] directly.

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425 *Island of Palmas* (n 413) 838.

426 And see pp 129–36, 134–35 fn 561 and associated text (especially), below.

427 See ch 1, pp 35–36, 43–44, 53 n 230 and associated text, above.

428 *Island of Palmas* (n 413) 838.

429 P Allott, *Eunomia: New Order for a New World* (OUP, Oxford 1990) 313, on the function of legal relations.

Rather, the passage conveys that the competence of the territorial State exclusively to exercise the functions of a State in its territory —the liberties and its complements/limits referred to above— is *the basis for the settlement of most disputes. More than a legal relation, the passage reflects an understanding that this scheme applies to most international disputes by default*. If it is true that this was the default way to create obligations in classic, general international law, it would not be surprising that obligations *inter partes* became 'paradigmatic'.[430]

A principle may be at work here,[431] but no opinion will be expressed on the matter. First, the pattern described in the introduction can be verified without enquiring too extensively into its origins. The results of these processes speak for themselves. Furthermore, there is some element of hindsight in this thesis's appreciation of this pattern. 'The development of the national organisation of States during the last few centuries' to which *Island of Palmas* makes reference was not dictated from the top-down. It was a long process whose outcome was by no means a foregone conclusion when it began.[432] This is particularly the case, for instance, of the law of diplomatic protection, which bitterly opposed Western and Latin American States and whose very existence had to be justified for a long time. Consequently, the pattern described in this chapter may have resulted from progressive and continuous interaction between States rather than from all-encompassing principles.

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430 See p 89, above.

431 Koskenniemi (n 396) [120] ('Principles such as "sovereignty"'), in light of [28] ('… "principles" … captures … norms … of a … higher degree of abstraction'). cf ch 1, pp 11–12, above.

432 cf Allott (n 429) 194–206, 197 (especially).

In any case, there is a remarkable enough pattern underlying all of these legal relations. Illuminating this pattern —and how it came to be derogated from— is the object of this chapter.

(c) Territorial, Personal, and Organisational Supremacy

If the combination of State liberties and protective entitlements described above is viewed as a whole, it becomes apparent that these entitlements fall on a spectrum. State A will be: **1)** entitled, as against State B, exclusively to exercise functions of the State in its own territory,[433] **2)** entitled, concurrently with State B, to exercise the same functions in 'lands without a master',[434] and **3)** (as a corollary to **1)**) forbidden from exercising these functions in the territory of State B. The key is that a State was free to carry out the functions of a State either in areas that belong to it or areas that belong to no one. By contrast, a State was forbidden from exercising these functions in areas that belong to another State. It is here that the concept of '**supremacy**' steps in.

A State could legally claim 'supremacy' in two cases, at least; this thesis will add a third. **First**, there is **territorial supremacy**,[435] a State's supreme authority over individuals or things found within its territory.[436] **Second**, there is **personal**

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433 See pp 95–96, above.

434 See pp 96–97, above.

435 Lauterpacht 1952 (n 416) vol 1, 254; Shaw (n 416) 574.

436 Lauterpacht 1952 (n 416) vol 1, 254.

supremacy,[437] a State's supreme authority over its nationals at home and abroad.[438] Sovereignty is often associated with control over individuals and territory.[439] And **third**, a State has what could be called **organisational supremacy**. This thesis will understand by this notion a State's supreme authority internally to organise itself: to determine the attributes of its agents, form of government, the level of its armaments, etc. This notion does not appear by name in any authority consulted by this thesis. However, many obligations analogous to those owed *erga omnes* concern the internal organisation of obligation-bearers. Such is the case of disarmament obligations[440] or those requiring the adoption of —eg uniform— internal legislation.[441]

Supremacy explains well the 'spectrum' of entitlements described above. As stated before classic, general international law followed three 'rules of thumb' in creating obligations *inter partes*:

> **(1)** States were at liberty to act in relation to individuals/things over which they alone —or no other State— had supremacy;
>
> **(2)** States were under obligation to act or not to act in certain ways over individuals/things over which other States had supremacy; and
>
> **(3)** Only the acting State (obligation-bearer) and the State(s) with supremacy (right-holders) were parties to the relevant legal relationships.

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437 Lauterpacht 1952 (n 416) vol 1, 254.

438 Lauterpacht 1952 (n 416) vol 1, 254.

439 *Sovereingty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* [2008] ICJ Rep 12, 40 [79].

440 See pp 161–65, below; ch 4, pp 231–32, below.

441 See ch 4, p 251 n 1110 and associated text, below.

If these rules and the notion of supremacy are considered together, the pattern behind the process that created obligations *inter partes* becomes clearer. State A was at liberty to carry out functions of a State where it had territorial supremacy (its own territory) or where no State had supremacy at all (eg the high seas).[442] Out of respect for State B's supremacy/sovereignty, State A bore obligations with respect to State B's territory.[443] In general, obligations arose for State A when: **1)** its supremacy clashed with State B's (eg its territorial supremacy over State B's national with State B's personal supremacy over the same individual) or **2)** where State A attempted to exercise the functions of a State where State B had supremacy, but State A had none (eg State A's attempting to board State B's ships in the high seas).

It should finally be clarified that values other than supremacy could play the same or a similar role. Thus territorial supremacy gave way to the sovereign equality of States where jurisdictional immunities were concerned.[444] The sovereign equality of States does not directly reflect any form of supremacy of one State over the other —quite the opposite, in fact. Only supremacy is of interest to this thesis.

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442 cf propositions **1)** and **2)**, p 100, above.

443 cf proposition **3)**, p 100, above.

444 See, eg, Lauterpacht 1952 (n 416) vol 1, 239; I Brownlie, *Principles of Public International Law* (7th edn OUP, Oxford 2008) 325.

B IMPORTANCE AND EFFECT OF 'THIRD' PARTY RIGHTS (*OR THE IMPORTANCE OF BEING OWED AN OBLIGATION*)

1 Introduction

Before going into detail on the creation of obligations *inter partes* in classical, general international law, a related question will be examined. If it is true that the clash of sovereignties or supremacies of States A and B produced obligations owed *inter partes*, what would be the effect of giving 'third' State C a separate, primary right that State B's nationals —ie individuals/things over which State C has no personal or territorial supremacy were treated in a certain way. As will be discussed below, the territorial State owed only the State of nationality the obligation to observe a certain treatment with respect to the latter's nationals.[445] Thus State A (territorial State) owes *State B* (State of nationality) the obligation to treat *State B's* nationals in a given way. What would occur, then, if State A also owed *State C* an obligation to treat *State B's* nationals a given way? And how would the *inter partes*/*erga omnes* character of these obligations further/hinder supremacy and independence?

These questions need answering because of the way this thesis conceives of obligations *erga omnes*. Firstly, it conceives of them as primary obligations, a proposition that is not universally accepted.[446] Secondly, this thesis conceives of obligations *erga omnes* as obligations owed by one State to all other States, but individually considered. In simpler words, the rights correlative to obligations *erga omnes* are primary, rather than secondary, and individual/discrete, rather than

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445 See pp 145–51, below.

446 See ch 5, pp 319–51, below.

collective or ancillary to other States' rights. Accordingly, this thesis cannot avoid analysing the reasons why State C was not individually —or otherwise— owed any obligation regarding the treatment of State B's nationals in **classic**, **general** international law.

In simpler words, what would State C's hypothetical right entail in general international law? As discussed in chapter 1, holding a primary right entails, for the right-holder:[447]

(1) Entitlement to make claims. The State to which an obligation is owed has standing to invoke the responsibility of the State which breaks that obligation. It becomes right-holder to all obligations that spring from the wrongful act. The same State can waive the claim, wholly or partially;

(2) Powers to contract in or out of obligations and immunities against other States' similar powers which they purport to exercise over the right-holder. In order to become opposable against a certain State, an obligation/right must be consented by it. *Jus cogens* permitting, a State may contract out of any international obligation;

(3) Protection against countermeasures taken against other States. States are entitled to demand that no obligation owed to them is suspended when countermeasures are taken against third States; and

(4) Protection against suspension/termination of obligations by reason of material breaches committed by other States. Treaties may only be suspended or terminated by the victim of a material breach '…in the relations between itself and the defaulting State', in principle.

Effects (1) and (2) will be of interest here. They illustrate how obligations *erga omnes* actually feature bilateral, individual correlative rights. It is submitted that being owed obligations *erga omnes* (*partes*) entitles the relevant State(s):

(1) Individually to demand redress for the breach of the obligation, *without prejudice to other States' claims*; and

(2) Bilaterally —thus not collectively— to contract out of the relevant primary obligations, *jus cogens* permitting, *without prejudicing other States' identical but discrete rights.* Derogating from an obligation *erga omnes* in this way

447 See ch 1, pp 55–84, above.

always results in a conflict of entitlements between the new legal regime and the obligation *erga omnes* in question.

If this is true, rights correlative to obligations *erga omnes* would be individual rather than collective. Likewise, If State C was granted a —hypothetical— right that State B's nationals were treated a certain way by State A alongside State B's —historically accurate— rights, State C would also be given control over the ultimate fate of those individuals. Waiver by State B of its claims against State A or any attempt by States A and B to modify the primary obligation would be valid in the mutual relations of States A and B. However, they would remain *res inter alios acta* for State C. State C's (or M's, or Z's) consent to both transactions would be necessary if either transaction was to be opposed to State C (or M, or Z). In this way, State C's 'third party rights' diminish State A and State B's control over the actions of their agents and nationals. Therefore, the concession of a right on State C would detract from State A's and B's supremacy.[448]

Conversely, then, since obligations owed *inter partes* between States A and B left matters in their hands exclusively, obligations *inter partes* further the supremacy of these two States, as will be discussed immediately below. This is why obligations *inter partes* became prevalent in classic, general international law.

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448 W Riphagen, 'Preliminary Report on the Contents, Forms and Degrees of State Responsibility (Part 2 of the Draft Articles on State Responsibility)' (UN Doc No A/CN.4/330, YbILC 1980-II(1)) 119 [62] ('…one might say that if the wrongful act of the guilty State A towards the injured State B created a new right of State C, the exercise of such right by State C would amount to an intervention in the external affairs of State A (and possibly, even of State B).'). See also Simma 1994 (n 396) 232.

2 Primary-Right-Holder's Control over Law-Making: the Power to modify of Primary Rights/Obligations and Immunities against such Modification

(a) Effect of these Legal Relations on Claims to Supremacy

A discrete right held by *State C* that State A treated *State B's* nationals in a certain way could only be modified and extinguished with State C's consent. Retaking the example used in the introduction, let State A owe State B an obligation to treat State B's nationals in a certain way. Let State A also owe an identical obligation to State C respecting the treatment of *State B's* nationals. Let it also be supposed that States A and B modify this obligation *inter se*, for instance, by adopting a treaty exempting themselves from the obligation to pay compensation to the other State's nationals if the latter are expropriated.

State C would not be a party to the A/B treaty. As discussed in chapter 1, treaties have relative effect, in principle.[449] Therefore, the legal position of State A vis-à-vis State B notwithstanding, the A/B treaty would not extinguish State C's original, discrete right that State A does not expropriate *State B's* nationals without compensation in any circumstance. Alternatively, State C may also modify its legal relations through unilateral acts, but State C must proclaim them.[450]

In sum, whether State C's right is renounced by treaty or by unilateral act, the result is the same: State C's consent is required in order to extinguish State C's right that State A does not expropriate nationals of State B without compensation. By

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449 See ch 1, p 51, above.

450 See, eg, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14, 132 [261] ('…an instrument with legal force, whether unilateral or synallagmatic, whereby Nicaragua has committed itself') (emphasis added).

contrast, obligations *inter partes* between States A and B, allow them —and only them— control over the fate of the individuals or things protected by their mutual obligation. Introducing a primary obligation *erga omnes*, involving State C's rights as it does, deprives States A and B of that exclusive control. State C has no personal supremacy over State B's nationals or organisational supremacy over State A's agents. *Therefore, an obligation owed inter partes, between States A and B only, furthers the supremacy/sovereignty of both States over these individuals and agents. By creating multiple individual/discrete rights, an obligation erga omnes hands partial control over the actions of these individuals/agents to separate entities other than those with supremacy. The relevant States' supremacies become diluted in the process*.

(b) What these Legal Relations say about the Individual Nature of Rights Correlative to Obligations *Erga Omnes*

On another order of thought, the paragraphs above assume that States A and B can indeed derogate from their mutual obligation as between themselves. They would do so by *inter se* agreements with no effect over State C's legal relations. Again, supposing that State A owes State B an obligation not to expropriate State B's nationals and State A also owing *State C* an obligation not to expropriate *State B's* nationals. As State A would bear obligations vis-à-vis two States simultaneously, these obligations would not be owed *inter partes*. However, even in this situation, any *inter se* agreement would remain valid as between States A and B. This is highly significant. The possibility that States A and B can derogate as between themselves the obligation/right that binds them without derogating State C's identical obligation shows that the obligation that binds States A and B can be described in bilateral

terms. In other words, this obligation is 'bilateralisable',[451] although it is not owed *inter partes*.

Indeed, it is widely accepted that a modification of an earlier treaty *inter se* by only some of the parties to the earlier treaty is not invalid even if the 'enjoyment' of the rights of other States is thereby impaired.[452] A cursory reading of the VCLT seems to contradict this interpretation. Parties to a treaty '… may modify … [a] treaty between themselves if'[453] '… the modification is not prohibited by the treaty and'[454] '[the modification] does not affect the enjoyment by other parties of their rights under the treaty'.[455] Many authorities simply state that the VCLT does not allow *inter se* modification of treaties that affect the enjoyment of other States' rights[456] or where

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451 On which see ch 4, p 264, below.

452 H Waldock, 'Sixth Report on the Law of Treaties' (UN Doc No A/CN.4/186, YbILC 1966-II) 76 [5] (art 63); J Crawford, 'Second Report on State Responsibility' (UN Doc No A/CN.4/498, YbILC 1999) [9(c)]–[9(d)]; J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law relates to Other Rules of International Law* (Cambridge Studies in International and Comparative Law No 29, CUP, Cambridge 2003) 60, 280–81, 310, 312; Koskenniemi (n 396) [319]–[320]. See also G Fitzmaurice, 'Third Report on the Law of Treaties' (UN Doc No A/CN.4/115 and Corr. 1, YbILC 1958-II) 39–40 [73] (art 16). See further, in a similar context, S Rosenne, *Breach of Treaty* (Grotius, Cambridge 1985) 88–89. cf Harvard Draft Convention on the Law of Treaties (1935) 29 AJIL Supp 653 (Harvard on Treaties) 1018–19 (art 22) (but see at pp 1024, 1026, limiting the scope of these statements). cf also Linderfalk U, 'International Legal Status Revisited - The Status of Obligations Erga Omnes' (2011) 80 Nord JIL 1, 14.

453 Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 41(1).

454 VCLT (n 453) art 41(1)(b).

455 VCLT (n 453) art 41(1)(b)(i). cf arts 40(4), 58(1)(b)(i).

456 Jennings and Watts (n 414) vol 1, 1256–57; Crawford 2006 (n 397) 440. cf similar statements with respect to obligations *erga omnes* in E Katselli Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (Routledge, London 2010) 50.

'integral' obligations are involved.[457] Integral obligations are analogous to obligations *erga omnes*. [458] It would therefore seem that, by not allowing *inter se* modification/suspension of treaties where other parties' rights are 'affected',[459] the VCLT establishes a disability in this regard. Others would rather have it that *inter se* modification in this regard '… cannot be tolerated'.[460] And intolerable it may well be; but if the later, conflicting treaty is not invalid, its provisions do have 'legal force'[461] and apply *inter se* on its parties.[462]

The same principle is at work in other VCLT provisions. Thus if some of the parties to the later, conflicting treaty are not parties to the earlier treaty, the later treaty will apply —ie it is valid— in the legal relations of parties to the later treaty *inter se*.[463] This shows that the obligations contained in the earlier treaty are not collective, as they can be derogated by some of the parties to the treaty only. As all

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457 Crawford 2006 (n 397) 405. cf Simma 1994 (n 396) 349, criticising this very point, but admitting that article 41 VCLT allows for *inter se* modification of these obligations and obligations *erga omnes*.

458 See ch 4, p 242, below.

459 cf Crawford 2006 (n 397) 440, suggesting a low threshold on this regard.

460 Pauwelyn (n 452) 71.

461 VCLT (n 453) art 69(1) (reasoning *a contrario* from the statement that invalid treaties have no legal force).

462 VCLT (n 453) art 30(4)(b).

463 VCLT (n 453) art 30, sub-ss (3), (4)(a). And see H Waldock, 'Second Report on the Law of Treaties' (UN Doc No A/CN.4/156 and Add 1–3, YbILC 1963-II) 55 [6], 60 [30]–[31] (art 14), in light of pp 53–54 (art 14(2)(a)–(2)(b)), equating the legal effects of —what are now— article 30(4) and article 41 conflicting treaties; Pauwelyn (n 452) 383–84.

States are bound by obligations *erga omnes*, this situation would not apply to them by analogy. But it may apply to treaty-based obligations *erga omnes*, the so-called obligations *erga omnes partes*.[464]

If States A and B can validly derogate, *inter se*, from the provisions of the earlier treaty without affecting the other parties' rights, it shows that whatever legal relations bound States A and B under the earlier treaty were actually bilateral. Of course, when the obligation in question has *jus cogens* status, *inter se* modification is impossible. [465] But obligations *erga omnes* and *jus cogens* overlap only occasionally[466] and the wider point made here is not detracted from.

To the argument that a conflicting *inter se* modification of certain treaties is 'intolerable', one could add that leaving the conflicting treaty in place allows for greater flexibility. Indeed, it is not uncommon that the text of a treaty and its application to differ considerably. Therefore, it is difficult to impeach a treaty abstractly, without paying attention to its effective application. Furthermore, the fact that a treaty that conflicts with another treaty is not automatically invalidated allows its parties to modify or reinterpret that treaty, as allowed by the law of treaties.[467] This is why the automatic invalidity of a treaty because it seems to contradict another

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464 See ch 3, pp 192–204, below.

465 VCLT (n 453) arts 53, 64. See also W Riphagen, 'Third Report on the Contents, Forms and Degrees of State Responsibility (Part 2 of the Draft Articles)' (UN Doc No A/CN.4/354, YbILC 1982-II(1)) 37 [92]; Pauwelyn (n 452) 426.

466 See ch 3, pp 205–15, 206–07 (especially), below.

467 VCLT (n 453) art 31(3)(a)–(b).

one is problematic and inflexible. Allowing for conflicting treaties to subsist creates embarrassing situations; a conflict of obligations is not a happy circumstance. However, if the conflicting treaty —even one that conflicts with obligations *erga omnes*— is allowed to remain, amendments and modifications can be made to that treaty that could resolve such conflict or lessen its effects. By contrast, merely invalidating a treaty destroys the legal force of whatever obligations arise under it. It is not as flexible a mechanism as the one defended in this thesis.

Thus, although imperfect, the 'bilateralist' scheme defended in this thesis allows for greater flexibility. It is not inappropriate to speak of this scheme as 'bilateralist'. As stated in the introduction to this chapter, aggregates of obligations *erga omnes* could be represented thus:

(1) State A owes State B not to mistreat **State B's** nationals;
(2) State A owes State C not to mistreat **State B's** nationals;
(3) State A owes State D not to mistreat **State B's** nationals **(…)**
(25) State A owes State Z not to mistreat **State B's** nationals.

By contrast, aggregates of obligations *inter partes* could be represented thus:

(1) State A owes State B not to mistreat State B's nationals;
(2) State A owes State C not to mistreat State C's nationals;
(3) State A owes State D not to mistreat State D's nationals (…)
(25) State A owes State Z not to mistreat State Z's nationals.

Aside from cases of dual nationality, the expropriation of State C's nationals would not affect State D's nationals. [468] Therefore, say, the breach of State C's (or State B's, or State M's) right in this last scheme would not entail a breach of other States' rights. This being the case, this last scheme (and obligations *inter partes*) is

[468] See pp 141–51, below.

not one where the 'enjoyment'[469] of other States' rights is involved. *Consequently, if States A and B exchanged their mutual obligation/right for a liberty of expropriation over their respective nationals, State C's nationals —and therefore State C's rights— would not be affected.*[470] By contrast, in the scheme depicting the structure of obligations *erga omnes*, the rights of all of States C, D … Z would be impaired if State A and State B agreed to derogate their mutual obligation and acted on this agreement. State A cannot, say, expropriate John Doe, State B's national, with respect to State B while at the same time not expropriating Mr Doe, *the same individual*, with respect to State C.[471] Again, in cases where obligations *inter partes* are involved, the individuals States B and C would each hold rights over would not be identical, in principle. And, again, this example assumes that the rights involved are individual rather than collective.

That said, the modification/suspension of any treaty can occur through a bilateral treaty.[472] Just as a treaty can conflict with another it can also conflict with

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469 VCLT (n 453) art 41(1)(b)(i).

470 See, eg, P Reuter, *Introduction to the Law of Treaties* (2nd English edn Kegan Paul International, London 1995) 133.

471 See p 110, above.

472 eg the —potential— derogation of North Atlantic Treaty (opened for signature 4 April 1949, entered into force 24 August 1949) 34 UNTS 243 (NAT) art 10 ('The Parties may, by unanimous agreement, invite any other European State') effected through the Interim Accord (Greece-FYROM) (opened for signature 13 September 1995, entered into force 13 October 1995) 1891 UNTS 3 (Interim Accord) art 11(1) ('… [Greece] agrees not to object to the application by or the membership of the [FYROM]'). These treaties are at issue in *Application of the Interim Accord of 13 September 1995 (FYROM v Greece)* (Pending) (2008). As only Greece is a party to both treaties, this is a case where article 30(4), rather than articles 41/58 of the VCLT would apply. Again, the legal effect of either provision is the same: the modifying, conflicting treaty will remain valid as between the relevant parties.

customary law, with similar effects,[473] although customary obligations whose modification imperils other States' rights are rather scarce. This is a key insight. If any two parties to an earlier treaty/customary rule can indeed modify the provisions of the earlier treaty/custom bilaterally, as between themselves, the legal relations that bound these States under the earlier treaty/customary regime were actually bilateral.

Thus SOLAS 1974[474] was a modification of SOLAS 1960.[475] SOLAS 1974 parties deemed it valid as between them[476] and gave its provisions priority over those of other conflicting, earlier conventions.[477] SOLAS 1960 and SOLAS 1974 include obligations analogous to obligations *erga omnes*[478] indeed.[479] And SOLAS 1960 contained provisions that SOLAS 1974 did not contain, but which could conflict with the obligations analogous to obligations *erga omnes* contained in SOLAS 1974. For instance, SOLAS 1960 obligations could be suspended altogether[480] in cases of

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473 cf Reuter (n 470) 140 ('If … a treaty between two States terminates the application of an earlier customary rule as between these States, this rule will not cease to govern the relation between each of them and third parties.')

474 International Convention on the Safety of Life at Sea (opened for signature 1 November 1974, entered into force 25 May 1980) 1184 UNTS 276 (SOLAS 1974).

475 International Convention on the Safety of Life at Sea (opened for signature 17 June 1960, entered into force 29 May 1965) 536 UNTS 27 (SOLAS 1960).

476 SOLAS 1974 (n 474) art VI(a).

477 SOLAS 1974 (n 474) art VI sub-ss (b)–(c).

478 IM Sinclair, *The Vienna Convention on the Law of Treaties* (Melland Schill Monographs in International Law, 2nd edn Manchester University Press, Manchester 1984) 109.

479 See ch 4, pp 251–52 n 1112 and associated text, below.

480 ie replaced with liberties. See ch 4, p 230 n 979 and associated text, below.

war.[481] SOLAS 1974 features no similar provision. Therefore, a party to both SOLAS 1960 and SOLAS 1974 could suspend provisions of SOLAS 1960 vis-à-vis this convention's other parties, while it could not suspend identical[482] SOLAS 1974 provisions vis-à-vis SOLAS 1974 parties. The 'enjoyment' of the rights[483] of SOLAS 1960 parties would be at issue by the conclusion of SOLAS 1974. Regardless of this, SOLAS 1974 entered into force in 1980, despite how certain of the parties of SOLAS 1960 had not become parties to SOLAS 1974. Thus, Australia, party to SOLAS 1960 since 1968,[484] only became a party to SOLAS 1970 in 1984, retroactively to 1983.[485] Jamaica became a party to SOLAS 1960 since 1968 and to SOLAS 1974 only after 1984; and so on.

A notable case of *inter se* modification was that of the competences of organs tasked with administering the Area by some of the parties to UNCLOS.[486] As Pauwelyn points out, provisions that regulate the competences of international

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481 SOLAS 1960 (n 475) art VI(a).

482 cf, eg, SOLAS 1960 (n 475) regulation 28(C), SOLAS 1974 (n 474) regulation 28(C).

483 Many would deny that obligations like these —so-called absolute obligations— feature individual rights. cf ch 4, pp 250–451 nn 1104–05 and associated text, below.

484 United Nations, 'UNTC' <http://treaties.un.org/Pages/showDetails.aspx?objid=080000028012d6c1> accessed 2 May 2010.

485 United Nations, 'UNTC' <http://treaties.un.org/Pages/showDetails.aspx?objid=08000002800ec37f> accessed 2 May 2010.

486 United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS); Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (opened for signature 28 July 1994, entered into force 28 July 1996) 1836 UNTS 3 (Implementation Agreement) (n 486).

organisations are analogous to obligations *erga omnes*.[487] However, the Agreement does conflict with the entitlements of UNCLOS parties. For instance, under article 144(1)(b) UNCLOS, the Sea-Bed Authority is empowered to transfer technological know-how to developing States; under section 5 of the Annex to the Implementation Agreement, transfer is more difficult. Control over intellectual property rights was one of the reasons why UNCLOS did not enter into force until the 1990s.[488] And yet, not all parties to UNCLOS are parties to the Agreement (eg Antigua and Barbuda). Other parties (eg Costa Rica) only acceded to the Agreement many years after UNCLOS entered into force for them,[489] and so on.

Finally, some insist that modifying such treaties *inter se* leads to a wrongful act[490] or does not prejudice claims to state responsibility.[491] If this is correct, so long

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487 Pauwelyn (n 452) 70–71. cf references to 'triangle relationship[s]' in K Sachariew, 'State Responsibility for Multilateral Treaty Violations: Identifying the "Injured State" and its Legal Status' (1988) 35 NILR 273, 277.

488 RR Churchill and AV Lowe, *The Law of the Sea* (Melland Schill Studies in International Law, 3rd edn Manchester University Press, Manchester 1999) 229–38.

489 cf United Nations, 'UNTC' < http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter =21&Te mp=mtdsg3&lang=en> accessed 2 May 2010, for the status of UNCLOS; United Nations, 'UNTC' < http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-6-a&chapter=21 &lang=en> accessed 2 May 2010, for the status of the Implementation Agreement.

490 B Simma, 'Reflections on Article 60 of the Vienna Convention on the Law of Treaties and its Background in General International Law' (1970) 20 ÖZöR 5, 9; Pauwelyn (n 452) 310 and passim. See also *El Salvador v Nicaragua* (1917) 11 AJIL 674 (CACJ) 725–28;*Costa Rica v Nicaragua* (1917) 11 AJIL 181 (CACJ) 226–27; in both cases the invalidity of the *inter se* modification were not considered due to lack of jurisdiction. cf, holding a contrary view, ADM McNair, *The Law of Treaties* (Clarendon Press, Oxford 1961) 222; M Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 Nord JIL 211, 234.

491 Rosenne (n 452) 89.

as the treaty remains in force, the wrongful act of having entered into it will be continuous. Therefore, it might be possible for the victim State to ask for an obligation to cease the wrongful act (ie by denouncing the later treaty), which would entail the treaty's practical invalidity.[492] This is a plausible argument,[493] but an imprecise one.

First, the obligation to cease the wrongful act would consist in the future denunciation of the treaty. The obligation to cease the wrongful act does not invalidate the treaty by itself.

Second, actions taken by State A or State B *pursuant* to the new treaty would be a wrongful act only if these actions are not on conformity with the earlier treaty between States A-C.[494] It is the actual application of the treaty that will lead to the wrongful act. That conflicts could exist and thus state responsibility claims, made, could not be ruled out. However, invalidating the convention *in abstracto*, root and branch, seems a step too far. States seem unfazed by the possibility that, say, SOLAS 1974 or modifying UNCLOS *inter se* could entail the obligation to 'cease' these treaties. In fact, UNCLOS came into force precisely because these *inter se* modifications were made. Consequently, the distinction between the illegality of the

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492 Pauwelyn (n 452) 299, 313–15, 314 (especially). See also at p 327. But see p 382 text immediately following fn 113.

493 VCLT (n 453) art 73.

494 McNair (n 490) 222. See also Gaja 2005 (I) (n 405) 127 text associated to fn 25, 128 ('... treaty directed to breach that obligation.') (emphasis added); Villalpando (n 411) 108 fn 313 cf Pauwelyn (n 452) 70, 423, for whom the conclusion of the new treaty is itself wrongful.

treaty itself and the illegality of actions pursuant to the treaty should be maintained.[495] In other words, the distinction between the (in)validity of the later, conflicting treaty and any wrongful acts which may arise under that same treaty must be maintained.

Third, the obligation to cease the wrongful act would not apply if the later treaty features parties that the earlier treaty does not.[496] If cessation is mandatory only where the parties to both treaties are the same, it follows that cessation is conceived as a sanction to the parties common to both treaties rather than as an impeachment on the validity of the later, conflicting treaty itself.[497] This observation is not relevant to obligations *erga omnes per se*. All States are bound by obligations *erga omnes*. Thus, all parties to any treaty that derogates from these obligations would also bear obligations *erga omnes*. However, the observation is relevant to obligations analogous to obligations *erga omnes* created by treaties or less-than-general custom (eg regional custom); the so-called obligations *erga omnes partes*. As will be seen later, both kinds of obligation have identical structures.

In any case, detractors of this position do have a point. And indeed, the *inter se* modification of an obligation analogous to obligations *erga omnes* does produce legal relations in conflict with each other. Assuming, again, that State A owes each of

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495 But cf Reuter (n 470) 133, equating both positions.

496 Pauwelyn (n 452) 301.

497 And cf *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90, 125 text associated to fn 3 (SO Shahabuddeen) ('There are situations in which the Court may determine that an international obligation has been breached by the act of negotiating and concluding an inconsistent treaty, without the decision being considered as passing on the validity of the treaty.'). Judge Shahabuddeen made these remarks while analysing the application of *Case of the Monetary Gold removed from Rome in 1943 (Italy v France, UK, US)* (Preliminary Question) [1954] ICJ Rep 19.

States B, C … Z the obligation not to expropriate State B's nationals and that States A and B modify these obligations *inter se*, so that State A would be at liberty to expropriate State B's nationals without compensation, the scheme already laid down for these obligations[498] would look slightly differently:

> **(1)** State A **is at liberty**, as against State B, to expropriate State B's nationals;
>
> **(2)** State A **owes** State C not to expropriate State B's nationals;
>
> **(3)** State A **owes** State D not to expropriate State B's nationals **(…)**
>
> **(25)** State A **owes** State Z not to expropriate State B's nationals.

By exercising liberty (1), State A will breach obligations (2)–(25). *Thus although State A is at liberty to expropriate State B's nationals vis-à-vis State B, this liberty is res inter alios acta for all other States. State A would remain under obligation to do otherwise vis-à-vis each of States C, D ... Z*. This thesis will employ this conflict of entitlements as a test of the *erga omnes* —or otherwise— character of primary obligations. However, the conflict of entitlements arises because the objects of the conflicting entitlements concern either the same individuals or the same things. *The problem is the content of the entitlements. The problem is not that these entitlements could not be described in bilateral terms, as the overwhelming majority of authorities would have it*. This will be treated at greater length in chapter 4.

Finally, some of the questions posed by this scheme cannot be answered in full detail in this thesis without too great a digression into other subjects. Thus it is stated that an earlier treaty may have *priority* over a later, conflicting treaty.[499] This

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498 cf p 110, above.

499 Koskenniemi (n 396) [320]. See also P Guggenheim, *Traité de Droit International Public: Avec Mention de la Pratique Internationale et Suisse* (2nd revised and augmented edn

would mean that the provisions of the earlier treaty would be applied over those of the later treaty.[500] Therefore, this is an issue of validity: of the legal effect to be given to the provisions of either treaty. As such, it raises concerns of second-order legal relations. Obligations *erga omnes* are first-order legal relations.[501]

In sum, the key issue here is not the —understandable— dissatisfaction with the regime applicable to *inter se* derogations of certain treaties, but rather that it represents positive law. This regime implies that rights correlative to obligations *erga omnes* are individual and bilateral. Hohfeld would agree. The regime also implies that the rights held by many States to the observance of the same conduct can be modified *inter se*. In other words, obligations can indeed be owed to the international community as a whole and '… be set aside or displaced as between two States'.[502] When considering *jus cogens*, this idea should be borne in mind.[503]

3 Primary-Right-Holder's Control over Enforcement

(a) *Jus Standi* and the Power to Extinguish Claims

Conferring a right to *State C* over State A's treatment of *State B*'s nationals would give State C standing to invoke the breach of the correlative obligation. Furthermore,

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Librairie de l'Université Georg & Cie, Genève 1967) vol 1, 269–70; Harvard on Treaties (n 453) 1024 [c] (art 22)

500 Koskenniemi (n 396) [333]–[334]. See also Harvard on Treaties (n 453) 1024–25 (art 22) ('subordinated … should prevail').

501 See ch 1, pp 22–23, 33, 48–49, 53–54, above.

502 cf J Crawford, 'Third Report on State Responsibility' (UN Doc No A/CN.4/507, YbILC 2000) [106(a)].

503 See ch 3, pp 205–15, below.

only State C would have the power to extinguish its own claim, be it through waiver or acquiescence. Because of this: **1)** State A would be responsible to State C for breach of obligations concerning State B's nationals and **2)** States A and B would need State C's consent definitively to dispose of all claims for mistreatment of State B's nationals.

The rule whereby a State owed an obligation had standing to claim for its breach has already been discussed.[504] The key here are two additional rules.

The **first** rule is that when a wrongful act injures multiple parties, each party is discretely entitled to invoke the responsibility of the defaulting State. Although 'injury' is an equivocal term, all primary-right-holders suffer injury when their rights are breached.[505] Multiple injured States may 'separately' invoke responsibility when the relevant wrongful acts occur.[506] Likewise, under the ASR, 'any State'[507] could make a claim for breach of obligations *erga omnes*, but as 'State[s] other than an Injured State'. Although the ILC's conception of injury is objectionable,[508] the ASR do convey that States need not act in unison to invoke state responsibility for breach

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504 See ch 1, pp 56–82, above.

505 See ch 5, pp 319–51, below.

506 Annex, UNGA Res 56/83 (12 December 2001) UN Doc A/Res/56/83 (ASR) art 46; J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (CUP, Cambridge 2002) 270 [3] (art 46). cf Crawford, 'Responsibility III' (n 502) fn 188 (Spain's legal position), [281].

507 ASR (n 506) arts 48(1), 48(2), in light of art 48(1)(b). On obligations *erga omnes* and the ASR, see also ch 5, pp 330–51, below.

508 eg ch 5, pp 337–45, below.

of these obligations.[509] They can invoke responsibility individually and independently —thus not collectively.

The **second** additional rule is that waiver/acquiescence by State B of its claim does not extinguish State C's claims if a wrongful act causes injury to both. This is a corollary of the previous rule. It can also be verified in some of the incidents of State practice surveyed in this chapter.[510] However, the ASR and some commentators would not agree that this rule applies to obligations *erga omnes*. They would have it that when the 'injured' State or the State injured in its 'subjective' —as opposed to 'objective' rights —eg the State of nationality of victims of genocide, an obligation *erga omnes*— waives its claim, all other States lose their entitlement to invoke state responsibility.[511] Again, this thesis takes issue with this definition of 'injury'. But in any case, this rule only applies where there is a discernible injured State, which is not always the case. Furthermore, per the ILC: **1)** '…if there is more than one, all the injured States' must waive their claims so that claims concerning obligations *erga omnes* are extinguished for all States,[512] and **2)** the refusal by any of the so-called

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509 Crawford, *Commentaries* (n 506) 277 [4] (art 48).

510 cf the apathy of the USSR with respect to the claims discussed at pp 159–61, below.

511 cf ASR (n 506) art 48(3) with arts 42, 45. See J Crawford, 'Third Report on State Responsibility' (UN Doc No A/CN.4/507, YbILC 2000) (n 506) [113]. See also I Scobbie, 'The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law"' (2002) 13 EJIL 1201, 1214.

512 See, eg, Crawford, *Commentaries* (n 506) 266 [1] (art 45).

non-injured States to pursue their claim does not affect the claims of all other, non-injured States.[513]

In sum, when 'third' party rights —eg— forbidding mistreatment of individuals are created, States A and B could not dispose of all claims for mistreatment of these individuals without the consent of all other right-holders. To that extent, their control over the fate of these individuals (or territory, property, agents, etc) is diminished.

(b) These Rules and the Individual Nature of Rights Correlative to Obligations *Erga Omnes*

The notion that the claims of multiple injured States are discrete also hints that primary rights correlative to obligations *erga omnes* are individual rights. Again, primary rights and secondary entitlements are not identical, but they mirror each other.[514] Therefore, the idea of an individual, bilateral structure of these secondary entitlements detracts from the notion that obligations *erga omnes* are collective obligations.[515] If it is true that primary obligations *erga omnes* can be described bilaterally, as discussed in the previous sub-section,[516] and if it is true that the ensuing secondary entitlements are also discrete —and thus describable bilaterally—,[517] it is

513 See p 120 n 509, above.

514 See ch 1, p 57 fn 248 and associated text, above.

515 cf Crawford, 'Responsibility III' (n 502) [84].

516 See pp 105–18, above.

517 Sachariew (n 487) 284; Simma 1994 (n 396) 310 ('… "multiple bilateralism"').

hard to see why the structure of obligations *erga omnes* could not be considered as bilateral as well.

4 Preliminary Conclusion: Obligations *Inter Partes* and State Sovereignty/Supremacy

This section has tried to explain the reasons why the introduction of 'third' party rights detracts from the supremacy of States. Among other entitlements, granting 'third' party rights would allow 'third' parties standing to invoke responsibility and control over the content of the primary right in question.[518] In turn, this would have given these 'third' States control over the fate of individuals or things over which they could claim no supremacy.

Thus a scheme whereby State A's wrongful acts on State B's territory only affected the legal relations between those two States would further both States' ability to deal with that wrongful act autonomously. By contrast, if the underlying obligation also owed to State C, States A and B must contend with two further norms. **First**, the State due a primary obligation (ie the primary-right-holder) was/is immune from the effects of any treaty to which it is a third party. **Second**, the State due an obligation could make a claim reparation for its breach; but where multiple States (eg States C, D … Z) are owed the same breached obligation (eg of respect for State B's territory), *any* of them could make a claim. *That is, multiple injury creates discrete claims*.[519]

In short, granting State C, D … Z a right over State A's conduct with respect to State B's territory or nationals or agents denies States A and B the power

[518] See ch 1, pp 55–84, above.

[519] See pp 118 ff, above.

definitively to dispose of these matters. The fact that they alone have supremacy but over the individuals and agents involved, but that none of the other States does, is beside the point. States A and B's agreements would be *res inter alios acta* for all other States. Therefore, States A and B could neither alter State C's primary rights nor impede that State C becomes entitled to secondary rights when State A breaches State C's rights by acting as agreed with State B. This is ultimately the reason why obligations *inter partes* further supremacy, independence, and sovereignty.

This does not mean that a different state of affairs would be impossible to conceive. The point is that these rules apply by default, through general international law. They could be replaced through *lex specialis*. However, while they are not so replaced, they apply to all legal relations that exist in general international law or in *lex specialis* that have not displaced general international law. This idea of application by default fits in well with the idea that obligations *inter partes* are the 'paradigm' in international law.[520] Seen in this light, the creation of obligations different than obligations *inter partes* would result from either **1)** treaties that excluded general international law[521] or **2)** customary law that excluded more general customary law.

The other point discussed in this section concerned the individual, bilateral nature of the rights correlative to obligations *erga omnes*. Not much needs to be added to this discussion at present; the issue will resurface throughout this thesis. It

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[520] See p 89, above.

[521] And see pp 136–41, 151–61, 163–65, below.

was concluded that primary-right-holders —even right-holders to obligations *erga omnes*— could:

(1) Individually demand redress for the breach of the obligation, *without prejudice to other States' claims*;

(2) Bilaterally —thus not collectively— to contract out of the relevant primary obligations, *jus cogens* permitting, *without prejudicing other States' identical but discrete rights; in turn, this creates a conflict of entitlements*.

C ACCOMODATING SUPREMACIES: THE CREATION OF OBLIGATIONS *INTER PARTES*

1 Introduction

As stated before, the manner in which classic, general international law created obligations *inter partes* could be distilled into a pattern comprising three 'rules of thumb':

(1) States were at liberty to act in relation to individuals/things over which they alone —or no other State— had supremacy;

(2) States were under obligation to act or not to act in certain ways over individuals/things over which other States had supremacy; and

(3) Only the acting State (obligation-bearer) and the State(s) with supremacy (right-holders) were parties to the relevant legal relationships.

Some of the reasons why rule **(3)** became prevalent have been discussed in the previous section.[522] It is now time to consider rules **(1)** and **(2)** more fully and to illuminate on the pattern behind the creation of these obligations.

This section will attempt to describe the way this pattern worked in classic, general international law through concrete examples. Two observations are apposite here.

First, this section will contrast the obligations *inter partes* resulting from this pattern with obligations analogous to obligations *erga omnes* that existed at the time, albeit only in conventional international law. More concretely, state practice under these regimes will be discussed. The state practice available to the author is mostly drawn from (Western and Central) Europe and the US. Although international law was not unknown in other regions at the time, not all States formed part of the legal

[522] See pp 105–22, above.

system present-day international law evolved from.[523] Furthermore, although research in yearbooks and journals which yielded other potentially relevant instances of practice, they could not always be verified through research in archival or historical sources. The examples discussed below are those which the author could research further in archives and books. In keeping with this thesis's separation of primary/secondary legal relations from tertiary legal relations,[524] research was limited to instances in which either the treaty regimes featured no compromissory clause or where claims by State parties were phrased in terms of primary and secondary legal relations despite the presence of such clauses. Since the rules of standing that exist in general international law can be modified through treaties, focusing research on this type of cases would prevent that claims arising under those treaties were unduly influenced by a lax approach to tertiary legal relations.

Second, the most important insight of this exercise is that *exceptions to the pattern described above did exist*. They existed in conventional international law rather than in general international law, but they existed nevertheless. This thesis has distinguished between general and conventional international law. Now, it will take a further step back and look at the broader picture: at international law as a discipline. The fact that certain patterns of legal relations exists by default does not mean that exceptions to such patterns are impossible. Although a system of law may be built around a certain set of values, this does not necessarily mean that the same legal

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523 See, eg, General Treaty for the re-Establishment of Peace between Austria, France, Great Britain, Sardinia and Turkey, and Russia (opened for signature 30 March 1856, entered into force 27 April 1856) 114 CTS 409 (Treaty of Paris 1856) art 7, admitting the Ottoman Empire into the system of public law then applicable in Europe and to the Concert of Europe.

524 See ch 1, pp 62–71, above.

system could not further new or different sets of values without losing its distinct features. That new or exceptional rules further these new values does not *by itself* mean that the legal system as a whole has undergone a complete transformation. *Rather, it may amount to the recognition that competing values also need protection*.

The mere fact that present-day international law protects values which classic international law did not does not mean that present-day international law is a wholly new system. Classic international law 'normally'[525] —ie through general international law— left States freedom to (mis)treat their own nationals in any way they wished. However, even at this time, it was possible to create obligations requiring States to treat their own nationals in certain ways. As these obligations did not exist by default, they had to be created through treaties. But treaties are sources of international law. Treaties can create international obligations, just as custom can. Therefore, international law —considered as a whole— could well have created obligations for the protection of a State's own nationals, although it never did so. As will be suggested throughout this thesis, obligations *erga omnes* result from derogating the pattern that existed in general international law —ie by default.

In simpler words, if an international obligation could have existed all along, the mere fact that this obligation now exists does not *necessarily* mean that **1)** international law as a whole has undergone a radical transformation or **2)** that the new obligation is different in substance from any other obligation. It may simply mean that the values consciously furthered by international law in the past —ie maximising independence through supremacy— may carry less weight now, at least in certain

[525] *Interpretation of Peace Treaties* ICJ Pleadings, 177 (UK). See also at p 176.

cases. Again, obligations *erga omnes* represent such exceptional obligations. Therefore, it is a mistake automatically —ie *necessarily*— to assume that obligations *erga omnes* either change international law completely or that they themselves are 'essential[ly]' to be 'distin[guished]' from any other obligation.[526] The ICJ was mistaken in that respect. Propagating these assumptions unquestioningly is one of the gravest conceptual mistakes in the literature on obligations *erga omnes*.

Finally, where different supremacies are accommodated, it is possible to impair one State's supremacy without thereby impairing another State's supremacy. In simpler words, defaults on obligations *inter partes* can occur vis-à-vis one State only. But where an obligation is established that concerns an individual/thing over which the right-holders have **1)** no supremacy or **2)** no claim to supremacy above all other potential right-holders, the situation is different. In each of these cases, the obligations in question would '… not lend themselves to differential application'.[527] They must be 'performed integrally' and could only lead to '… a general failure to carry out the obligation in question.'[528] In simpler words, when obligations are created without paying any mind to a State's supremacy or an equivalent value, the legal positions of all relevant States (eg all parties to the treaty or customary regime that contains them) are identical. State A can violate the jurisdictional immunities of State B's soldiers without thereby violating State C's soldiers' immunities. However,

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526 cf *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (New Application: 1962)* (Judgment) [1970] ICJ Rep 3, 32 [33] ('… distinction essentielle').

527 G Fitzmaurice, 'Second Report on the Law of Treaties' (UN Doc No A/CN.4/107, YbILC 1957-II) 55 [128] (art 19).

528 Fitzmaurice, 'Treaties II' (n 527) 55 [128] (art 19) (emphasis added).

if State A bears the obligation not to acquire more than 1,000 main battle tanks —ie in State A's *own* armed forces—, State A cannot both have this number or less with regards to State B, but have more than this number with regards to State C. Either State A has 1,000 tanks or less or it has more than 1,000 tanks. Both propositions cannot simultaneously be true.

The argument made here is not that *erga omnes* protection *must* be created so that violations of international law carried out within States' —formerly— exclusive domains *are protected at all*[529] *or protected effectively*.[530] The argument is rather that obligations *erga omnes are* created by protecting these values in this way.

2 Liberties and Obligations concerning a State's own (and Other States') Territory

(a) Introduction

The following sub-sections will show that **1)** obligations *inter partes* involve the territorial supremacy of one, right-holding State and the actions of another State and **2)** obligations analogous to those owed *erga omnes* are created over individuals and things right-holders have no plausible claim to supremacy.

(b) Enforcement Jurisdiction

In *Island of Palmas* independence signified the authority exclusively to exercise of the functions of the State over a certain portion of the world.[531] In line with this

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529 See, eg, CF Amerasinghe, *Diplomatic Protection* (Oxford Monographs in International Law, OUP, Oxford 2008) 90; Picone (n 240) 17–18. cf similar statements in Simma 1994 (n 396) 296–97; Katselli Proukaki (n 456) 13–14.

530 Pauwelyn (n 452) 72–73; G Gaja, 'Obligations and Rights Erga Omnes in International Law (Second Report)' (2005) 71 (I) AIDI 189, 193.

531 See pp 96–99, above.

statement, the exclusive exercise of State sovereignty within a State's territory is widely regarded as an attribute of sovereignty.[532] However, the statement that jurisdiction is territorial is correct, but imprecise. The key here is to understand the role of States' territory in the creation of obligations *inter partes*. A distinction should be drawn between **1)** prescriptive jurisdiction, **2)** enforcement jurisdiction,[533] and **3)** the exclusive exercise of either prescriptive jurisdiction or enforcement jurisdiction.

Only one of the 'heads'[534] of prescriptive jurisdiction, referred to before,[535] is territorial. The other 'heads' are active personality,[536] passive personality,[537] protective or security jurisdiction,[538] and universal jurisdiction.[539] This being the case, prescriptive jurisdiction is not exclusively territorial. Two 'heads' of

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532 See, eg, Brownlie (n 444) 289.

533 R O'Keeffe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 JICJ 735, 736.

534 O'Keeffe (n 533) 738.

535 See pp 96–99, above.

536 Jurisdiction over a State's own national, even abroad. This can be tied with personal supremacy (pp 99–101, above; 141–51, below).

537 Jurisdiction over an offender whose acts carried out abroad have resulted in the death/harm of a State's nationals in certain cases. Brownlie (n 444) 304; O'Keeffe (n 533) 739.

538 Jurisdiction over the acts of aliens abroad which affect a State's security concerns in certain cases. Brownlie (n 444) 304–05.

539 Originally, universal jurisdiction concerned acts for which prescriptive jurisdiction existed, but none of the previous titles to prescriptive jurisdiction applied. (O'Keeffe (n 533) 745–46; GS Goodwin-Gill, 'Crime in International Law: Obligation Erga Omnes and the Duty to Prosecute' in GS Goodwin-Gill and S Talmon (eds) *The Reality of International Law: Essays in Honour of Ian Brownlie* (Clarendon Press, Oxford 1999) 204). Now it is understood more narrowly, as prescriptive jurisdiction over certain international crimes (eg genocide).

prescriptive jurisdiction can exist concurrently[540] (eg territorial jurisdiction over genocide committed in the State's territory and universal jurisdiction of other States over the same acts). Therefore prescriptive jurisdiction may regulate extra-territorial conduct and is not necessarily exclusive.

The same is not true with respect to enforcement jurisdiction. Enforcement jurisdiction is exercised, for example, by arresting individuals,[541] by granting them licences to, say, fish in the State's EEZ,[542] or by upholding customs and immigration legislation in the contiguous zone.[543] The interest of enforcement jurisdiction for this thesis is that acts of enforcement jurisdiction concern, eg, the physical apprehension of individuals. As such, the classical liberty to exercise enforcement jurisdiction over a State's own nationals or stateless individuals[544] is a reflection of the state of the law before, say, the prohibitions of torture and genocide became positive law. Because of this, discussions about enforcement jurisdiction are relevant when describing classic general international law's position on obligations —now owed *erga omnes*— that involve the physical apprehension of individuals (eg torture, genocide), the exploitation of resources, the disposal of waste (eg environmental law), etc.

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540 O'Keeffe (n 533) 738 fn 11.

541 O'Keeffe (n 533) 736–37.

542 cf UNCLOS (n 486) art 62 sub-ss (4)(a), 4(k).

543 UNCLOS (n 486) 33(1) ('… control … prevent … punish').

544 See pp 141–45, below.

The three 'rules of thumb' discussed before, whereby general international law created obligations *inter partes*, should be remembered here. **First**, a State would be endowed with liberties to act respecting individuals/things over which no State — or none other than itself— would have supremacy. **Second**, a State would be under obligation to act in a certain way respecting individuals/things over which other States did have supremacy. **Third**, these obligations would be established out of deference to the supremacy/sovereignty of the correlative-right-holding-State only.[545] And it should also be remembered that States had **territorial supremacy** over all individuals/things found within its territory and **personal supremacy** over its nationals, at home or abroad.[546]

Turning to the first 'rule of thumb', it is widely held that enforcement jurisdiction is territorial.[547] This statement is imprecise as well. Enforcement jurisdiction is territorial *only in the sense that the territorial State's enforcement jurisdiction was —is— exclusive within the confines of its territory*. However, again, a State can exercise enforcement jurisdiction beyond the limits of its territory. *Island of Palmas* makes this clear when it states that in the functions of a State can be exercised by all States in areas '… like the high seas or lands without a master'.[548] Thus, for

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545 See p 100, above.

546 See pp 99–100, above.

547 See, eg, Jennings and Watts (n 414) vol 1, 458.

548 *Island of Palmas* (n 413) 838.

instance, the flag State was at liberty to board and inspect ships flying its flag[549] or no flag [550] in the high seas, an act of enforcement jurisdiction carried out extra-territorially. Likewise, a State could licence any of its nationals to exploit resources found in the high seas, eg living resources. [551] By the same token, it is not inconceivable that a State could have exercised enforcement jurisdiction over its own nationals or other individuals in *terra nullius*,[552] for instance. Indeed, when in *terra nullius*, an individual would be in a similar situation as in the territory of the State of nationality. [553] That is, where individuals found themselves under the unfettered supremacy of a State, international law left them at the mercy of the actions of that State.

Therefore, the statement that, say, in the high seas no State could exercise any act of sovereignty or jurisdiction[554] is imprecise. *Rather, States could not exercise*

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549 P Guggenheim, *Traité de Droit International Public: Avec Mention de la Pratique Internationale et Suisse* (Librairie de l'Université, Georg & Cie, Genève 1953) vol 1, 449 text associated to fn 3. cf the implications of statements on flag State 'authority' in *The Case of the SS Lotus (France v Turkey)* (Judgment) PCIJ Rep Series A No 10, 25.

550 ie stateless ships; See pp 150, below.

551 *Fur Seal Arbitration (GB v US)* (1893) 1 Moore Int Arb 755, 938–39, rejecting US jurisdiction ('… droit de protection et de propriété') over seals caught by British vessels in the high seas. Reasoning *a contrario*, it follows that 'protection' of legislation limiting catches of living resources is an act of enforcement jurisdiction.

552 cf HF Van Panhuys, *The Rôle of Nationality in International Law: an Outline* (A. W. Sythoff, Leyden 1959) 56 ('… in cases of banishment to no man's land').

553 And see WE Hall, *A Treatise on International Law* (6th edn Clarendon Press, Oxford 1909) 243–44 ('... as a general rule persons belonging to a state community, when in places not within the territorial jurisdiction of any power, are in the same legal position as in the soil of their own State.'). cf first 'rule of thumb', at p 132, above.

554 cf, eg, UNCLOS (n 486) art 137(1).

jurisdiction in the high seas over each other or over each other's nationals. Here is where the second and third 'rules of thumb' come into play; viz concerning the role of supremacy as creator of obligations owed to only one State.[555] As is well-known, State A's arrest of an individual or the act of serving of a warrant on State B's territory without State B's consent is a wrongful act. The *rationale* behind this obligation is to ensure respect for the sovereignty/independence of the territorial State[556] and thus its territorial supremacy.[557] Indeed the prohibition to effect arrests[558] or to exercise acts of adjudicative jurisdiction[559] in the territory of other States furthers the territorial State's sovereignty. Thus in the same measure that enforcement/adjudicative jurisdiction is an emanation of a State's sovereignty,[560] all States have a duty to abstain from exercising 'acts of sovereignty' in the territory of

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555 See pp 99–100, above.

556 M Akehurst, 'Jurisdiction in International Law' (1972–1973) XLVI BYIL 145, 146 ('The act is contrary to international law only if it represents a usurpation of the sovereign powers of the local State.') and passim; Jennings and Watts (n 414) 386–87. See also UNSC Res 138 (23 June 1960) UN Doc S/4349, [1].

557 Lauterpacht 1952 (n 416) vol 1, 262 fn 2 and associated text; Jennings and Watts (n 414) 385.

558 *US ex rel Lujan v Grenjen*, 510 F2d 62 (2nd Cir 1975) (US) 67; *Villareal v Hammond* 74 F2d 503 (5th Cir 1934) (US) 506. See also American Law Institute, *Restatement of the Law (Third): The Foreign Relations Law of the United States* (Revised and enlarged edn American Law Institute Publishers, St Paul 1987) 329 [b] (§432); Jennings and Watts (n 414) 388. See also Akehurst (n 556) 147. cf *In Re Argoud*, 45 ILR 90 (Court of Cassation) (France) 96.

559 *Service of Summons in Criminal Proceedings (Austria)* (1961) 38 ILR 133 (Sup Ct) (Austria) 133–34; *Biria v Kiardo* (1967) 45 ILR 53 (Sup Ct) (Morocco) 54; *Re Caneba* (1969) 75 ILR 222 (Rome Court of Appeals) 224–25. But see Akehurst (n 556) 146–47.

560 *Austrian Summons Case* (n 559) 134.

other States.[561] This prohibition has even been deemed fundamental to the character of the territorial State as a State.[562]

Classic environmental obligations were construed in a similar way. In general, these obligations fell into the category of obligations not to use a State's territory — or to allow that territory be used— in a manner that would cause damage in the territory of other States.[563] These kinds of obligations protected a wide range of values aside from the environment; eg allowing a State's territory to be used by belligerents to facilitate combat operations in the territory of another State[564] or in a way that imperilled international navigation,[565] and so on. The focus was on the protection of *another State's* territory.

The key is that territory, nationality, property, etc. were signal posts for the creation of primary obligations;[566] *ie for limiting the obligation-bearer's freedom of*

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561 Lauterpacht 1952 (n 416) 262; 3rd Restatement (n 558) 329 [b] (§432); Akehurst (n 556) 146 ('… usurpation of sovereign powers'), 150; Brownlie (n 444) 289. See also Riphagen, 'Responsibility III' (n 465) 29 [45] text associated to fn 26.

562 Lauterpacht 1952 (n 416) vol 1, 255.

563 *Trail Smelter Case (USA v Canada)* (1941) III RIAA 1938 (Trail Smelter II) 1963, citing C Eagleton, *The Responsibility of States in International Law* (New York University Press, New York 1928) 80. And see *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 241–42 [29], cited with approval in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, 41 [53].

564 See, eg, B Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Grotius Classic Reprint Series vol 2, Grotius Publications, Cambridge 1987) 83; Brownlie (n 444) 446 text associated to fn 91.

565 *Corfu Channel (UK v Albania)* (Merits) [1949] ICJ Rep 4, 22.

566 This is a crucial idea when considering 'injury', 'damage', and the many characterisations of obligations *erga omnes*. See ch 5, below.

action and for furthering the right-holder's exercise of sovereign liberties. States were at liberty to carry out acts of enforcement jurisdiction even extra-territorially, except where another State's supremacy (thus nationals, territory, agents, property, etc) were involved. Consequently, if the prohibition to exercise 'acts of sovereignty', say, in a State's territory furthers the territorial sovereignty/supremacy of the territorial State only and complemented its independence, then this prohibition, between States A–Z, could be summarised thus, in schematic form:[567]

> **(1)** State A owes State B not to exercise enforcement jurisdiction in State B's territory;
>
> **(2)** State A owes State C not to exercise enforcement jurisdiction in State C's territory;
>
> **(3)** State A owes State D not to exercise enforcement jurisdiction in State D's territory; **(…)**
>
> **(25)** State A owes State Z not to exercise enforcement jurisdiction in State Z's territory.

These obligations are owed *inter partes*.[568]

(c) Departure from this Pattern: the *Statute of Memel* Case

The dispute underlying the *Statute of Memel* Case before the PCIJ illuminates on this thesis's conception of obligations *erga omnes* as departures from the scheme that created obligations *inter partes*. Obligations *erga omnes* are modern, customary obligations identical in all relevant respects to the treaty obligations that derogated

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567 And see ch 1, pp 19–20, above; p 89, above.

568 And see American Law Institute, *Restatement of the Law (Second): Foreign Relations Law of the United States* (St. Paul 1965) §44(2) ('A state that exercises its enforcement jurisdiction [in the territory of another State] when … it may not do so, violates the other state's rights') (emphasis added).

from the pattern discussed in this chapter even before 1945. Some such treaty obligations were included in the Paris Convention.[569]

The city of Memel (*Klaipéda*) and its adjacent territory was placed under the authority of the UK, France, Japan, and Italy at the end of World War I (1914–1918).[570] These four administering powers ceded the administration of the territory to Lithuania, who in turn agreed to respect a certain degree of autonomy for Memel. The Paris Convention established a Directorate that would govern the territory. Article 17 of the annex to the Paris Convention laid down the procedure to replace the President of the Directorate. The President held office so long as he retained the confidence of the Chamber of Representatives of the Territory of Memel. He or she could not be dismissed otherwise.

Memel could either be seen as Lithuanian territory or be assimilated to it. It was a territorial unit submitted to an international status '… under the sovereignty of Lithuania'.[571] Thus, this treaty departed from general international law prevalent at the time in that it created obligations for Lithuania concerning territory somehow

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569 Convention Relative au Territoire de Memel (opened for signature 8 May 1924) 29 LNTS 86 (Paris Convention).

570 Treaty of Peace between the Allied and Associated Powers and Germany (opened for signature 28 June 1919, entered into force 10 January 1920) 112 BFSP 1 (Treaty of Versailles) art 99.

571 Paris Convention (n 569) annex I, art I ('The Memel Territory shall constitute, under the sovereignty of Lithuania, a unit, organised on democratic principles, enjoying legislative, judicial, administrative and financial autonomy within the limits prescribed in the present Statute.') See also *Interpretation of the Statute of the Memel Territory (France, UK, Italy, Japan v Lithuania)* PCIJ Rep Series C No 59, 408 ('… transfert à la Lithuanie des droits de souveraineté') (Poincaré, France). The extent of Lithuanian sovereign entitlements was a contested issue. See *Interpretation of the Statute of the Memel Territory (France, UK, Italy, Japan v Lithuania)* (Judgment) PCIJ Rep Series A/B No 49, 346–48 (DO Bustamante, Altamira, Schücking, van Eysinga).

'under its sovereignty'. What is the same, none of the four administering powers had a claim to supremacy over Memel. At any rate, Memel's international status was not established to further the sovereignty of the administering powers. Regardless of this, Lithuania bore obligations towards the other parties to the Paris Convention.

Indeed, the Paris Convention did not conform to the pattern then existing in general international law for the creation of obligations/rights. Had that been the case, the legal positions of some of the four administering powers could have been distinguished from that of the others with respect to compliance. Thus, Lithuania could, say, violate the territorial sovereignty of the UK without violating that of France; ie affect British territorial supremacy without affecting French territorial supremacy. By contrast, Lithuania could not dismiss the Directorate vis-à-vis the UK, but leave the same Directorate in place vis-à-vis France. Lithuania could also expropriate an Italian national without expropriating a Japanese national. But Lithuania could not both allow the President of the Directorate to remain in office vis-à-vis Italy but at the same time dismiss him vis-à-vis Japan.

This is important. *Where an obligation is created paying no mind to the supremacy of either the right-holder(s) or the obligation-bearer(s), the legal positions of all right-holders with respect to compliance become identical*. Thus:

(1) Lithuania owes Japan not to dismiss the President of the Directorate;

(2) Lithuania owes Italy not to dismiss the President of the Directorate;

(3) Lithuania owes France not to dismiss the President of the Directorate;

(4) Lithuania owes the UK not to dismiss the President of the Directorate.

Now, Lithuania did dismiss the President of the Directorate in circumstances that the four administering powers considered illegal.[572] The four administering powers seised the PCIJ jointly.[573] It should be noted that Lithuania objected to the applicants' standing, but only by alleging they had not submitted the dispute the LON Council. The PCIJ rejected the objection[574] and held Lithuania had breached some of the obligations in the treaty.[575] However, rather than asking the Court to assess the legality of Lithuania's conduct against the Paris Convention, they asked the Court to clarify the extent of Lithuania's powers under it.[576]

This should be borne in mind because in the course of the oral proceedings the applicants stated:

> The present case may be said thus to differ from, at any rate, the majority of the cases which have been brought before the Court by way of an application. In this case the Applicant Powers are not here to defend their particular interests, or to maintain any rights of their own which they allege to have been infringed. Their only interest … is to see that the Convention to which they are parties is carried out by Lithuania in accordance with what they conceive is its proper interpretation …[577]

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572 Viz the President of Directorate visited Germany in an official capacity without the permission of the Lithuanian Government. *Memel Pleadings* (n 571) 516–17.

573 Paris Convention (n 569) art 17.

574 *Interpretation of the Statute of the Memel Territory (France, UK, Italy, Japan v Lithuania)* (Preliminary Exceptions) PCIJ Rep Series A/B No 47, 253.

575 *Memel Merits* (n 571) 336, 337 [6].

576 *Memel Pleadings* (n 571) 13 (Application).

577 *Memel Pleadings* (n 571) 173 (Malkin, UK) (emphasis added).

The underlined passage is what is generally highlighted from the parties' pleadings in this case. And this passage is interpreted to the effect that none of the four administering powers had individual rights at stake in this case.[578] This is not correct. **First**, the idea that the case is different from other contentious cases, 'brought … by way of application' —ie contentiously— is the main thrust of the statement. Thus the idea of a lack of infringement of 'rights of their own' is not necessarily due to the fact that no primary rights existed under the Convention,[579] but rather that no rights were 'alleged to have been infringed in this case'. The advisory-opinion-like formulation of the application did not go unnoticed by the judges.[580] **Second**, this interpretation does not sit well with the rest of the applicants' oral arguments. The applicants did claim that Lithuania assumed obligations towards them.[581] For instance, the Italian representative adduced the applicants' right that Memel's autonomy was respected.[582] These claims seem to address primary obligations/rights owed by Lithuania to the four applicants.

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578 *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Second Phase)* (Judgment) [1966] ICJ Rep 6, 376–77 (DO Jessup); Tams (n 406) 76. See also F Voeffray, *L'Actio Popularis ou la Défense de l'Intérêt Collectif devant les Juridictions Internationales* (Publications de l'Institut Universitaire de Hautes Études Internationales, Genève, PUF, Paris 2004) 51.

579 cf *Memel Pleadings* (n 571) 562, where the rights corresponding to Lithuanian obligations are described —in what this thesis would recognise— as secondary/tertiary entitlements, rather than primary ones.

580 *Memel Merits* (n 571) 336–37, 350 ff (DO Anzilotti). By the time the PCIJ was seised of the case (11 April 1932), the President of the Directorate had resigned *motu proprio*. *Memel Pleadings* (n 571) 542.

581 *Memel Pleadings* (n 571) 176–77 (Malkin, UK).

582 *Memel Pleadings* (n 571) 190 (Pilotti, Italy).

A further possible interpretation is that the parties of the Paris Convention had collective rights at stake ('not to defend their particular interests'; 'no rights of their own'). The applicants did later refer to their common or unified interests in the solution of the dispute.[583] Again, 'collective' rights are certainly conceivable. However, this notion does not sit well with the present state of general international law, where obligations *erga omnes* exist. If states can: **1)** individually invoke responsibility for impairment of those rights, **2)** bilaterally —thus *inter se*, individually— derogate from rights even where the enjoyment of other States' rights is at stake,[584] it is hard to see how these rights could be considered as collective rights, at least in general international law.

3 Liberties and Obligations concerning the Treatment of Individuals

(a) The Position of a State's own Nationals and of Stateless Individuals

The same scheme is at work where the treatment of individuals by the territorial State is concerned. Again, the three 'rules of thumb' through which classic, general international law created obligations *inter partes* should be remembered here. **First**, a State held liberties to act respecting individuals/things over which no State —or no other State but itself— would have supremacy. **Second**, a State bore obligations to act in certain ways with respect to individuals/things over which other States did have supremacy. **Third**, these obligations would be established out of deference to the supremacy/sovereignty of the correlative-right-holding-State only.[585] It should also be

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583 *Memel Pleadings* (n 571) 190 (Pilotti, Italy).

584 See pp 105–18, above.

585 See pp 99–101, above.

remembered that States had **territorial supremacy** over all individuals/things found within its territory and **personal supremacy** over its nationals, at home or abroad.[586]

In classic, general international law a State was at liberty to (mis)treat its own nationals. A State would violate no obligation[587] or engage its responsibility[588] by mistreating its own nationals. Over these individuals the state of nationality would have both personal supremacy and, when applicable, territorial supremacy. It is telling that one of the ways in which the impossibility for State B to exercise diplomatic protection against State A for mistreatment of a common national was that State A would violate no obligation in (mis)treating this individual.[589] State A's conduct would constitute '… action on the domestic plane'.[590] Under one line of argument, the dual national would place itself under the jurisdiction of State A, which jurisdiction could not be impeached by another sovereign's jurisdiction.[591] Thus if the pattern discussed before is correct and no other State could claim supremacy over

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586 See pp 99–100, above.

587 See, eg, Lauterpacht 1952 (n 416) vol 1, 256, 279, 583; Van Panhuys (n 552) 44, 183; JL Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th edn Clarendon Press, Oxford 1963) 291 ('…no rule was clearer'); G Schwarzenberger and ED Brown, *A Manual of International Law* (6th edn Professional Books, Milton 1976) 143.

588 *Dickson Car Wheel Co (USA) v United Mexican States* (1931) IV RIAA 669, 678. cf *Alexandre Tellech (US v Austria and Hungary)* (1928) VI RIAA 248, 249.

589 Amerasinghe (n 529) 52–53.

590 Amerasinghe (n 529) 52.

591 *Alexander's Case (GB v US)* (1872) 3 Moore Int Arb 2529, 2531; *Tellech* (n 588) 249. cf erosion of this principle in ILC, 'Titles and Texts of the Draft Articles on Diplomatic Protection Adopted by the Drafting Committee on Second Reading' (19 May 2006) UN Doc A/CN.4/L.684 (DADP) art 7.

individuals as against its national/territorial State, it is not surprising that States held these unfettered liberties.

The only settled[592] exception to this state of affairs did not detract from this scheme. If a State expelled an alien with a nationality, the State of nationality had to admit this individual if the expelling State requested it to do so.[593] This obligation complemented the expelling State's liberty to expel aliens from its territory.[594] And just as the expelling State was at liberty to expel or allow aliens into its territory,[595] any other potential receiving State had the same liberty.[596] If the expelling State 'inconvenienced'[597] receiving States by forcing them to receive the individuals it had expelled, it would break the law.[598] However, if the expelled alien was a national of the receiving State, this was not the case.[599] The key is that a State's liberty to expel

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592 cf the case of humanitarian intervention. Lauterpacht 1952 (n 416) vol 1, 279–80; Brierly (n 587) 291–92.

593 Van Panhuys (n 552) 56; P Weis, *Nationality and Statelessness in International Law* (2nd edn Sijthoff & Noordhoff, Alphen aan den Rijn 1979) 46; Jennings and Watts (n 414) 858. See also Schwarzenberger and Brown (n 587) 114 text associated to fn 63.

594 Van Panhuys (n 552) 56.

595 *Boffolo Case (Italy v Venezuela)* (1903) X RIAA 528, 531–32, 537 [1]; Lauterpacht 1952 (n 416) vol 1, 631–32. See also Brownlie (n 444) 520. See further *Re Immigration Act and Hanna* (1957) 24 ILR 465 (Sup Ct British Columbia) (Canada) 468–69, 471; Shaw (n 416) 1022, on expulsion of aliens as a form of retorsion, which entails lack of obligation (thus liberty) on the State undertaking to this.

596 Jennings and Watts (n 414) 857–58; Goodwin-Gill (n 539) 200 text associated to fn 3. See further *Hanna* (n 595) 471.

597 Van Panhuys (n 552) 55.

598 *Engel v Zubrick* 51 F2d 662 (6th Cir 1931) (US) 633 text associated to fn 1.

599 Van Panhuys (n 552) 56 [II.a)]. cf *Engel* (n 598) 633.

aliens furthered its territorial supremacy; [600] it originated from that State's sovereignty,[601] at any rate. Of course, limitations have gradually been imposed on States' discretion in this regard, then[602] and now.[603] However, again, this obligation was established in furtherance of a State's own territorial supremacy. This obligation falls under the second and third rules of thumb[604] and was owed *inter partes*.

A further step of the analysis is the position of the stateless individual in classic, general international law. Through their 'international status', [605] stateless individuals may be assimilated to aliens.[606] However, no State could claim personal supremacy over them, by definition. Therefore,[607] harm to stateless individuals would

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600 Lauterpacht 1952 (n 416) vol 1, 631. cf the position of the receiving States in Weis (n 593) 47.

601 *A-G for Canada v Cain* [1906] AC 542 (PC) 545–46, 546 ('One of the rights possessed by the supreme power in every State') (especially).

602 *Boffolo* (n 595) 532, 537 [2]–[4]. See also references at Cheng (n 564) 36 fns 13–15.

603 See, eg, the prohibition of *non refoulement* discussed in *Soering v UK* (App No 14038/88) (1989) 11 EHRR 439, 464 ff. See also Brownlie (n 444) 521; Shaw (n 416) 736.

604 See pp 141–42, above.

605 *Gilon v Chmoulowsky* (1940) 11 AD 186 (Court of Appeals of Paris) 186.

606 2nd Restatement (n 568) 518 [g] (§ 171) in light of § 171(a), 529 [d] (§ 175) ('… stateless alien.'); Jennings and Watts (n 414) vol 1, 886 fn 2 and associated text. See also *Chokr v Katz* (1923) 2 AD 258 (Egypt) 258; *Talima v Minister of the Interior* (1927) 8 AD 313 (Estonia) 313. Municipal systems of law treated stateless individuals as non-aliens for many reasons. Thus, see, eg, *Nationality of Married Women (Danzig) Case* (1932) 6 AD 257, 257; *Poor Persons' Procedure (Poland) Case* (1934) 8 AD 311, 311–312; *Poor Persons' Procedure (Austria) Case* (1935) 8 AD 314, 314; *obiter dictum* in *Hanna* (n 595) 469.

607 2nd Restatement (n 568) 529 [d] (§ 175) ('… a state, being responsible only to other states, could not be responsible to anyone for an injury to a stateless alien').

prejudice no State's supremacy.[608] Stateless individuals fell within the complete sway of the territorial State's jurisdiction and supremacy. Unsurprisingly, it was believed that '[a] State … does not commit an international delinquency in inflicting an injury on an individual lacking nationality'.[609] States did not break any obligation by (mis)treating them in any way.[610]

(b) State Responsibility for Injury to Aliens (with a Nationality)

Having considered the position of stateless individuals, the position of aliens **with a nationality** becomes clearer. As is well known, States of nationality had —have— the right that territorial States observe international law on the person of its nationals.[611] Territorial States had —have— a correlative obligation to observe international law in the person of another State's nationals. What this thesis would highlight is that in classic, general international law, only when another State's nationals were involved would the territorial State's liberties be curbed. Of course, any obligation owed between States forbidding mistreatment of certain individuals would protect these individuals. But protection was not afforded to these individuals because they were individuals; otherwise, a State's own nationals and stateless

608 Schwarzenberger and Brown (n 587) 95 text associated to fn 7, 115, assimilating stateless individuals with *res nullius*, cited with approval by Weis (n 593) 119.

609 *Dickson* (n 588) 678.

610 2nd Restatement (n 568) 529 [d] (§ 175). See also Jennings and Watts (n 414) vol 1, 886; Amerasinghe (n 529) 117

611 See ch 1, p 15 n 35 and associated text, above.

individuals should have been afforded protection of the law.[612] They were not. Likewise, it is not an individual's general status as an alien that granted that individual protection;[613] otherwise stateless individuals would arguably[614] have received protection through an international obligation as well. They did not. Only the existence of a State of nationality would establish these protections in general international law.

Therefore, it was actually because of the State of nationality's sovereignty/supremacy that individuals received protection. It is in this context that this thesis would agree with most of the statement in *Dickson*, to the effect that

> The injury inflicted upon an individual, a national of the claimant State, which implies a violation of the obligations imposed by international law upon each member of the Community of Nations, constitutes an act internationally unlawful, because it signifies an offense against the State to which the individual is united by the bond of nationality. The only juridical relation, therefore, which authorizes a State to exact from another the performance of conduct prescribed by international law with respect to individuals is the bond of nationality. This is the link existing between that law and individuals and through it alone are individuals enabled to invoke the protection of a State …[615]

The underlined passages of this statement illuminates on what this thesis seeks to convey: in classic, general international law, only nationality was a source of rights for the national State; obligations, for the territorial State; and protection, for

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612 And see Van Panhuys (n 552) 44, on the moral equivalency to protection of all individuals. See also Amerasinghe (n 529) 76, assimilating the international minimum standard with the protection of 'interests of individuals' through modern human rights law.

613 Thus the concept of 'state responsibility for injury to aliens' is overbroad.

614 cf n 612 and associated text, above.

615 *Dickson* (n 588) 678 (emphasis added).

individuals. But this thesis would suggest that the statement is somewhat wrong in assuming that this state of affairs is due to[616] an '… offense against the State … of nationality'. Aside from being circular —if an 'offense' is committed through the breach of right highlighted in the next sentence—, this thesis would object that the right of the State of nationality is itself the result of an antecedent process. And this process is the now familiar one of accommodating the territorial and personal supremacies involved when an alien with a nationality is admitted in a State's territory.

It is in this way that this thesis understands the **third** 'rule of thumb', whereby obligations like these would be established out of deference to the supremacy/sovereignty of the correlative-right-holding-State only.[617] The position of stateless individuals highlights this 'rule of thumb' rather neatly. From this vantage point, then, it is understandable that the legal position of the maltreating State's own nationals and that of stateless individuals could be assimilated.[618] Neither of these types of individuals had a State with a claim to supremacy over them other than the State which mistreated them.

Indeed, the accommodation of personal and territorial supremacy can also be seen in the justifications for primary obligations concerning the treatment of aliens with a nationality. A certain element of hindsight in the way this thesis accounts for

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616 *Dickson* (n 588) 678 ('The only juridical relation, <u>therefore</u>') (emphasis added).

617 And see pp 105–22, above,

618 And see *Dickson* (n 588) 679.

the origin these primary obligations cannot be ruled out.[619] Opposition by Latin American States to diplomatic protection has now largely been overcome[620] although, at the time, the achievement of —a mutually satisfactory— solution to this debate might not have seemed as assured as it does now.

But it is perhaps because the existence of these primary obligations had to be explained that many justifications for them were asserted.

Thus some would have it that the primary obligation to observe international law over aliens with a nationality results from the effects of the State of nationality's personal supremacy over the territorial State's territorial supremacy.[621] A form —an extreme form— of this argument would identify the individual as an element of the former State, a State's population being one of the elements of its very statehood.[622] This view is probably wrong, as a State's population also includes individuals other than its own nationals. But it is telling that attempts to justify the obligation refer to the relationship between the individual and the State, rather than to the individual

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619 See p 98, above,

620 In fact, see Constitution 2010 (Dominican Republic) art 25(3), allowing for recourse to diplomatic protection by aliens. See also Constitution 1983 (El Salvador) art 99; Constitution 1985 (Guatemala) art 29; Constitution 1982 (Honduras) art 33, allowing for the same in case of denial of justice. See further Constitution 1949 (Costa Rica) art 19. cf Constitution 2008 (Ecuador) art 416(12); Constitution 1993 (Peru) art 71; Constitution 1999 (Venezuela) arts 151, 301, limiting diplomatic protection.

621 GI Leigh, 'Nationality and Diplomatic Protection' (1971) 20 ICLQ 453, 453 fn 3 and associated text, 455; M Bennouna, 'Rapport Préliminaire sur la Protection Diplomatique' (UN Doc No A/CN.4/484, YbILC 1998-II(1)) 3 [10] text associated to fn 7; JR Dugard, 'First Report on Diplomatic Protection' (UN Doc No A/CN.4/586, YbILC 2000-II(1)) 13 [36] text associated to fn 45. See also Van Panhuys (n 552) 21–22.

622 Van Panhuys (n 552) 21 ('… personal element').

alone. Another view —the most popular— would justify these primary obligations on the personal jurisdiction the State of nationality. The latter retains —prescriptive— jurisdiction over nationals abroad, which prevents the total submission of that individual to the territorial State's —presumably[623] enforcement— jurisdiction.[624]

A similar situation occurred with respect to the visitation of ships in the high seas. In classic, general international law, jurisdiction over ships in the high seas was left to the State whose flag the ship in question is flying.[625] Flag State jurisdiction was exclusive,[626] for the most part.[627] Therefore, the flag State was at liberty to exercise jurisdiction over ships flying its own flag.[628] Conversely, visiting a vessel flying another State's flag without its consent in times of peace '… constitutes a violation of the sovereignty of the country whose flag the vessel flies'[629] in general international

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623 See p 130–31, above.

624 Bennouna (n 621) [10]; Dugard (n 621) [36].

625 *Le Louis* (1817) 2 Dodson 210, 253; 165 ER 1464, 1478; *The Antelope* (1825) 23 US 66 (US Sup Ct) 122–23, 130; *Lotus* (n 549) 25. And see, eg, UNCLOS (n 486) art 92(1).

626 G Gidel, *Le Droit International Public de la Mer: Le Temps de Paix* (Sirey, Chateauroux 1932) vol 1, 256–57, commenting on coercible acts. See also Convention on the High Seas (opened for signature 29 April 1958, entered into force 30 September 1962) 450 UNTS 11 (CHS) art 11(3); UNCLOS (n 486) art 97(3).

627 The coastal State had/has some measure of jurisdiction to ensure innocent passage, the port State has jurisdiction over vessels in port or attempting to enter into port, etc.

628 See n 625, above. See also *Crim, 15 janvier 1985* Bull Crim 1985, N 27; N° de pourvoi 84-92517 (Cour de Cassation) (France), accepting jurisdiction of French court to order carrying out expertise on French ship located in foreign port; 2nd Restatement (n 568) §§ 31(a), 32(1)(a).

629 *Owners of the Jessie, the Thomas F Bayard and the Pescawha (Great Britain) v. United States* (1921) VI RIAA 57, 58 (emphasis added).

law.[630] All discussions about sovereignty and supremacy of primary-right-holding-States and of supremacy over individuals should be remembered here.

The position of stateless vessels was similar to that of stateless individuals. A vessel is stateless where it is not entitled to fly the flag of any State.[631] Thus '[n]o question of … breach of international law could arise if there was no State under whose flag a vessel sailed.'[632] The need for the existence of that other State is reminiscent of the position of stateless individuals in *Dickson*.[633] The absence of that State was fatal to the claim in *Molvan*.[634] A ship flying no flag was not protected by any international obligation.[635] Any State was at liberty to board ships of no nationality in general international law.[636]

Accordingly, since **1)** the existence of a State of nationality was a condition of obligations respecting individuals in classic, general international law, **2)** respect to that State's supremacy was involved in the creation of the relevant legal relations, and

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630 cf *Jessie* (n 629) 58 ('… except by special convention').

631 *US v Rosero* 42 F3d 166 (4th Cir 1994) (US) 171.

632 *Molvan v A-G for Palestine* [1948] AC 351 (PC) 369. See analysis of this case in Churchill and Lowe (n 488) 214. However, the situation of the crews of these vessels was different.

633 (n 588). See p 146, above.

634 (n 632) 353.

635 *R v Dean* [1998] 2 Cr App R 171 (CA) 179. See also Lauterpacht 1952 (n 416) vol 1, 546.

636 Churchill and Lowe (n 488) 214 ('… this right … is implicit in the status of stateless ships.'); Shaw (n 416) 548. See also UNCLOS (n 486) art 110(1)(d).

3) having considered the effects that creating rights for 'third' parties would entail,[637] it is reasonable to confirm[638] that obligations concerning the treatment of individuals —ie of aliens with a nationality— were owed *inter partes*, thus:

> **(1)** State A owes State B not to expropriate State B's nationals;
> **(2)** State A owes State C not to expropriate **State C's** nationals;
> **(3)** State A owes State D not to expropriate **State D's** nationals; **(…)**
> **(25)** State A owes State Z not to expropriate **State Z's** nationals.

(c) Departures from this Pattern

That said, this scheme describes a pattern that existed in general international law up to modern times. But whereas **classic**, **general** international law almost never imposed obligations on States over their own nationals, **classic**, **conventional** international law did do so, albeit rarely. For instance, the Peace of Westphalia (1648) included obligations like these. One of the Treaties of Münster established obligations to respect the religious freedoms of Lutherans throughout Germany.[639] This would now be recognised as obligations over a State's own nationals,[640] to which they are *analogous*.[641]

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637 See pp 105–22, above.

638 *Barcelona Traction* (n 526) 32 [33], [35].

639 Peace Treaty between the Holy Roman Emperor and the King of France and their Respective Allies (Münster) (opened for signature 24 October 1648) 1 CTS 271 (Treaty of Münster) art XXVIII ('Those of the Confession of Augsburg').

640 cf Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (opened for signature 4 November 1950) (ECHR) art 9; American Convention of Human Rights (opened for signature 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143 (ACHR) art 12.

641 The idea of nationality as understood today did not fully develop until the 19th Century.

Indeed, treaties of this kind tended to come about at the end of armed conflicts or at moments in which States organised far-reaching international law regimes. An important landmark in this regard[642] is the Treaty of Berlin 1878,[643] which ended the Russo-Turkish War (1877–1878). Article XLIV obliged Romania not to discriminate against its own nationals on the basis of religion when granting civil rights, hiring public employees, issuing professional regulations, etc. It also obliged Romania to guarantee the religious freedom of its own citizens and of foreigners. Similarly, article LXI obliged the then Ottoman Empire to enact reforms benefiting its Armenian subjects. The Ottoman Empire had to guarantee their security against violence from its Kurdish and Circassian subjects. Likewise, article LXII established obligations for the Ottoman Empire that were analogous to Romania's obligations under article XLIV. Other provisions of interest include Montenegro's obligation under article XXIX not to possess a navy.[644]

Representations were made to Romania about non-fulfilment of its obligations concerning its Jewish population. At the very least, these representations illustrate that the legal positions of all parties vis-à-vis Romania's fulfilment of the obligation were identical and that unanimous —collective— consent was not required to make them. Indeed, respect for non-discrimination and religious freedom was a condition

642 cf Lauterpacht 1952 (n 416) vol 1, 264; D Anzilotti, 'La Responsabilité Internationale des États à Raison des Dommages Soufferts par des Étrangers ' (1906) XIII RGDIP 5, 10.

643 Treaty between Austria-Hungary, France, Germany, Great Britain, Italy, Russia and Turkey for the Settlement of Affairs in the East (opened for signature 13 July 1878, entered into force 3 August 1878) 153 CTS 171 (Treaty of Berlin 1878).

644 See pp 161–65, below.

for the recognition of Romanian independence.[645] Article XLIV was not accepted by the Romanian Government[646] or by Romanian public opinion,[647] each for different reasons,[648] the loss of Bessarabia to Russia among them.[649] This state of affairs hindered attempts at reforming Romanian laws.[650] Thus although Romania did modify —the relevant— article 7 of the Constitution of 1866, enshrining the gist of article XLIV,[651] these reforms still made it difficult for Jews to acquire Romanian nationality. To a certain extent, Romania made its Jewish citizens stateless,[652] with a view to escaping from the provisions of article XLIV of the Treaty of Berlin 1878.[653]

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645 Treaty of Berlin 1878 (n 643) arts XLIII–XLIV.

646 C Iancu, *Jews in Romania, 1866–1919: From Exclusion to Emancipation* (East European Monographs No 449, Columbia University Press, Boulder 1996) 94 ff.

647 Iancu (n 646) 101–05. And cf I Geiss, *Der Berliner Kongreß 1878: Protokolle und Materialien* (Schriften des Bundesarchivs No 27, Boldt, Boppard am Rhein 1978) 102 (Wadddington, France) ('… S.E. ne se dissimule pas les dificultés locales qui existent en Roumanie') (emphasis added). cf also at pp 84–85 (Gorchakov, Russia).

648 E Sincerus, *Les Juifs en Roumanie, depuis le Traité de Berlin (1878) jusqu'à ce Jour: Les Lois et Leurs Conséquences* (Macmillan, London 1901) 1–2.

649 RW Seton-Watson, *A History of the Roumanians: From Roman Times to the Completion of Unity* (The University Press, Cambridge 1934) 344, 347.

650 cf *Roumania (No 1) Correspondence Relative to the Recognition of the Independence of Roumania* (C (2nd Series) 2554, 1880) 62–63, 68 (White).

651 Iancu (n 646) 105–06; Seton-Watson (n 649) 352.

652 *Kahane c Parisi et État autrichien* (1929) VIII RDTAM 943, 956–57.

653 *C (2nd Series) 2554* (n 650) 67 (White). See also Lauterpacht 1952 (n 416) vol 1, 611 fn 2; Iancu (n 646) 107. Romania would have disputed this characterisation; see *Kahane* (n 652) 950 ('…ils n'étaient pas considérés, par la Roumanie, comme des … heimatloses.') *Heimatlos*, in German, means stateless.

The reforms of the Constitution of 1866 fell short of the Treaty of Berlin's requirements. France protested the new reform of the Constitution.[654] For its part, the UK considered certain aspects of the new reforms were a breach of article XLIV.[655] Both Governments withheld recognition of Romanian independence on these grounds. Germany did likewise, but its motives were not exclusively guided by 'humanitarian considerations'.[656] Germany wanted Romania to cancel its debts with Prussian investors who financed the construction of Romanian railway lines.[657] Only after settling this claim[658] did the three States recognise Romania through a common note, on 20 February 1880. They repeated their discomfort with the violations of the Treaty of Berlin 1878, but left it to the Romanian Government to enforce its laws fairly.[659] The Romanian Government had previously given guarantees that it would carry out the promised reforms in accordance with the Treaty of Berlin 1878, as far as

654 ie William Henry Waddington, the one-time French Prime Minister and Minister of Foreign Affairs. See Iancu (n 646) 107.

655 *C (2nd Series) 2554* (n 650) 4 (Marquess of Salisbury), in light of p 66 (art 7(1)).

656 Iancu (n 646) 108.

657 Iancu (n 646) 108; Seton-Watson (n 650) 351.

658 Seton-Watson (n 650) 353.

659 *C (2nd Series) 2554* (n 646) 88, 91–92. See also *Kahane* (n 652) 952–53.

practicable, in face of domestic opposition.[660] Complete and equal citizenship was only granted to Romanian Jews in 1918–1919.[661]

A further example some of those contained in article VI of the GABC 1885.[662] Article VI bound States exercising sovereignty over the Congo Basin, among other regions,[663] to forbid the slave trade among natives. The ICJ would recognise this prohibition as an example of an obligations *erga omnes*.[664] Among the parties to the GABC 1885 there was the Congo Free State (1885–1908), a sovereign entity but personal fiefdom of the King of Belgium,[665] which later became a Belgian colony (1908–1960).

Incidentally, the GABC 1885 was later modified through the GABC 1890 and the prohibition of slavery was relaxed[666] in certain colonies where slavery was

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660 *C (2nd Series) 2554* (n 650) 45. See also Sincerus (n 648) 6–7.

661 *Kahane* (n 652) 950, 953. And see Treaty between the Principal Allied and Associated Powers and Roumania (opened for signature 9 December 1919) 5 LNTS 335 (Minorities Romania) art 7.

662 General Act of the Conference of Plenipotentiaries of Austria-Hungary, Belgium, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, Sweden-Norway, and Turkey (and the United States) respecting the Congo (opened for signature 26 February 1885, entered into force 19 April 1886) 165 CTS 485 (GABC 1885).

663 cf GABC 1885 (n 662) art I.

664 *Barcelona Traction* (n 526) 32 [34].

665 The territory of the Congo Free State was originally owned by the *Association Internationale du Congo*, in effect 'an instrument of the King of the Belgians' (AB Keith, *The Belgian Congo and the Berlin Act* (Clarendon Press, Oxford 1919) 45). It was the private property of the King of Belgium, although it was also a recognised, sovereign entity. For a relevant history, see ibid chs II–V, especially at pp 38–39, 45–50, 53–54, 62–67.

666 General Act of the Brussels Conference relating to the African Slave Trade between Austria-Hungary, Belgium, Congo, Denmark, France, Germany, Great Britain, Italy, the Netherlands,

widespread. An example was Zanzibar, a British protectorate since 4 November 1890,[667] before the GABC 1890 came into force[668] —but after its conclusion. During this brief period of time, the UK had assumed the obligations of the GABC 1885,[669] but tolerated slavery in Zanzibar. The Congo Free State pointed out to as much in 1906, when making a *tu quoque*-style defence against the British claims discussed here.[670] The GABC 1890 would fall foul of *jus cogens* at present. But the GABC 1890 does show that there is nothing inherent in the concept of obligations *erga omnes* or other morally compelling obligations that forbids their derogation through *inter se* agreements.[671] That would prevent their derogation: their replacement with some other legal relation. When considering the *inter se* modification of obligations *erga omnes*[672] or *jus cogens*,[673] it should be borne in mind that there is nothing

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Persia, Portugal, Russia, Spain, Sweden-Norway, Turkey, the United States and Zanzibar (opened for signature 2 July 1890, entered into force 30 March 1892) 173 CTS 293 (GABC 1890) art III.

667 'Foreign Office, 4 November 1890' *London Gazette* (London 4 November 1890) 5802. See also Agreement for Protection between Great Britain and Zanzibar (opened for signature 14 June 1890) 173 CTS 249 (Zanzibar Protectorate Treaty) art I.

668 cf 173 CTS 321, 324.

669 GABC 1885 (n 662) art I(3).

670 *Africa No 1 (1906): Correspondence respecting the Report of the Commission of Inquiry into the Administration of the Independent State of the Congo* (Cd 3002, 1906) 19.

671 *Oscar Chinn (UK/Belgium)* (Judgment) PCIJ Rep Series A/B No 63, 132–33, 135 (SO Van Eysinga). See also 149 (SO Schücking). cf similarly *Customs Regime* (n 412) 64 (SO Anzilotti).

672 cf pp 105–18, above.

673 See ch 3, pp 205–14, below.

inherent in the concept of obligations —*erga omnes* or otherwise— that would determine the invalidity of other conflicting obligations.[674] Additional, suitable arguments must be marshalled to prove the invalidity of conflicting obligations (eg that state practice and *opinio juris* support this contention).

Returning to article VI of the GABC 1885, in general international law, inhabitants of the Congo Free State were under the territorial and personal supremacy of that entity. Therefore, the Congo Free State would ordinarily have held absolute liberties to (mis)treat these individuals. Indeed, when resisting UK claims about the way it treated these individuals, the Free State insisted on these liberties.[675] It considered its conduct to be outside the remit of the PCA and of arbitral tribunals.[676] This line of argument would only be correct if article VI GABC 1885 was deemed '… a declaration of general principles … rather than a binding obligation'.[677] But as article VI contained true international obligations,[678] the Free State's erstwhile

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674 The GABC 1890 was itself revised by the Convention revising the General Act of Berlin, February 26, 1885, and the General Act and Declaration of Brussels, July 2, 1890 (opened for signature 10 September 1919) 15 AJIL Supp 314 (1919 Revising Convention), but not with respect to the prohibition of slavery. This treaty did not include all parties to the GABC 1885 (eg Spain); it was applied by the PCIJ '… dans le[s] rapports mutuels'of the UK and Belgium in *Oscar Chinn* (n 671) 80, regardless.

675 *Africa No 1 (1904): Correspondence and Report from His Majesty's Consul at Boma respecting the Administration of the Independent State of the Congo* (Cd 1933, 1904) 2. ('… ne se trouve … aucune disposition … qui reconnaîtrait … un droit d'intervention dans l'administration des affaires intérieures')

676 *Cd 1933* (n 675) 9.

677 *Cd 3002* (n 670) 19.

678 cf GABC 1885 (n 662) art VI ('All the Powers … bind themselves … to help in suppressing slavery, and especially the slave trade. They shall ...') (emphasis added).

liberties of 'internal' administration would disappear.[679] Indeed, the UK claimed rights of GABC 1885 parties to ensure that its provisions were complied with.[680] Were the UK's thesis correct, any other party would presumably hold the same right. And —without explicitly claiming these rights— the US also made representations to the Free State about the treatment of native populations and asked for remedial action.[681]

Other examples can be found in the docket of the ICJ.

On occasion of *Genocide 1951*,[682] States before the Court discussed the nature of the obligations arising under the Genocide Convention.[683] Concretely, Israel believed that some of the obligations on cooperation in the elimination of genocide were of a 'contractual' —as opposed to 'normative'— nature.[684] The distinction between the 'contractual' and the 'normative'[685] will recur in this thesis. It is

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679 cf the US's position on the matter, at (1909) 3 AJIL Supp 94, 95; (1909) 3 AJIL Supp 140, 140–41.

680 *Cd 3002* (n 670) 18, 19 (Sir E Grey). See also *Africa No 7 (1904): Further Correspondence respecting the Administration of the Independent State of the Congo* (Cd 2097, 1904) 41 (Marquess of Landsdowne), adducing obligations of the parties so to act.

681 (1909) 3 AJIL Supp 94, 95–96.

682 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15 (*Genocide 1951*).

683 Convention on the Prevention and Punishment of the Crime of Genocide (opened for signature 1 January 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention).

684 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* ICJ Pleadings, 334 (Rosenne, Israel).

685 See also *Genocide 1951 Pleadings* (n 685) 315 (Kerno, UN).

misguided.[686] But suffice it to point out for now that a 'contractual' obligation is owed by one party to another;[687] ie it is a primary obligation/right. The prohibition of genocide is now an obligation *erga omnes*.[688]

Shortly before this, on occasion of the two *Peace Treaties* advisory opinions,[689] the UK and the US were even more explicit. Thus at the end of World War II (1939–1945), the peace treaties with Hungary, Bulgaria and Romania included obligations to respect the human rights of these States' own nationals.[690] The US and the UK set in motion the procedures for the settlement of disputes laid down in these conventions alleging violations of the human rights provisions by the three States. Defects in these provisions ultimately foiled all attempts to use of these procedures.[691] But before this —advisory— ruling was issued, the States that

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686 See, eg, ch 4, pp 253–57, below.

687 The UK would not agree that obligations under the Genocide Convention were of a contractual nature, but it did agree that a contractual obligation was owed by one party to another. See, eg, *Genocide 1951 Pleadings* (n 685) 63–64, 67–68 (UK).

688 See introduction, pp 1–2, above. On reciprocal, 'contractual'obligations, see ch 4, pp 235–41, below.

689 *Interpretation of Peace Treaties* (Advisory Opinion) [1950] ICJ Rep 65; *Interpretation of Peace Treaties (Second Phase)* (Advisory Opinion) [1950] ICJ Rep 221.

690 Treaty of Peace with Hungary (opened for signature 10 February 1947, entered into force 15 September 1947) 41 UNTS 167; 42 AJIL Supp 225 (Treaty of Peace with Hungary) art 2; Treaty of Peace with Bulgaria (opened for signature 10 February 1947, entered into force 15 September 1947) 41 UNTS 49; 42 AJIL Supp 179 (Treaty of Peace with Bulgaria) art 2; Treaty of Peace with Romania (opened for signature 10 February 1947, entered into force 15 September 1947) 42 UNTS 33; 42 AJIL Supp 252 (Treaty of Peace with Romania) art 3. See also Treaty of Peace with Italy (opened for signature 10 February 1947, entered into force 15 September 1947) 49 UNTS 3 (Treaty of Peace with Italy) arts 15–16; Treaty of Peace with Finland (opened for signature 10 February 1947, entered into force 15 September 1947) 48 UNTS 203 (Treaty of Peace with Finland) arts 6–7.

691 See especially *Peace Treaties II* (n 689) 228–29.

appeared before the Court made several remarks about the nature of the human rights provisions in the peace treaties.

Thus, the three States pleaded that the way they treated their own nationals was part of their domestic jurisdiction.[692] In their correspondence with these three States, the US and the UK both rejected the notion that the treatment of these States' own nationals could still form part of the reserved domain despite the relevant treaty provisions.[693] Before the Court, they expanded on this position; in so doing, they claimed that they were owed a primary obligation that the three States respected the human rights of their nationals as per the treaty. The USSR was hostile to the proceedings.

For the US, the three States undertook obligations vis-à-vis the other parties through their respective peace treaties.[694] On this basis, the US requested 'remedial measures'[695] —eg cessation of wrongful conduct— from the three States concerned. The UK went even further. It claimed to have '… certain rights under the Peace Treaties, rights to the observance of the provisions regarding human rights, and that the ex-enemy Governments have corresponding obligations.'[696] The UK asserted '…

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692 See, eg, *Peace Treaties Pleadings* (n 525) 137–43 (US).

693 cf Pauwelyn (n 452) 72('… human rights … is a national matter … between the public authorities of a State and its own nationals.'), 73 ('… inherently national'). cf also, in a different context, Provost (n 403) 401 ('… internal nature').

694 *Peace Treaties Pleadings* (n 525) 155 (US).

695 *Peace Treaties Pleadings* (n 525) 143 (US).

696 *Peace Treaties Pleadings* (n 525) 320 (Fitzmaurice, UK). See also at p 177 (UK).

its own rights',[697] thereby seeking '… fulfilment towards itself'[698] of the obligations in question. It bears noting that Canada,[699] as well as Australia and New Zealand,[700] joined in with the US and the UK in accusing the three States of wrongful acts before the matter went to the Court. However, these States either did not appear before the Court or did not elaborate on the nature of the entitlements they had under the peace treaties.

Nevertheless, it remains the case that the US and the UK both claimed primary rights. They claimed that the three States concerned owed them the obligation to observe the human rights provisions on their own nationals. For this thesis, this is of paramount importance.

4 Liberties concerning the Regulation of a State's Own Agents, Form of Government, and Legal System

Finally, the same scheme is at operation with the obligations —or lack of them— concerning State's own legal system. Before considering them, the three 'rules of thumb' whereby classic, general international law created obligations *inter partes*, should be remembered. **First**, a State held liberties to act respecting individuals/things over which no State —or no other State but itself— would have supremacy. **Second**, a State bore obligations to act in certain ways respecting

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697 *Peace Treaties Pleadings* (n 525) 326 (Fitzmaurice, UK). See also p 330 [5] (Fitzmaurice, UK)

698 *Peace Treaties Pleadings* (n 525) 330 [5] (Fitzmaurice, UK)

699 *Peace Treaties Pleadings* (n 525) 137 fn 2, 138 fn 4, 140 fn 5 (US), 87 [2] 109 (UK).

700 *Peace Treaties Pleadings* (n 525) 73 [7], 85 [3] (UK).

individuals/things over which other States had supremacy. **Third**, these obligations would be established out of deference to the supremacy/sovereignty of the correlative-right-holding-State only.[701] And, again, States had what this thesis has termed **organisational supremacy** over all of its agents and over its legal system.[702]

In principle, sovereignty allows States '… considerable liberties in respect of internal organization'.[703] Among these liberties there was that of deciding on the size of their armed forces and on how to equip them. The statement to the effect that '…in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited'[704] reflects the legal position in classic, general international law. As such, this liberty follows the same pattern as other entitlements discussed before. The object of this liberty concerns the liberty-holder's own armed forces, over which no other State has supremacy. Accordingly, this liberty is analogous to a State's liberty to exercise enforcement jurisdiction over its own territory,[705] over its own nationals and stateless individuals,[706] over ships flying their own flag,[707] and so on. Furthermore, like all liberties discussed before, this liberty

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701 See p 100, above.

702 See p 100, above.

703 Brownlie (n 444) 106.

704 *Nicaragua 1986* (n 450) 135 [269] (emphasis added).

705 See pp 129–36, above.

706 See pp 141–45, above.

existed in general international law; exceptions only occurred through treaties.[708] The possibility of acceptance of limitations to armament through convention conveys as much. Therefore, a contrary state of affairs was not impossible to conceive, but it had to be expressly consented to by the liberty-holder.

Thus at the end of World War I (1914–1918), certain disarmament obligations were imposed on Austria through the Treaty of St Germain.[709] This would be a derogation from the first 'rule of thumb', whereby liberties exist with respect to the treatment of individuals/things over which no other State had supremacy. And because the obligation would concern the obligation-bearer's own armed forces, the second and third 'rules of thumb' would not apply.[710] Thus other States would be given rights over the obligation-bearer's armed forces; they have no claim to supremacy respecting their organisation. This obligation is not created out of deference to the supremacy of all right-holders. These States had no claim to supremacy over the obligation-bearer's armed forces.

And, indeed, at the prospect of Austrian rearmament in the 1930s, the 'Little Entente' protested what it saw as a violation of that treaty. The 'Little Entente'

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707 See pp 149–50, above.

708 cf Lauterpacht 1952 (n 416) vol 1, 258–59, where treaty exceptions to supremacy feature examples of obligations analogous to *erga omnes* ones (eg disarmament obligations).

709 Treaty of Peace between the Principal Allied and Associated Powers, Belgium, China, Czechoslovakia, Cuba, Greece, Nicaragua, Panama, Portugal, Roumania, the Serb-Croat-Slovene State and Siam, and Austria (opened for signature 10 September 1919) 226 CTS 8 (Treaty of St Germain) part V.

710 See pp 161–62, above.

comprised Czechoslovakia, Yugoslavia, and Romania. They were defensive allies.[711] All three States and Austria were also parties to the Treaty of Saint Germain. Among other obligations, the Treaty of Saint Germain obliged Austria to keep an army of volunteers and accordingly forbade universal compulsory military service.[712] On 1 April 1936, Austria introduced compulsory military service for all 18–42 year-old males.[713] Seven days later, the 'Little Entente' protested this measure adducing, *inter alia*, violations of the Treaty of Saint Germain.[714] Austria replied that these measures helped guarantee its independence. Further, Austria stated that, at any rate, the 'informal approval' of its acquisition of tanks and airplanes[715] meant that insistence on compliance with the Treaty of Saint Germain was extemporaneous.[716] On 8 May 1936, the 'Little Entente' reiterated the need to observe the disarmament provisions of the Treaty of Saint Germain.[717]

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711 Little Entente Pact (opened for signature 16 February 1933, entered into force 30 May 1933) (1933) 27 AJIL Supp 117 (Little Entente Pact).

712 Treaty of St Germain (n 709) art 119.

713 (1936) 30 AJIL 517, 517; (1934–1936) Keesings 2493H, 2494.

714 (1934–1936) Keesings 2500D; '3 States Protest Austria's Arming' *New York Times* (New York 7 April 1936) 13; 'Conscription in Austria: Protest by Little Entente' *Times* (London 7 April 1936) 15.

715 cf Treaty of St Germain (n 709) arts 135, 144.

716 'Illegality is Questioned' *New York Times* (New York 7 April 1936) 13.

717 (1934–1936) Keesings 2544C, 2545; 'Policy of Little Entente: A Difficult Moment' *Times* (London 9 May 1936) 13. See also (1936) 30 AJIL 519, 519.

It is not clear who ‘informally approved’ Austrian rearmament. But it seems that the ‘Little Entente’ acted on its own, without seeking the concurrence of other parties to the Treaty of St Germain. When considering the notion of collective rights, this should be borne in mind.

D CHAPTER CONCLUSION

This chapter has explained why obligations *inter partes* came to prevail in **classic**, **general** international law. These obligations are linked to the notion of state sovereignty; they helped to further two of sovereignty's aspects: independence and supremacy. Three 'rules of thumb' were distinguished in this regard:

(1) States were at liberty to deal with individuals/things over which no other State had supremacy. (**Independence**)

(2) Obligations reversed these liberties where the former liberty-holder State attempted to exercise its entitlements over an individual/thing over which another State had **supremacy**; and

(3) Obligations were only owed to the State with **supremacy** over the individuals/things concerned out of respect for its sovereignty alone, thereby excluding the possibility of obligations owed to the international community as a whole.

It has also been discussed that obligations not being owed to more than one State also furthered independence and supremacy. Being owed a primary obligation —ie holding a primary right— is important in international law because it entitles the State concerned:[718]

(1) To demand redress for breach of that obligation; ie standing to invoke State responsibility;

(2) To contract out of the primary obligation in question, *jus cogens* permitting;

Accordingly, being owed obligations *erga omnes* (*partes*) entitles the relevant State(s):

(1) **Individually** to demand redress for the breach of the obligation, *without prejudice to other States' claims*;

(2) **Bilaterally** —thus not collectively— to contract out of the relevant primary obligations, *jus cogens* permitting, *without prejudicing other States' identical but discrete rights; in turn, this creates a conflict of entitlements*.

[718] See ch 1, pp 55–84, above; ch 2, pp 102–24, above.

None of these entitlements could be extinguished without the consent of the State that held them. Therefore, the concession of rights on States other than those whose supremacy or conduct is involved ('third' States) would wrest ultimate control from those States, say, to dispose of the legal consequences of wrongful acts. It was speculated, then, that the prevalence of obligations *inter partes* was not a coincidental.[719]

At the same time it was concluded how these entitlements show that obligations *erga omnes* and its correlative rights were primary, rather than secondary, and individual/discrete, rather than collective or ancillary to other States' rights. It has also been argued that exceptions to this classical scheme did exist in certain treaties; these exceptions support arguments made in this thesis. However, these exceptions did not —necessarily, at least— result in a change in the fabric of international law or in the character of these obligations.

Of course, these contentions are not universally accepted. All will be defended in turn. The next chapter will consider obligations *erga omnes* more directly. It will explain how these obligations differ —or not— from related notions and why the way this thesis conceives of them is more coherent than most of the present-day literature on the matter.

[719] See p 89, above.

CHAPTER 3 THE CONCEPT OF OBLIGATIONS *ERGA OMNES*

A INTRODUCTION: THE 'ESSENTIAL' DISTINCTION BETWEEN OBLIGATIONS *ERGA OMNES* AND OBLIGATIONS *INTER PARTES*

1 Introduction

This chapter will consider obligations *erga omnes* in more detail. The modern debates on obligations *erga omnes* started with the 1970 ICJ judgment in the *Barcelona Traction* case.[720] Barcelona Traction was owned in great part by Belgian nationals, both physical and juridical persons. With the outbreak of the Spanish Civil War (1936–1939), the company's services were interrupted. This plunged the company into heavy debt until, in 1948, bond-holders requested Spanish courts to submit the company to bankruptcy procedures. Though extensively litigated in Spain, the dispute was not solved to the satisfaction of the Belgian nationals. This prompted Belgium to take a claim for denial of justice before the ICJ. The claim was initially filed on behalf of Barcelona Traction itself and later, through a new application, on behalf of its Belgian shareholders.

In short, the case turned on whether the State of nationality of the shareholders could exercise diplomatic protection for loss suffered through measures taken against company incorporated in a third State. The Court answered the question in the negative. The case thus turned on the classic law of diplomatic protection to decide this case. However, in arriving at this conclusion, the ICJ first made an 'essential distinction' between obligations '… whose performance is the subject of diplomatic

720 *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (New Application: 1962)* (Judgment) [1970] ICJ Rep 3.

protection'[721] and obligations owed to the international community as a whole; that is, between what in this thesis calls obligations *inter partes* and obligations *erga omnes*. This has rightly been considered an *obiter dictum*.[722] However, '[t]he dicta of the Court are no less influential than the *rationes decidendi*… of its pronouncements', as Brownlie warns.[723] Indeed the ICJ's *dictum* on obligations *erga omnes*, the classic pronouncement on the matter, has '…taken on a life of … [its] own'[724] to the extent that obligations *erga omnes* now form part of positive law.

Again, the 'essential distinction' is the main problem that this thesis intends to grapple with —and oppose—: determining what it is that makes obligations *erga omnes*, unique and which distinguishes them from obligations *inter partes*. At face value, the 'essential distinction' *concerns the character of what obligations erga*

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721 *Barcelona Traction* (n 720) 32 [35] ('…obligations dont la protection diplomatique a pour objet d'assurer le respect.')

722 See, eg, H Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989' (1989) LX BYIL 1, 94; C Annacker, 'The Legal Regime of Erga Omnes Obligations in International Law' (1994) 46 AJPIL 131, 133; M Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford Monographs in International Law, Clarendon Press, Oxford 1997) 7; J Delbrück, '"Laws in the Public Interest" — Some Observations on the Foundations and Identification of *Erga Omnes* Norms in International Law' in V Götz, P Selmer and R Wolfrum (eds) *Liber Amicorum Günther Jaenicke — Zum 85 Geburtstag* (Beitrage zum ausländischen öffentlichen Recht und Völkerrecht No 135, Springer, Berlin 1998) 17, 35; 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, 1057; M Koskenniemi, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of General International Law' (UN Doc No A/CN.4/L.682, YbILC 2006) [387]; P Picone, 'La Distinzione tra Norme Internazionali di *Jus Cogens* e Norme che producono Obblighi *Erga Omnes*' (2008) XCI RIDI 5, 7, 9–10. cf J Crawford, 'Third Report on State Responsibility' (UN Doc No A/CN.4/507, YbILC 2000) [97].

723 I Brownlie, 'The Relations of Nationality in Public International Law' (1963) XXXIX BYIL 284, 286–87.

724 CJ Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge Studies in International and Comparative Law, CUP, Cambridge 2005) 2.

omnes protect: the importance of rights protected by these obligations. This will be refuted in time.

2 Bilateral and Multilateral 'Rules' and Obligations

The structure of obligations *erga omnes* could be classified, somewhat imperfectly, as 'multilateral'.[725] As stated before, a distinction has to be made between a rule or source, such as custom, and obligations contained in those rules or sources.[726] Similarly, bilateral and multilateral rules and bilateral and multilateral obligations should also be distinguished.

Bilateral means having two sides or parties;[727] **multilateral**, three or more sides or parties.[728] A **bilateral rule** (eg a bilateral treaty or bilateral custom) operates only for two parties; a **multilateral rule**, operates for three or more parties. At the present stage of international law, only customary obligations operate for all members of the international community. Accordingly an obligation can only be owed to all the

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725 Crawford, 'Responsibility' III (n 722) [96], [106], [106(a)]; J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (CUP, Cambridge 2002) 154 [8] (art 17); J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law relates to Other Rules of International Law* (Cambridge Studies in International and Comparative Law No 29, CUP, Cambridge 2003) 61. See also C Dominicé, 'The International Responsibility of States for Breach of Multilateral Obligations' (1999) 10 EJIL 353, 358, fn 18 (especially).

726 See introduction, pp 7–6, above.

727 J Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 RdC 325, 335.

728 Crawford 2006 (n 727) 336.

members of that community if that obligation exists in general customary law,[729] a multilateral rule.

That said, a **bilateral obligation/right** is often defined as one that binds/entitles two parties only, even if that obligation is contained in a multilateral rule.[730] Thus, multilateral treaties that feature bilateral rules are often considered as multilateral in 'external appearance'[731] but bilateral in application.[732] The ability, say, to suspend or terminate a treaty on account of material breach as against the defaulting State only,[733] without further legal effects, also points to this idea. An example of a bilateral obligation would be any of the primary obligations that

729 See, introduction, p 5, above,

730 See, eg, Crawford, 'Responsibility III' (n 722) [25], [99], [100]; Dupuy 2002 (n 722) 1072; Crawford 2006 (n 727) 343 text associated to fn 24; G Gaja, 'The Concept of an Injured State' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 943.

731 B Simma, 'Reflections on Article 60 of the Vienna Convention on the Law of Treaties and its Background in General International Law' (1970) 20 ÖZöR 5, 47 text associated to fn 168.

732 See, eg, Simma 1970 (n 731) 47 text associated to fn 168, 48 text associated to fn 177, 68–69, 76 text associated to fn 326; B Simma, 'From Bilateralism to Community Interest' (1994) 250 RdC 217, 336, 342, 351; Crawford, *Commentaries* (n 725) 83 [8] (art 2); M Spinedi, 'From One Codification to Another: Bilateralism and Multilateralism in the Genesis of the Codification of the Law of Treaties and the Law of State Responsibility' (2002) 13 EJIL 1099, 1106 fn 27; Tams 2005 (n 724) 45. See also W Riphagen, 'Third Report on the Contents, Forms and Degrees of State Responsibility (Part 2 of the Draft Articles)' (UN Doc No A/CN.4/354, YbILC 1982-II(1)) 37 [92], 38 [98], 43 [126]; W Riphagen, 'Sixth Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles); and "Implementation" (*Mise en Œuvre*) of International Responsibility and the Settlement of Disputes (Part 3 of the Draft Articles)' (UN Doc No A/CN.4/389, YbILC 1985-II(1)) 7 [14] (art 5); K Sachariew, 'State Responsibility for Multilateral Treaty Violations: Identifying the "Injured State" and its Legal Status' (1988) 35 NILR 273, 277; J Alcaide Fernández, 'Orden Público y Derecho Internacional: Desarrollo Normativo y Déficit Institucional' in A Salinas de Frías and M Vargas Gómez-Urrutia (eds) *Soberanía del Estado y Derecho Internacional: Homenaje al Profesor Juan Antonio Carrillo Salcedo* (Servicio de Publicaciones de la Universidad de Córdoba, Sevilla 2005) 91, on obligations with bilateral effects.

733 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) sub-ss (a)(i), (b).

underlie the classic law of diplomatic protection.[734] These obligations have already been represented, in schematic form, thus:

(1) Spain owes Canada certain treatment of Canadian nationals;
(2) Spain owes Belgium certain treatment of Belgian nationals;
(3) Spain owes Ethiopia certain treatment of Ethiopian nationals; and so on.

Although all obligations bind/entitle two parties only, the concept of 'bilateral obligation' effectively conveys that the breach of any of these obligations has legal consequences for two States only. *Again, the key to bilateral and multilateral obligations is not who is addressed their correlative rights but what these obligations/rights consist of*. The key to bilateral obligations is that their objects differ slightly from that of similar obligations.[735] All things the same, the treatment required of Spain over Ethiopian nationals is equal to that required of Spain over Canadian nationals; but Spain's obligations towards Ethiopia do not *consist of* the treatment of Canadian nationals. Likewise, obligations *consisting of* the treatment of Ethiopian nationals are not owed to Canada. The beneficiaries of the obligations (ie individuals) might well receive equal treatment, but the right-holders (ie States) are not entitled to see all beneficiaries treated in this way. Thus when the obligation owed to Ethiopia is breached, the obligation towards Canada is left intact.

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734 *Barcelona Traction* (n 720) 47 [89] ('... esentiellement bilatéraux').

735 cf Annacker (n 722) 136 text associated to fn 31 ('… (identical) bilateral legal relationships.'); R Huesa Vinaixa, 'Plurality of Injured States' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 950.

Conversely, then, a **multilateral obligation** is described as one that is owed to more than one State.[736] Because of the *pacta tertiis* principle,[737] parties entitled to observance of a multilateral, primary obligation must be parties of the rule that contains them;[738] therefore multilateral obligations are necessarily contained in multilateral rules. However, what has been said about the imperfection of the classification of 'bilateral obligations' and about their convenience for this thesis also applies to multilateral obligations. As stated before, the key to obligations *erga omnes*, examples of multilateral obligations, is that exactly identical obligations are borne by one State vis-à-vis all other relevant States. Thus if:

(1) State A owed State B not to mistreat **State B's** nationals;
(2) State A owed State C not to mistreat **State B's** nationals;
(3) State A owed State D not to mistreat **State B's** nationals **(…)**
(25) State A owed State Z not to mistreat **State B's** nationals.

If State A mistreats State B's nationals, all States to which these obligations are owed would hold secondary entitlements,[739] but severally and discretely.[740] That is, the effects of breach would not be confined to two States only. The multilateral aspect of these obligations occurs at secondary level, rather than at primary level. And this thesis rejects the notion that 'multilateral' obligations cannot be described in

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736 Crawford, 'Responsibility III' (n 722) [9], [106]. See also Dominicé (n 725) 357.

737 cf VCLT (n 733) art 35.

738 See W Riphagen, 'Preliminary Report on the Contents, Forms and Degrees of State Responsibility (Part 2 of the Draft Articles on State Responsibility)' (UN Doc No A/CN.4/330, YbILC 1980-II(1)) 114 [37], with respect to multilateral and bilateral treaties.

739 See ch 1, pp 56–82, above.

740 See ch 2, pp 118–22, above.

bilateral terms at primary level: that they are not 'bilateralisable', as they indeed are.[741]

Consequently, multilateral obligations could best be defined —pending more extensive discussion— *as a related set of primary obligations whose objects are identical, and, therefore, whose breach leads to general default*.

3 Legal Interests and the Structure of Obligations *Erga Omnes* and Obligations *Inter Partes*

In any case, that obligations *erga omnes* are 'multilateral' obligations[742] is showed by how all States are said to have a 'legal interest' in their observance.[743] By contrast, only Canada had a truly 'legal interest' at stake in *Barcelona Traction*.[744] The notion of legal interest is equivocal.[745] Most agree that a State's 'concern'[746] that a certain obligation is carried out does not by itself give that State either standing to invoke responsibility for its breach or the status of correlative right-holder. That is, the 'mere',[747] 'simple',[748] or 'pur sang'[749] interest of States that obligations are carried

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741 See ch 4, pp 258–69, 264 (especially), below.

742 See n 736, above.

743 *Barcelona Traction* (n 720) 32 [33] ('… intérêt juridique').

744 This is the implication in *Barcelona Traction* (n 720) 41–45 [69]–[84].

745 And see A Gattini, 'A Return Ticket to "Communitarisme", please' (2002) 13 EJIL 1181, 1192–93, on different possible meanings of this notion.

746 *Barcelona Traction* (n 720) 32 [33] ('… concernent tous les États.').

747 G Arangio-Ruiz, 'Third Report on State Responsibility' (UN Doc No A/CN.4/440 and Add.1, YbILC 1991-II(1)) 18 [52].

out does not turn States into right-holders.[750] Many understand legal interests as a mere concern that other States carry out obligations the obligations that they bear.[751]

Two other meanings of legal interest are more to the point. First, a legal interest can mean a primary right.[752] In *South West Africa 1966*, legal interests were understood in this way.[753] Second, a legal interest could mean standing[754] to invoke responsibility (secondary entitlements) or standing to seise a tribunal. In *South West Africa 1962*, legal interests were understood in this way. This was the main thrust of the discussion in the context where the statement was made. [755] Likewise, the ICJ held that article 7 of the Mandate granted LoN members legal interests in the

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748 *Barcelona Traction* (n 720) 38 [54].

749 A De Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (Kluwer Law International, The Hague 1996) 12–15.

750 See also G Gaja, 'Obligations and Rights Erga Omnes in International Law (First Report)' (2005) 71 (I) AIDI 117, 121. See also at p 156 (Lady Fox). But cf E Katselli Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (Routledge, London 2010) 1 ('… fundamental interests owed to the international community as a whole') (emphasis added), 174.

751 See Pauwelyn (n 725) 81. See also, eg, Crawford, 'Responsibility III' (n 722) [109] ('… legitimate concern'), in light of [104] ('… right or even a legally protected interest') (emphasis added).

752 See, eg, K Zemanek, 'New Trends in the Enforcement of Erga Omnes Obligations' [2000] 4 MPUNLY 1, 29–30.

753 *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Second Phase)* (Judgment) [1966] ICJ Rep 6, 37–39 [60], [63]–[65], 42 [73], 51 [99].

754 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 (*Genocide 2007*) 120 [185] ('… legal interest or standing').

755 *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Preliminary Objections) [1962] ICJ Rep 319, 343–44, 344 ('… right to take legal action') (especially).

observance of primary obligations owed to themselves and *to other entities* —ie the LoN and the mandated populations.[756] Consequently, the applicants had standing to seise the Court despite their lack of primary rights. Although it is normally the case that standing is granted to primary-right-holders,[757] many would refuse to recognise all States a primary right in the observance of obligations *erga omnes*. In such a case, States' 'legal interests' would only consist in the ability to invoke responsibility for breach of obligations not actually owed to them.[758] These conceptions of legal interests and obligations *erga omnes* will be the subject of chapter 5.

In any case, the relevance of the concept of obligations *erga omnes* for standing[759] has appeared in several ICJ cases.

In *Nuclear Tests*, Australia and New Zealand, the applicants, argued that there was an obligation for France not to conduct atmospheric nuclear tests operated in relation to every State.[760] Hence, the applicants claimed they could invoke obligations *erga omnes* in these proceedings along the lines of *Barcelona Traction*.[761] The Court

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[756] *South West Africa 1962* (n 755) 343–44.

[757] See ch 1, pp 56–82, below.

[758] See ch 5, pp 319–51, below.

[759] The distinction between standing to invoke responsibility and standing to seise a court (eg the ICJ) is seldom made, but can be maintained. See ch 1, pp 62–71, above.

[760] *Nuclear Tests (Australia v France)* ICJ Pleadings, 333–36, 338–42 (Memorial, Australia); *Nuclear Tests (New Zealand v France)* ICJ Pleadings, 203 [190](a)–(b), 209–11 (Memorial, NZ), 264–65 (Finlay, NZ)

[761] *Nuclear Tests Australia Pleadings* (n 760) 334–35, 343; *Nuclear Tests NZ Pleadings* (n 760) 207–12 (Memorial, NZ), 264–66, 266 (especially) (Finlay, NZ)

ruled that statements by France that it would carry out no further nuclear tests in the South Pacific made the dispute 'disappear'.[762] Although the Court did not elaborate on *Barcelona Traction*, many of its judges did.

Judge Petrén believed that international law did not regulate nuclear tests and consequently that the applicants lacked standing.[763] Nevertheless, he approved of *Barcelona Traction*. He believed that States assumed international human rights obligations even in relation to their own nationals vis-à-vis all States of the international community, *ought to be* admissible.[764] Thus he believed that *Barcelona Traction* addressed the question of standing. Likewise, Judges Onyeama, Dillard, Jiménez de Aréchaga, and Waldock felt that an *actio popularis* on the basis of *Barcelona Traction* could be the subject of '… rational legal argument and [be] a proper subject of litigation'.[765] Judge *ad hoc* Barwick would have granted standing to the applicants along *Barcelona Traction* lines.[766]

By contrast, Judge De Castro rejected the *Barcelona Traction* dictum outright. He believed applicants did not possess legal interests and, therefore, that they lacked

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762 *Nuclear Tests (Australia v France)* (Judgment) [1974] ICJ Rep 253, 271 [56]; *Nuclear Tests (New Zealand v France)* (Judgment) [1974] ICJ Rep 457, 476 [59].

763 *Nuclear Tests Australia* (n 762) 302–03, 305–06. The separate opinions in both cases are substantially the same. Only the Australian case will be cited hereafter.

764 *Nuclear Tests Australia* (n 762) 303.

765 *Nuclear Tests Australia* (n 762) 369–70 [117].

766 *Nuclear Tests Australia* (n 762) 437–38.

standing.[767] Contrary to Judge Petrén, he could not believe the Court meant to allow State A could complain against State B for State B's breach of its own nationals' human rights through *Barcelona Traction*,[768] a decision he would rather have interpreted in light of customary law.[769] At the very least, his position testifies to *the perception* that *Barcelona Traction* did concern the issue of standing. By contrast, Judge Gros implied that an action based on obligations *erga omnes* was inadmissible, but did not elaborate further.[770]

Dissenting in *East Timor*,[771] a case already commented on,[772] Judge Weeramantry would have granted 'judicial relief' —and therefore, standing— to Portugal, the applicant.[773] It should be remembered that Portugal challenged a 1989 treaty of delimitation of the East Timorese continental shelf between Indonesia, which invaded East Timor in 1976, and Australia. Portugal asserted standing on the basis of East Timor's *erga omnes* right to self-determination and its status as administering power of its former colony.[774] Portugal argued that the 1989 treaty

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767 *Nuclear Tests Australia* (n 762) 388.

768 *Nuclear Tests Australia* (n 762) 387.

769 *Nuclear Tests Australia* (n 762) 388.

770 *Nuclear Tests Australia* (n 762) 288 [21], on obligations *erga omnes* and *actio popularis*.

771 *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90.

772 See ch 1, pp 64–65, text associated to nn 287–88, 290, above.

773 cf *East Timor* (n 771) 202, 214–215, 221 [C].

774 cf *East Timor (Portugal v Australia)* ICJ Pleadings, 1, 19 (application, Portugal).

deprived East Timor of valuable natural resources and therefore violated its right to self-determination.[775] The Court agreed that self-determination was an example of obligations *erga omnes*, but it declared the application inadmissible for lack of jurisdiction.[776] For Judge Vereshchetin, Portugal's standing depended squarely on the East Timorese people's right to self-determination.[777] Consequently, he would not allow standing unless Portugal proved its application was supported by the people of East Timor.[778] By implication he would have held the opposite if the requisite support from the people of East Timor had been established.

Finally, in *Ugandan Armed Activities*,[779] Uganda filed a counter-claim alleging that 17 Ugandan nationals and diplomatic personnel had been '… detained for more than three hours, brutally beaten, insulted and spat upon' by DRC soldiers.[780] The counter-claim was declared inadmissible because Uganda had not successfully proven these individuals possessed Ugandan nationality and therefore could not meet the rule of nationality of claims.[781] Uganda did not invoke the breach

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775 cf *East Timor Pleadings* (n 774) 1, 11–20 (application, Portugal).

776 *East Timor* (n 771) 102 [29].

777 *East Timor* (n 771) 135.

778 *East Timor* (n 771) 135 ff, 136 (especially).

779 *Armed Activities on the Territory of the Congo (DRC v Uganda)* (Judgment) [2005] ICJ Rep 168.

780 *Armed Activities on the Territory of the Congo (DRC v Uganda)* ICJ Pleadings, [399], [405] (counter-memorial, Uganda), [52] (Suy, Uganda, hearing no CR 2005/10).

781 *Ugandan Armed Activities* (n 779) [333].

of any obligation *erga omnes*.[782] But for Judge Simma, who noticed this oversight,[783] had Uganda pleaded violations of these individuals' human rights and to humanitarian law, Uganda could have asserted standing.[784] He would justify standing to enforce humanitarian law would on common article 1 of the Geneva Conventions[785] and for human rights treaties, on article 48(1)(a) ASR.[786]

All of these opinions testify to the effect of *Barcelona Traction* to the question of standing[787] (and of its lack of success in subsequent cases). Other alleged effects of obligations *erga omnes* such as the obligations not to recognise the legality of acts breaching them[788] and to cooperate in bringing and end to them[789] do not fit this thesis.

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782 *Ugandan Armed Activities Pleadings* (n 780) [405] (counter-memorial, Uganda), [52] (Suy, Uganda, hearing no CR 2005/10).

783 *Ugandan Armed Activities* (n 779) [32] (SO Simma).

784 *Ugandan Armed Activities* (n 779) [33]–[34] (SO Simma).

785 See, eg, Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (opened for signature 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva IV) art 1.

786 *Ugandan Armed Activities* (n 779) [33]–[35] (SO Simma); Annex, UNGA Res 56/83 (12 December 2001) UN Doc A/Res/56/83 (ASR).

787 And see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, 216 [37] (SO Higgins). cf *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA)* (Order : Provisional Measures) [1984] ICJ Rep 169, 198 (SO Schwebel).

788 And see *Wall* (n 787) 200 [159]. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16 (*Namibia*) 56 [126]. cf *Wall* (n 787) 231–32 [41]–[42] (SO Kooijmans).

B DISTINGUISHING OBLIGATIONS *ERGA OMNES* FROM RELATED NOTIONS

1 Introduction

On the basis of the provisional definition of multilateral obligations adopted above,[790] obligations *erga omnes* can swiftly be distinguished from other related notions.

2 *Erga Omnes* Effects of Certain Legal Regimes

A first distinction should be made between obligations *erga omnes* and the *erga omnes* effects of certain legal regimes. As stated before, obligations *erga omnes* create rights among all the parties to the rule (ie custom) that contains them.[791] By contrast, the legal regimes considered here create obligations/rights for States that are not parties to it.[792] Thus, for instance, in *Aaland Islands*, a LON commission of jurists held that Sweden could demand from Finland that it fulfil the obligation not to fortify the Aaland Islands.[793] The obligation arose from an annex to the Treaty of Paris 1856,[794] which ended the Crimean War (1853–1856). Sweden was a third party to this regime. Likewise, the ICJ held that the UNGA's termination of the South African

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789 And see *Wall* (n 787) 200 [159].

790 See pp 174–75, above.

791 See introduction, p 5, above.

792 Riphagen, 'Responsibility III' (n 732) 42 [121]; Delbrück (n 722) 25; Tams (n 724) 204, 308, 309–10 [1]. See also *International Status of South West Africa* (Advisory Opinion) [1950] ICJ Rep 128, 153 (SO McNair). See further Annacker (n 722) 131.

793 *Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Questions* (1920) 3 LNOJ Sp Supp 5.

794 Convention between Great Britain, France, and Russia respecting the Aaland Islands (opened for signature 30 March 1856, entered into force April 27 1856) 46 BFSP 23 (Aaland Island Treaty) art I.

mandate over South West Africa/Namibia[795] as valid *erga omnes*, even among non-UN Members.[796]

Accordingly, these regimes, sometimes called 'objective regimes', introduce an added complication to the subject. Whereas obligations *erga omnes* operate among all States of the international community <u>*because*</u> they are part of general international law, these 'objective regimes' operate among all States <u>*in spite of*</u> the limited number of parties to the treaty or customary rule that creates them. Some who support the notion that obligations *erga omnes* only create secondary entitlements for States would have it that 'objective regimes' are not altogether different from obligations *erga omnes*[797] or that they may be likened to obligations *erga omnes* in some respect.[798] As will be seen later, the position that obligations *erga omnes* create secondary entitlements only implies that no State in the international community, aside from States historically owed obligations in general international law —eg the State of nationality, territory, property, etc— was entitled to see these obligations fulfilled. Regardless, all States would be entitled to react to its breach.[799] As the States concerned would be third parties to the primary obligations arising from

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795 Mandate for German South West Africa (1921) 2 LNOJ 89 (SWA Mandate).

796 *Namibia* (n 788) 56 [126].

797 Delbrück (n 722) 19.

798 J Juste Ruiz, 'Las Obligaciones "Erga Omnes" en Derecho Internacional Público'*Estudios de Derecho Internacional: Homenaje al Profesor Miaja de la Muela* (Tecnos, Madrid 1979) generally. See also U Linderfalk, 'International Legal Status Revisited - The Status of Obligations Erga Omnes' (2011) 80 Nord JIL 1, 4.

799 See ch 5, pp 319–51, below.

objective regimes, the analogy with obligations *erga omnes* is reasonable, from this standpoint.

Since rights under these regimes are derived even by non-parties, discussing them in detail would digress from the main subject of this thesis significantly. 'Objective regimes' will not be considered any further.

3 Rights *Erga Omnes* and Obligations *Omnium*

A second distinction has to be drawn between *rights correlative* to obligations *erga omnes* and rights *erga omnes*/obligations *omnium*. Rights *erga omnes* are correlative to obligations binding on all possible entities: rights opposable *erga omnes*[800] by the right-holder. The concept appears, for instance, in *East Timor*, where Portugal argued that these rights give rise to obligations *omnium*, that is, obligations binding on all entities on which the rule in question operates.[801] The term 'obligations *omnium*' was coined by Weil, who defined them as obligations '... binding on all States without distinction, regardless of individual consent.'[802] Therefore, as Weil understands it, the concept would also include, say, the inability of a persistent objector to escape from the applicability of a customary rule.[803] The consent aspect of obligations *erga omnes*

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800 See *East Timor* (n 771) 102 [29] cited with approval in: *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v Rwanda)* (Order : Provisional Measures) [2002] ICJ Rep 219, 245 [71]; *Wall* (n 787) 172 [88]. See further F Voeffray, *L'Actio Popularis ou la Défense de l'Intérêt Collectif devant les Juridictions Internationales* (Publications de l'Institut Universitaire de Hautes Études Internationales, Genève, PUF, Paris 2004) 86; Gaja 2005 (I) (n 750) 134–35.

801 *East Timor Pleadings* (n 774) 114 [5.04] fn 267 and associated text (Reply, Portugal).

802 P Weil, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 413, 433. See also at p 437.

803 See also Weil 1983 (n 802) 438.

cannot be extensively discussed in this thesis. What is relevant is that 'rights *erga omnes*' and 'obligations *omnium*' are opposable to all States. Therefore, 'rights *erga omnes*' are rights correlative to 'obligations *omnium*'; hence their being analysed in one section.

The problem is that while all rights correlative to obligations *erga omnes* are opposable to all States, not all rights opposable to all States (ie rights *erga omnes*) feature an obligation *erga omnes* as their correlative.[804] Thus, in *East Timor*, Portugal argued that obligations *erga omnes* and rights *erga omnes* were different concepts, although they could overlap.[805] Existing in general international law as they do,[806] obligations *erga omnes* are owed by every State to every other State. Therefore, the entities that hold rights correlative to obligations *erga omnes*[807] do indeed hold these rights against every State. Thus if a right *erga omnes* is a right held against every State, rights correlative to obligations *erga omnes* are rights *erga omnes*. However, rights correlative to some obligations *inter partes* that exist in general international law are also held against every State. Thus, State A is entitled that none of States B, C

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804 Voeffray (n 800) 86; S Villalpando, *L'Émergence de la Communauté Internationale dans la Responsabilité des Etats* (Publications de l'Institut Universitaire de Hautes Études Internationales, PUF, Paris 2005) 100. cf Gaja 2005 (I) (n 750) 129.

805 *East Timor Pleadings* (n 774) 114 [5.04] (Reply, Portugal). See also Weil 1983 (n 802) 422 ('... the appearance, alongside obligations *erga omnes*, of ... obligations *omnium*.') (emphasis added).

806 See introduction, p 5, above.

807 As if the terminology in this respect was not muddled enough, Arangio-Ruiz has referred to such rights as 'rights *omnium*'. See G Arangio-Ruiz, 'Fourth Report on State Responsibility' (UN Doc No A/CN.4/444, YbILC 1992-II(1)) 44 [132].

… Z board ships flying its flag in the high seas without its consent. This right is held against all States, but the correlative obligations are owed *inter partes* to State A.[808]

The practical difference between obligations and rights *erga omnes* can be illustrated through the concept of attribution. Acts of State B, obligation-bearer, are not attributable to States C, D … Z, obligation-bearers, except in circumstances not relevant to this thesis.[809] It should be remembered that obligations are legally required conduct for the obligation-bearer.[810] This insight of Hohfeld's is critical here, as the *rights erga omnes* that State A's ships not be boarded in the high seas have *many independent obligation-bearers, but only one right-holder*. Thus when State B boards State A's ships in violation of its obligation vis-à-vis State A, States C, D … Z's legal relations with State A remain unaffected,[811] despite the '*erga omnes*' character of State A's *right*. By contrast, if this thesis is correct, *obligations erga omnes* are aggregates of identical, bilateral obligations for which there *is a multitude of right-holders, but only one obligation-bearer*. For instance, if Spain simultaneously broke the rights of Belgium, Canada, and Ethiopia when it mistreated Canadian nationals in

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808 See ch 2, pp 149–50, above.

809 ASR (n 786) art 6.

810 See ch 1, pp 11, 35 n 137 and associated text, above.

811 J Crawford, 'Overview of Part Three of the Articles of State Responsibility' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 935 ('Every State is responsible for its own conduct in respect of its own international obligations.')

the hypothetical scheme discussed above,[812] Spain's actions would simultaneously — but severally— infringe all rights correlative to those obligations.

In sum, the notion of right *erga omnes* is not irrelevant to obligations *erga omnes*. However, they are broader than obligations *erga omnes*. All rights correlative to obligations *erga omnes* are rights *erga omnes*, but so are rights correlative to some obligations *inter partes* that exist in general international law. Therefore the notion of rights *erga omnes* and the related notion of obligations *omnium* will not be considered any further.

[812] See p 173, above.

C THE IMPORTANCE OF RIGHTS PROTECTED BY OBLIGATIONS *ERGA OMNES*

1 Introduction

As stated before, for the ICJ made an 'essential distinction'[813] between obligations owed *inter partes* and obligations owed *erga omnes* in which the latter are owed thus *because they protect 'important' rights*.[814] This statement is quite bold. It also: **1)** contradicts positive international law, **2)** creates definitional problems, as it does not account for a plethora of obligations structurally identical to obligations *erga omnes* that may protect values of lesser importance —viz obligations *erga omnes partes*—, and **3)** allows obligations *erga omnes* to be confused with *jus cogens*.

The main problem with this approach is to believe that obligations owed *erga omnes* are so owed because of the fundamental character of what they protect: that the importance of the underlying value sufficiently explains why an obligation is owed *erga omnes*. Others would have it that the importance of these values is necessary —ie a condition— to explain the structure of these obligations.[815] Prof Tams even rejects other commentators' conceptions of obligations *erga omnes* because they do not take into account ICJ statements on the importance of obligations *erga omnes*.[816]

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813 ie that they are different in nature, an idea many accept. See, eg, Delbrück (n 722) 18; M Ragazzi, 'International Obligations *Erga Omnes*: Their Moral Foundation and Criteria of Identification in Light of Two Japanese Contributions' in GS Goodwin-Gill and S Talmon (eds) *The Reality of International Law: Essays in Honour of Ian Brownlie* (Clarendon Press, Oxford 1999) 466; Tams (n 724) 125. See also also Zemanek (n 752) 20 ('…by their very nature, owed to a community of states').

814 *Barcelona Traction* (n 720) 32 [33] ('Vu l'importance des droits en cause') (emphasis added).

815 J Crawford, 'Fourth Report on State Responsibility' (UN Doc No A/CN.4/517, YbILC 2001) [50].

816 Tams (n 724) 118, 131, 133.

Prof Tams maintains that the importance of the rights that obligations *erga omnes* protect is one of the necessary components of those obligations.[817] Different but similar focuses (eg on the moral importance of obligations *erga omnes*)[818] also exist in the literature.

Now, it can readily be conceded that all examples of obligations erga omnes identified by the ICJ undeniably protect '... essential principles of contemporary international law.'[819] It goes without saying that the determination of the importance of an obligation, vis-à-vis another, is a troubling matter. The ICJ gave no guidance on how to determine this. However, it is not impossible to tackle this element of the 'essential distinction', eg, by considering States' pronouncements on this matter or judgments by international tribunals.[820] In any case, it is clear that the examples of obligations *erga omnes* identified by the ICJ undeniably protect 'important rights'. As examples of obligations *erga omnes*, the Court has identified the outlawing of acts of aggression and of genocide, as well as the principles and rules concerning 'les droits fondamentaux de la personne humaine', including the protection against slavery and racial discrimination,[821] the right to self-determination[822] and obligations deriving

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817 Tams (n 724) 153–56.

818 Ragazzi 1997 (n 722) 203.

819 *East Timor* (n 772) 102 [29]. And see Voeffray (n 800) 243.

820 Tams (n 724) 153–55.

821 *Barcelona Traction* (n 720) 32 [34].

822 *East Timor* (n 771) 102 [29]; *Wall* (n 787) 199 [155].

from humanitarian law.[823] This thesis will not dispute that these prohibitions protect important values.

However, from the fact that all obligations erga omnes protect important rights, it does not follow that all obligations that feature correlative rights of the same or of an equivalent degree of importance are owed erga omnes. This is implied in the idea that obligations are owed *erga omnes* because they protect such important rights. In simpler words, it would not be consistent with the ICJ's dictum to find obligations *inter partes* —ie not owed *erga omnes*— that protect the exact same rights as obligations *erga omnes* do. But in *Barcelona Traction* itself the ICJ made remarks on the existence of such contradiction itself. The ICJ rightly observed that 'obligations whose performance is the subject of diplomatic protection' —ie obligations *inter partes*—, like human rights obligations —owed *erga omnes*—,[824] also include protection against denial of justice.[825] In the same passage, the ICJ likened denial of justice to human rights. Some noted the contradiction between both passages with respect to human rights.[826]

The more relevant contradiction is that obligations inter partes, like obligations erga omnes, may protect the same right or value. Those who comment on how the passage discussed above stands for the proposition that some human rights

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823 *Wall* (n 787) 199 [155].

824 *Barcelona Traction* (n 720) 32 [34].

825 *Barcelona Traction* (n 720) 47 [91].

826 cf, eg, Thrilway (n 722) 100 ('… withdrawal on the question of human rights').

are not owed *erga omnes*[827] perceived the contradiction, but did not draw the appropriate conclusions. Other examples can readily be found in positive law. The protection of individuals' right to life[828] is an arguable example of one of the 'basic rights of the human person',[829] protected by obligations *erga omnes*.[830] Nevertheless, obligations respecting the international minimum standard also include a prohibition against taking lives of aliens.[831] The latter type of obligations are owed *inter partes*.

Aside from the illogic of using a trait shared by two concepts in order to explain their differences, the ICJ's definition creates a more practical problem. If obligations *erga omnes* and obligations *inter partes* protect the same or similarly important rights, an obligation could be considered both owed *erga omnes* and owed *inter partes* at the same time. Or, more precisely, an obligation could be said to belong to either category depending on which of its aspects the legal operator in question decides to focus on. This problem will reappear when considering the role of community interests for the structure of obligations *erga omnes*.[832]

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827 See, eg, J Crawford, 'First Report on State Responsibility' (UN Doc No A/CN.4/490, YbILC 1998) [71].

828 Universal Declaration of Human Rights, UNGA Res 217 A (III) (10 Dec 1948) (UDHR) art 3.

829 *Case of the Gómez-Paquiyauri Brothers v Peru* (Judgment) IACtHR Series C No 110 (8 July 2004) [128] fn 105 and associated text.

830 *Barcelona Traction* (n 720) 30 [34].

831 *Thomas H Youmans (USA) v United Mexican States* (1926) IV RIAA 110, 115 [2].

832 See ch 4, pp 270–81, below.

2 Under-Inclusion: Obligations *Erga Omnes Partes*

(a) Introduction

The essential distinction is also under-inclusive. While all examples of obligations *erga omnes* identified by the ICJ protect important rights, not all obligations analogous to obligations *erga omnes* protect important rights. The 'essential distinction' does not take into account all of the so-called obligations *erga omnes partes*.

What the '*partes*' in obligations *erga omnes partes* denotes is that these obligations are owed 'to all' or 'towards all' the parties to a multilateral rule less general than general customary law (eg a multilateral treaty, regional custom). That is, the community to which obligations *erga omnes partes* is owed is smaller than the 'international community as a whole', to which obligations *erga omnes* are owed.[833] In sum, obligations *erga omnes partes* are obligations that must be performed vis-à-vis all parties to the rule that contains them, these parties being less numerous than the members of the international community as a whole.

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[833] See, eg, Annacker (n 722) 135; Crawford, 'Responsibility III' (n 722) [106(a)]–[106(b)]; B Stern, 'Et si on utilisait le Concept de Préjudice Juridique? Retour sur une Notion Delaisée à l'Occasion de la Fin des Travaux de la CDI sur la Responsabilité des États' [2001] AFDI 3, 14; Dupuy 2002 (n 722) 1072; P-M Dupuy, 'Quarante Ans de Codification du Droit de la Résponsabilité Internationale des États. Un Bilan' (2003) 107 RGDIP 305, 333–34; Gaja 2005 (I) (n 750) 123; G Gaja, 'Obligations and Rights Erga Omnes in International Law (Second Report)' (2005) 71 (I) AIDI 189, 191; Alcaide Fernández (n 732) 95–96; Koskenniemi (n 722) [390]. See also *Prosecutor v Blaskic* (Judgment on the the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997) ICTY-95-14, App Ch (29 October 1997) fn 33, in light of text associated to it; ASR (n 786) art 48(1); Obligations *Erga Omnes* in International Law (Resolution, Institute of International Law, 5th Commission) (2005) art 1. See further Simma 1994 (n 731) 370, commenting on treaty-based, human rights obligations; ID Seiderman, *Hierarchy in International Law: The Human Rights Dimension* (School of Human Rights Research Series No 9, Intersentia-Hart, Antwerpen 2001) 134–35; LA Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002) 13 EJIL 1127, 1136.

Considering obligations *erga omnes partes* will require a long digression from the main object of this sub-section. This sub-section will explain: **1)** how the structure of obligations *erga omnes partes* is like and **2)** how custom contains obligations like these. Since this thesis would have it that obligations *erga omnes partes* are analogous to obligations *erga omnes*, discussing these two points is important. Later on, it will be shown that some obligations *erga omnes partes*, analogous to obligations *erga omnes* as they are, do not protect values crucial to the international community.

(b) Identity of the Structures of Obligations *Erga Omnes* and Obligations *Erga Omnes Partes*

Many commentators consider that obligations *erga omnes* and obligations *erga omnes partes* are subjected to identical[834] or similar[835] legal regimes. This is correct, but it is not universally accepted.[836] Both types of obligations are indivisible: they must be performed for all parties to the rule (eg treaty, custom) that contains them,

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834 Arangio-Ruiz, 'Responsibility IV' (n 807) 34 [92]; Annacker (n 722) 135–36. See also Simma 1994 (n 731) 370; M Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 Nord JIL 211, 212, 233, 239, referring to custom- and treaty-based obligations *erga omnes*, and p 235, on the legal regime of customary and treaty-based human rights obligations; Stern (n 833) 14. See further Obligations *Erga Omnes* in International Law (n 833) art 2, in light of art 1, but cf references to Gaja in the next footnote.

835 Gaja 2005 (I) (n 750) 122–24, 163 (Meron); Gaja 2005 (II) (n 833) 191; Koskenniemi (n 722) [393], [402]–[403]. See also Voeffray (n 800) 77.

836 Ragazzi 1997 (n 722) 201 text associated to fn 42; *Blaskic* (n 833) fn 33 ('… rightly made a distinction'); Dupuy 2002 (n 722) 1172; I Scobbie, 'The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law"' (2002) 13 EJIL 1201, 1203; Sicilianos (n 833) 1136; Frowein JA, 'Obligations Erga Omnes' (MPEPIL) <http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1400&recno=1> accessed 22 July 2009, [7]. See also Tams (n 724) 126, who believes —correctly— that the respective regimes for both types of obligations are '…not necessarily identical' (emphasis added) because treaty-based obligations *erga omnes partes* may establish self-contained regimes. Gaja, 2005 (I) (n 750) 123 and Villalpando (n 804) 249 text following fn 886 make similar points.

the nature of the rule and the number of parties bound by this rule being irrelevant considerations here. Illuminating on how obligations *erga omnes* (*partes*) do this thesis's main contribution.

As the starting point of this analysis, it bears remembering that obligations *inter partes* arose in classic, general international law as a way to accommodate claims to supremacy. Most obligations arose out of respect to the supremacy of one State's only.[837] Therefore, obligations in general international law and in treaties that did not displace general international law were owed *inter partes*. An apposite example is the international minimum standard, at issue in *Barcelona Traction*. These obligations have already been represented, in schematic form, thus:

(1) Spain owes Canada certain treatment of Canadian nationals;
(2) Spain owes Belgium certain treatment of Belgian nationals;
(3) Spain owes Ethiopia certain treatment of Ethiopian nationals; and so on.

Here, Spain's mistreatment of Belgian nationals would not impair, say, Ethiopian rights, which only concerned the treatment of Ethiopian nationals. An individual could, exceptionally, hold more than one nationality, in which case two rights would be broken by the mistreatment of the individual in question. But this does not detract from the scheme above.[838]

It was also clarified how the obligation *erga omnes* not to commit genocide could be summarised, in schematic, bilateral form, thus:

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837 See ch 2, especially pp 99–101, above.

838 cf ch 2 pp 141–51, above.

(1) Spain owes Canada not to commit genocide against 'individuals';

(2) Spain owes Belgium not to commit genocide against 'individuals';

(3) Spain owes Ethiopia not to commit genocide against 'individuals'; and so on.

The structure of obligations *erga omnes partes* is the type of structure described immediately above. This is better explained by way of example. The LTBT[839] is considered an example of a treaty that contains obligations *erga omnes partes*. [840] Among the obligations established under the LTBT, there is the undertaking not to carry out underwater nuclear explosions —for testing nuclear weapons or for any other purpose— in any place under a State's jurisdiction or control.[841]

Firstly, the LTBT is a good springboard from where to analyse obligations *erga omnes* (*partes*) because it is formulated in 'abstract' terms: it is silent as to the identity of the correlative right-holders of the obligations it lays down.[842] Article I LTBT only refers to the legal position of the State under obligation. The only 'right' referred to in the treaty is the power to withdraw from the treaty in certain circumstances.[843] Treaties could determine the identity of primary right-holders,[844]

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839 Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water (opened for signature 5 August 1963, entered into force 15 October 1963) 480 UNTS 43 (LTBT).

840 See, eg, Sachariew (n 732) 281; Crawford, 'Responsibility III' (n 722) [106b]. See also Simma 1994 (n 731) 336.

841 LTBT (n 839) art I(1)(a).

842 See introduction, pp 4–5, above.

843 LTBT (n 839) art IV.

but this could also be ascertained through interpretation of its provisions.[845] A textual and contextual interpretation of the obligations in article I LTBT treaty fails to reveal the identity of the primary-right-holders.

Secondly, it should be remembered that all sets of obligations can be described as bilateral and as giving rise to individual, correlative rights. Not all objections to this state of affairs have been overcome.[846] But which States are these? General international law, like the LTBT does not indicate who the correlative right-holder of a customary obligation must be, either.[847]

Indeed, what the LTBT *does displace* from general international law —as do obligations *erga omnes*— is the rationale behind the creation of obligations *inter partes*. The LTBT creates obligations for States not to detonate nuclear artefacts 'underwater'. The word 'underwater' conveys that State A will be under obligation not to detonate a nuclear device under **any** body of water, internal or otherwise.[848] This is further enhanced by how this obligation is to be carried out in areas where States have 'jurisdiction or control'. [849] For LTBT purposes, a party has temporary

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844 See, eg, references to the sending State in Vienna Convention on Consular Relations (opened for signature 24 April 1963, entered into force 19 March 1967) 596 UNTS 261 (VCCR) art 36.

845 cf Crawford, 'Responsibility III' (n 722) [103], [106b] text following from fn 196 (especially).

846 See ch 4, pp 258–69, below.

847 See introduction, pp 6–7, text associated to n 16, above.

848 'Arms Control and Disarmament' 11 Whiteman Digest Intl Law § 14, 783, 790. See also E Schwelb, 'The Nuclear Test Ban Treaty and International Law' (1964) 58 AJIL 642, 647–48.

849 LTBT (n 839) art I(1).

control over any area in which it detonates a nuclear device, even if this area is not under a State's jurisdiction (eg if the area is an uninhabited island whose title this State does not claim).[850] Contrary to general international law, where sovereignty and supremacy create of obligations and rights for States in general international law, sovereignty and supremacy are not the main values furthered by the LTBT.

In simpler words, by treating all bodies of water identically, without regard to title to them —and thus to territorial supremacy—, the LTBT displaced the second of three 'rules of thumb' discussed in chapter 2. Again, these rules are: **first**, a State held liberties to act respecting individuals/things over which no State —or no other State but itself— would have supremacy; **second**, a State bore obligations to act in a certain way respecting individuals/things over which other States did have supremacy, and **third**, these obligations would be established out of deference to the supremacy/sovereignty of the correlative-right-holding State only.[851] The obligations in article I LTBT could be summarised, in schematic form, thus:

(1) State A owes State B not to detonate nuclear devices under any/all bodies of water;

(2) State A owes State C not to detonate nuclear devices under any/all bodies of water;

(3) State A owes State D not to detonate nuclear devices under any/all bodies of water; **(…)**

(25) State A owes State Z not to detonate nuclear devices under any/all bodies of water; and so on.

If this interpretation is correct, State B —and each of States C, D … Z— is owed an obligation —ie *State B* has a right— that State A does not detonate a nuclear

850 11 Whiteman (n 848) 791–92.

851 See ch 2, pp 99–101, above.

device **not only** in **1)** *State B's* internal waters, territorial seas, contiguous zone and EEZ, **but also** in **2)** *State A's* internal waters, territorial seas, contiguous zone and EEZ, **3)** *State C's* internal waters, territorial seas, contiguous zone and EEZ, and **4)** the high seas. Should State A detonate a nuclear device in the high seas —'a' body of water—, it will breach all obligations at the same time. Should State A do the same in its own internal waters —'a' body of water as they are—, it will break all obligations simultaneously; and so on.

Now, although all States would hold secondary entitlements after breach of these primary obligations, they would not hold the same secondary entitlements. A difference will be made, at the appropriate time[852] between injury (breach of a right), inherent on all wrongful acts, and damage, resulting from the way the wrongful act is carried out in fact. State B's and State C's entitlements and obligations with regards to different bodies of water are identical. It could not be said that State A could detonate a nuclear device in the high seas with respect to State B only, but not with respect to State C or M or X. If this is true, such an act injures all States (ie violates an obligation owed to them). Likewise, it could not be said that State A could detonate a device in its internal waters with respect to one State but not with respect to others. If this is true, such an act injures all these other States. And since the LTBT treats all bodies of water alike, the same should be admitted with respect to State A's detonating a nuclear device in, say, State B's EEZ.

[852] See ch 5, pp 291–305, below.

However, since State B's 'right[s]' (liberty)[853] to exploit the resources in its EEZ are exclusive,[854] State B would suffer material damage *aside* from injury when State A detonates a device in State B's EEZ and destroys, say, living marine resources. This would entitle State B to compensation aside from any other secondary right (eg satisfaction). State C could not claim compensation in these circumstances. Had State A detonated the same device in the high seas, it would have injured both State B and State C, to the extent that it owed them the obligation not to do so. But since States B and C are only permitted —are at liberty— to exploit these resources[855] without exclusivity, neither of States B or C could claim to have suffered material damage by the loss of these resources. They would also lose them if, say, State A exploited these resources first; no redress would be called for in this situation.

In sum, distinctions between secondary rights partly depend on the occurrence of damage. Damage partly depends on the way in which a wrongful act is carried out in actual fact. Injury (violation of a right) can occur where damage does not. Therefore, that States would be entitled to different rights after the breach of an obligation *erga omnes* (*partes*) in no way determines that they are not injured by their breach. [856]

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853 It is an entitlement for State B to exploit these resources itself. See ch 1, pp 44–48, above.

854 United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) art 56(1)(a) ('… sovereign rights'). See also art 73.

855 See, eg, UNCLOS (n 854) art 87(1)(e).

856 See, eg, ch 5, pp 302–05, below.

The same observations apply to other examples of obligations *erga omnes partes*. Disarmament obligations, owed *erga omnes partes*,[857] are another such example. The Washington Naval Treaty[858] forbade its five parties to possess capital ships heavier than 35,560 tonnes.[859] Should the United States have constructed a 40,000 tonne battleship whilst the treaty was in force, it could not be said that this ship was built only with respect to Great Britain, but not Japan, France or Italy. In schematic form, these obligations under this treaty could be summarised thus, assuming their correlative rights are individual:

(1) The US owes Japan not to build capital ships heavier than 35,560 tonnes;
(2) The US owes the UK not to build capital ships heavier than 35,560 tonnes;
(3) The US owes France not to build capital ships heavier than 35,560 tonnes; and
(4) The US owes Italy not to build capital ships heavier than 35,560 tonnes.

The rights correlative to the obligations not to build this type of ship are all identical, this being the critical insight in understanding obligations *erga omnes* (*partes*). Japan had as much a right that this ship was not built as Italy or France or the UK. Likewise, if in response to the US breach of this treaty, France decided to build three 40,000 tonne battleships, it could not be said that these new battleships only existed with respect to the US, but not the UK, Italy or Japan. In this sense, then, the obligations arising from this treaty are owed *erga omnes partes*.

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857 Crawford, 'Responsibility III' (n 722) fn 195; Tams (n 724) 131 fn 30 and associated text. See also ch 4, pp 232–33, below.

858 Treaty between the British Empire, France, Italy, Japan and the United States of America for the Limitation of Naval Armament (opened for signature 6 February 1922, entered into force 17 August 1923) 117 BFSP 453 (Washington Naval Treaty).

859 Washington Naval Treaty (n 858) art V.

(c) Customary Obligations *Erga Omnes Partes*

Having studied this thesis' conception of obligations *erga omnes partes*, it is important to point out that obligations *erga omnes partes* also arise in custom, where obligations *erga omnes* exist. This makes more plausible this thesis's assertion of the fundamental identity of the structure of both types of obligations.

Many commentators would have it that obligations *erga omnes partes* only arise through treaties.[860] Others call them obligations *erga omnes contractantes*.[861] In Latin, a *contractus* is a contract. By extension, obligations *erga omnes contractantes* are owed to all parties to the treaty that contains them.

However, Prof Crawford —'astonishing[ly]'—[862] points out that obligations *erga omnes partes* can arise through custom.[863] Annacker believes that regional custom could feature obligations owed to all parties among which the rule

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860 Dupuy 2002 (n 722) 1072; Dupuy 2003 (n 833) 333–34; Pauwelyn (n 725) 55 ('… *erga omnes partes*, that is, to all states party to the treaty'), 67; Tams (n 725) 120; I Feichtner, 'Community Interest' (MPEPIL) <http://www.mpepil.com/subscriber_article?script=yes&id=/ epil/entries/law-9780199231690-e1677&recno=1> accessed 22 July 2009, [44]. See also G Arangio-Ruiz, 'Responsibility IV' (n 807) 34 [92]; Gaja 2005 (I) (n 750) 164 (Zemanek); Koskenniemi (n 722) [390]; Katselli Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (Routledge, London 2010), 14 text associated to fn 21. This point seems implied at Gaja 2005 (I) (n 750) 191.

861 Seiderman (n 833) 130; Voeffray (n 800) 77; Tams (n 724) 120; Gaja 2005 (I) (n 750) 163 (Meron). Others use the term, while admitting that an obligation *erga omnes partes* may rise through custom. eg Annacker (n 722) 135.

862 Tams (n 724) 122.

863 Crawford, 'Responsibility III' (n 722) [106(b)] text associated to fn 196. See also Villalpando (n 804) 248 text associated to fn 884.

operates.[864] These insights are correct. Some of the customary obligations of the depositaries of international treaties are owed *erga omnes partes*. Ironically, the parties to which these obligations are owed are those to the deposited treaty. Indeed, the depositary's basic obligation, that of '… keeping custody of the original text of the treaty'[865] existed in custom[866] before being enshrined in the VCLT. This obligation also breaks with traditional law-creating processes, as it does not accommodate particular claims to supremacy, by one State, and independence, by another State.[867] The obligation rather concerns a unique item: the original of the treaty.

If State A purposefully destroys the original of a treaty it is charged to keep, it could not be said that this wrongful act occurred only with respect to State B, but not State P or State W, parties to the same treaty. Thus, in 1945, the US Department of State refused to transfer the original copy of the UNCh[868] to the National Archives, for exhibition purposes. The State Department considered that a 'foreign office' not keeping custody this text would hinder, *inter alia*, other signatories' —plural—

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864 Annacker (n 722) 135.

865 VCLT (n 733) art 77(1)(a).

866 S Rosenne, 'More on the Depositary of International Treaties' (1970) 64 AJIL 838, 849 ('… reflecting settled custom'). cf H Waldock, 'First Report on the Law of Treaties' (UN Doc No A/CN.4/144 and Add 1, YbILC 1962-II) 82–83 (art 27) with H Waldock, 'Fourth Report on the Law of Treaties' (UN Doc No A/CN.4/177 and Add 1&2, YbILC 1965-II) 63 (art 28) ('… well-accepted practice') (US).

867 It thus breaks the second 'rule of thumb'. See p 197, above.

868 Charter of the United Nations (opened for signature 26 June 1945, entered into force 24 October 1945) 39 AJIL Supp 190 (UNCh).

examination of the original of the treaty.[869] This shows that the effects of breach of these depositary functions cannot be limited to a single party. Thus, State A's obligation in this respect, vis-à-vis States B, C … Z, could be summarised thus:

(1) State A owes State B to keep the original of the treaty in question;
(2) State A owes State C to keep the original of the treaty in question;
(3) State A owes State D to keep the original of the treaty in question; **(…)**
(25) State A owes State Z to keep the original of the treaty in question; and so on.

The objects of all these obligations are identical. Consequently, they are owed *erga omnes* (*partes*).

(d) 'Non-Important' Obligations *Erga Omnes Partes*

Having explained the structure of obligations *erga omnes partes* and how they also come about in custom, the subject of this sub-section can be retaken. Obligations *erga omnes* (*partes*) also protect rights which by no measure could be counted among the '… essential principles of contemporary international law.'[870] This is another reason why the ICJ's 'essential distinction' between obligations *erga omnes* and obligations *inter partes*[871] has been incorrectly drawn.

For instance, as part of a loan agreement with Sweden, Norway, Denmark, and Finland, Tanzania agreed to expand the milk production and poultry units at the Kibaha Education Centre.[872] Assuming, as Hohfeld and classic international law did,

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869 'Treaties and Other International Agreements' 14 Whiteman Digest Intl Law § 10, 75.

870 *East Timor* (n 771) 102 [29]. See also *Genocide 2007* (n 754) [147].

871 See pp 188–91, above.

872 Exchange of Notes constituting an Agreement concerning Assistance for the Expansion of the Milk Production and Poultry Units at the Kibaha Education Centre (opened for signature 29

that this provision creates individual, correlative rights for the four former States, Tanzania's obligations, in schematic, bilateral form, could be summarised thus:

(1) Tanzania owes Norway to expand the Kibaha Education Centre;
(2) Tanzania owes Sweden to expand the Kibaha Education Centre;
(3) Tanzania owes Denmark to expand the Kibaha Education Centre; and
(4) Tanzania owes Finland to expand the Kibaha Education Centre.

It bears remembering that in general international law, Tanzanian obligations would relate only to the treatment of other States' property or agents or nationals. This is what begat obligations *inter partes*. By contrast, the obligations *erga omnes partes* over the Kibaha Education Centre impose an obligation on Tanzania concerning a building over which correlative right-holders (Sweden, Denmark, Finland, and Norway) have no claim to supremacy. It is thus out of the question whether, say, Tanzania can impair Swedish supremacy but not Norwegian supremacy, as occurred in classic, general international law. This is why the object of all four of Tanzania's obligations under this treaty is exactly identical. *Thus, had Tanzania used the proceeds of the loan, say, to buy weaponry for its military, it would break all the obligations to use those proceeds to expand the centre above with a single wrongful act*.

From this viewpoint, then, establishing an 'essential distinction' between this obligation *erga omnes* (*partes*) and the more traditional obligations *inter partes* by

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November 1972, entered into force 29 November 1972) 1033 UNTS 237 (Kibaha Notes) [1]–[2].

focusing on the relative importance or not of the Kibaha Education Centre for Tanzania for the 'international community as a whole'[873] is to miss the point.

3 Problem of Overbreadth: Separating *Jus Cogens* from Obligations *Erga Omnes*

(a) Introduction

The final definitional problem in considering that the 'importance' of the values that obligations protect sufficiently explains why they are owed *erga omnes* is that obligations *erga omnes* are easily confused with *jus cogens*.[874] Thus, the ICTY would have it that torture has achieved *jus cogens* status because of the importance of the values it protects.[875]

As the starting point of this analysis, it is worth noting that many of obligations *erga omnes* identified by the ICJ have also been identified as examples of *jus cogens*. The prohibition of genocide, an obligation *erga omnes*,[876] is also considered as an example of an obligation with *jus cogens* character.[877] The

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873 However, Tanzania did suffer a severe drought shortly after this agreement entered into force. See J Briggs, 'Villagisation and the 1974-6 Economic Crisis in Tanzania' (1979) 17 Journal of Modern African Studies 695, 696–97, 699–702). This illustrates the difficulty in qualifying agreements such as this as 'trivial'.

874 Crawford, 'Responsibility III' (n 722) [106(a)] ('From the Court's reference … and from the character of the examples it gave … one can infer that the core cases of obligations *erga omnes* are those non-derogable obligations … They are thus virtually coextensive with … *jus cogens*.'); E Wyler, 'From "State Crime" to Responsibility for "Serious Breaches of Obligations under Peremptory Norms of General International Law"' (2002) 13 EJIL 1147, 1157 text associated to fn 55. See also Tams (n 724) 139 text associated to fns 95–96, 142, on the similar rationale between one of the approaches to *jus cogens*and and obligations *erga omnes*.

875 *Prosecutor v Anto Furundzija* (Judgment) ICTY-95-17/1, T Ch II (10 December 1998) [153].

876 See introduction, pp 1–2, above.

877 *Völkermordkonvention* BVerfGE, JZ 2001, 975 (Germany) 976; *Rwandan Armed Activities* (n 800) 32 [64]. See also *Genocide 2007* (n 754) 104 [147].

prohibition of the use of force has also been identified as an example of *jus cogens*.[878] The prohibition of aggression, loosely, '… the most serious and dangerous form of the illegal use of force',[879] is another example of obligation *erga omnes*.[880] Some would have it that both notions protect the same subject-matters; for instance, that both protect values fundamental to international public order or collective/community interests.[881] Therefore, there is some overlap between the two concepts, at least.

Indeed, there is some debate on whether *Barcelona Traction* obliquely referred to *jus cogens*[882] or not when defining obligations *erga omnes*.[883] The former position seems correct. It should be remembered that *jus cogens* was enshrined in the VCLT, which had been opened for signature some months prior to the judgment. Likewise, the ICJ referred to the international community in a way that mirrors the

878 See, eg, ILC, 'Draft Articles on the Law of Treaties: Text as finally adopted by the Commission on 18 July 1966' (18 July 1966) UN Doc A/CN.4/190 (YbILC-1966(II)) 247 [1] (art 50); CD Gray, *International Law and the Use of Force* (Foundations of Public International Law, 2nd edn OUP, Oxford 2004) 29, 46; Tams (n 724) 145 fn 127, referring to state practice; A Orakhelashvili, *Peremptory Norms in International Law* (Oxford Monographs in International Law, OUP, Oxford 2006) 50.

879 UNGA Res 3314 (XXIX) 'Definition of Aggression' UN Doc A/Res/3314, ann, preamble.

880 See introduction, p 2, above.

881 See, eg, Simma 1994 (n 731) 300; Byers (n 834) 236; Ragazzi (n 722) 72, 189; Stern (n 833) 27; Gaja 2005 (I) (n 750) 127; Picone (n 722) 17; Katselli Proukaki (n 750) 10. See also Tams (n 724) 141.

882 See, eg, Seiderman (n 833) 124; Voeffray (n 800) 75–76; Frowein (n 836) [2]. See also De Hoogh (n 749) 91; Tams (n 724) 140 text associated to fn 99; Crawford 2006 (n 727) 410.

883 Picone (n 722) 10. See also Byers (n 834) 230.

VCLT, especially in the authoritative French text of the judgment.[884] Additionally, Judge Ammoun discussed *jus cogens* in a separate opinion appended to the judgment.[885] In a recent case, the ICJ referred to '… breaches … of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*.'[886] Aside from stating that *jus cogens* protects 'essential humanitarian values' as obligations *erga omnes* do, the passage relates both notions on the basis of what they protect. It may also suggest that both notions are identical[887] or that *jus cogens* always entails obligations *erga omnes*.[888]

However, the idea, that all obligations *erga omnes* are *jus cogens*,[889] is not universally accepted.[890] A notable theory in this respect is that of the concentric

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884 cf *Barcelona Traction* (n 720) 32 [33] ('… communauté internationale dans son ensemble … concernent tous les Etats'); VCLT (n 733) art 53 ('…la communauté internationale des Etats dans son ensemble').

885 *Barcelona Traction* (n 720) 304, 310 fn 56, 312, 325 [34(c)] (especially) (SO Ammoun).

886 *Genocide 2007* (n 754) [147](emphasis added).

887 On which point, see Picone (n 722) 14. See also Seiderman (n 833) 123–24. See further *Simón, Julio Héctor y otros s/privación ilegítima de libertad— Causa No 17.768* (2005) Fallos 328:2056 (Supreme Court) (Argentina) [13] (Boggiano J), holding that *Barcelona Traction* established that human rights (obligations *erga omnes*) are owed *jus cogens*; Spinedi (n 731) 1124.

888 On which point, see Byers (n 834) 212, 236; Dupuy 2002 (n 722) 1162, 1165; Sicilianos (n 833) 1137; Gaja 2005 (I) (n 750) 153 (Cançado-Trindade); Gaja 2005 (II) (n 833) 192, 211 (Cançado-Trindade); Tams (n 724) 148–51, 310 [4]; Koskenniemi (n 722) [404] ('… plausible to assume') … See also Simma 1994 (n 731) 293–94, 299–300; Stern (n 833) 27. See further Weil (n 802) 430; GS Goodwin-Gill, 'Crime in International Law: Obligation Erga Omnes and the Duty to Prosecute' in GS Goodwin-Gill and S Talmon (eds) *The Reality of International Law: Essays in Honour of Ian Brownlie* (Clarendon Press, Oxford 1999) 220 text associated to fns 106–07.

889 See, eg, Zemanek (n 752) 12 ('*Erga omnes* obligations are … owed to a community of states, be it the international community as a whole (*jus cogens*).' '), and also at p 6. See also A Cassese, 'The Character of the Obligation Violated' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 416–17.

circles. As one would represent sets using Euler diagrams, obligations *erga omnes* and *jus cogens* are represented by concentric circles. The circle of obligations *erga omnes* is larger and completely surrounds that of *jus cogens*.[891] Of course, the fact that these circles are concentric implies that both concepts share the same 'nature' and 'root'.[892] Others would simply highlight the similarities —rather than the identity— of both notions.[893]

The idea that obligations *erga omnes* (*partes*) and *jus cogens* share the same legal consequences or come about in the same way is incorrect. To continue with the Euler-diagram-metaphor above, the circles that are *jus cogens* and obligations *erga omnes* (*partes*) do indeed overlap, but they are not concentric. An obligation *jus cogens* is not a mere obligation, but rather an obligation complemented by a disability. Not all obligations *erga omnes* are *jus cogens*. And not all alleged instances of *jus cogens* are obligations, *erga omnes* or otherwise. Thus, some would consider as part of *jus cogens* the liberty of self-defence[894] and the right (liberty) of

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890 See Arangio-Ruiz, 'Responsibility IV' (n 807) 34 [92]; Byers (n 834) 212, 237; Dupuy 2002 (n 722) 1162; Sicilianos (n 833) 1137; Gaja 2005 (I) (n 750) 157 (Lady Fox); Gaja 2005 (II) (n 833) 192; Koskenniemi (n 722) [404]. See also Arangio-Ruiz, 'Responsibility III' (n 747) 35 [122]; L Henkin, 'Inter-State Responsibility for Compliance with Human Rights Obligations' in LC Vohrah (ed) *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International, The Hague 2003) 393–94.

891 See Gattini (n 745) 1184; Sicilianos (n 833) 1137; Gaja 2005 (I) (n 750) 128, 131 ('… norms of *jus cogens* are a subcategory of obligations *erga omnes*'), 166 (Zemanek); Villalpando (n 804) 106–07, 259.

892 Villalpando (n 804) 107 ('… *nature* … racine').

893 Arangio-Ruiz, 'Responsibility IV' (n 807) 34 [92], on similarities in the structure of the legal relations underpinning both notions; Delbrück (n 722) 35; Ragazzi 1997 (n 722) 90, in light of p 190 on *jus cogens* as a disability; Alcaide Fernández (n 732) 95; Frowein (n 836) [3].

894 Orakhelashvili (n 878) 50–51; Koskenniemi (n 722) [374]. See ch 1, pp 29–33, above.

self-determination.[895] Indeed, there is no reason why a liberty could not be held so fundamental that its derogation is forbidden.

(b) Article 53 VCLT and Obligations *Erga Omnes*

Indeed, in article 53 VCLT,[896] *jus cogens* is better seen as a *disability* which complements obligations *erga omnes* (*partes*). As stated before, from the fact that a subject bears obligations or holds rights or liberties it does not follow that the same subject is (un)able to change its legal situation.[897] Thus when assessing the legal position of any subject, it is always possible to enquire as to these two separate questions, namely **1)** how the law regulates the subject's conduct and **2)** whether the same subject is (un)able to change this.[898] Obligations *erga omnes* concern the first aspect of this legal situation, whereas *jus cogens* concerns the second aspect of the same legal situation. Many believe that *jus cogens* concerns the priority of the rules it protects over those they conflict with, rather than any question of wrongfulness, responsibility, or enforcement.[899] Likewise, it should be remembered[900] that

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895 Koskenniemi (n 722) [374].

896 (n 733).

897 cf ch 1, p 49 n 208, above.

898 CFH Tapper, 'Powers and Secondary Rules of Change' in AWB Simpson (ed) *Oxford Essays in Jurisprudence* (Clarendon Press, Oxford 1973) 244–45.

899 *Furundzija* (n 875) [153], contrasting 'enforcement' with 'rank'/'hierarchy'. See also Byers (n 834) 226, 230; Crawford, 'Responsibility IV' (n 815) [49]; R Kolb, *Théorie du Ius Cogens International: Essai de Relecture du Concept* (Publications de l'Institut universitaire de hautes études internationales, PUF, Paris 2001) 90, 92–93; D Alland, 'Countermeasures of General Interest' (2002) 13 EJIL 1221, 1237 text associated to fns 56–58; Wyler (n 874) 1157; Pauwelyn (n 725) 99; Gaja 2005 (I) (n 750) 156–57 (Lady Fox); Koskenniemi (n 722) [380]. See further Simma 1994 (n 731) 300; J Crawford, 'Second Report on State Responsibility' (UN Doc No A/CN.4/498, YbILC 1999) [49] text associated to fn 100. cf Picone (n 722) 14; authors cited in Kolb (n 899) 92–93 fns 305, 308. cf also Dupuy 2002 (n 722) 1075–76 fn 87 and associated text.

wrongfulness does not, by itself,[901] make 'disappear'[902] the primary obligation whose violation gives rise to it.[903] That is, the breach of an obligation does not affect the continuing validity of that obligation. Consequently, the distinction between **1)** an obligation as such and **2)** the (in)ability derogate of the same obligation, could be maintained.

Indeed, article 53 VCLT addresses treaty invalidity [904] rather than wrongfulness,[905] but wrongfulness is what the breach of obligations truly entails.[906] Article 53 VCLT speaks of a norm '… accepted by the international community of States as a whole as a norm from which no derogation is permitted' (emphasis added). To 'derogate' is '[t]o repeal or abrogate in part … to destroy or impair the force and effect of; to lessen the extent or authority of' [907] or '[t]o take away (something *from* a thing) so as to lessen or impair it.'[908] What 'no derogation' of a *jus*

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900 See ch 1, pp 22 n 68 and associated text, 53–54, above.

901 Crawford, *Commentaries* (n 725) 195 [4] (art 29).

902 Crawford, *Commentaries* (n 725) 194 [2] (art 29).

903 ASR (n 786) art 29.

904 Alland (n 899) 1237 ('bindingness').

905 cf VCLT (n 733) part V, s 2, art 53 (especially); part VI, art 73 (especially). See also Alland (n 899) 1234; Kolb (n 899) 90 fn 298 and associated text, 91, 95.

906 See ch 1, pp 22 n 68 and associated text, 26–27, 53–54, above.

907 University of Oxford, 'Oxford English Dictionary: The Definitive Record of the English Language' <http://www.oed.com/> accessed 17 November 2009 (OED) ('derogate', 1).

908 OED (n 907) ('derogate', 4); see also second entry.

cogens norm conveys, then, is that whatever norm attains this status cannot be detracted from through a particular convention. The point is more forcefully driven by the Spanish text of the VCLT, which refers to *jus cogens* as norms that admit of no contrary agreement.[909] Article 53 VCLT will disallow derogations through *lex specialis* from *lex generalis* that has attained *jus cogens* status.[910] More concretely, the type of **derogation** which *jus cogens* disallows will generally be negative derogation —subtracting from a set of minimum rules— as opposed to **positive derogation** or '*adjonction*' —adding or expanding on a set minimum rules[911] (eg creating a more extensive prohibition of torture than what has already attained *jus cogens* status).

If this view is correct, article 53 VCLT speaks to Hohfeld's second order of entitlements, where disabilities exist, rather than to the first order of entitlements, where obligations exist. Moreover, article 53 VCLT is framed in the negative: 'no derogation'. This suggests that States lack the ability to change or otherwise modify the norms that attain *jus cogens* status.[912] In short, *jus cogens* conveys that States lack powers: that they bear disabilities.[913] As stated before, general international law can

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909 VCLT (n 733) art 53 ('… norma que no admite acuerdo en contrario') (emphasis added).

910 Kolb (n 899) 87, 96, 140.

911 Kolb (n 899) 367–68.

912 And see *Furundzija* (n 875) [156] ('… restrict the normally unfettered treaty-making power of sovereign States').

913 Ragazzi 1997 (n 722) 190; ch 1, pp 51–52, above.

be derogated through particular conventions.[914] Thus if an obligation has attained *jus cogens* status '… individual States are not permitted to derogate from … [it] at all',[915] if no 'contrary agreement' will be valid that displaces this prohibition, the obligation will remain in force as between the parties to that agreement. This is a significant advantage over so-called *jus dispositivum*, or norms that have not achieved *jus cogens* status and can therefore be displaced by the relevant parties.[916] Under this view, then, *jus cogens* in article 53 VCLT could rightly be thought of as a complement or enhancement[917] to whatever legal relation attains this status, as opposed to an element that is of the essence of that legal relation.[918]

In simpler words, obligations *erga omnes* rein in State conduct by imposing obligations. *Jus cogens* prevents the derogation of some of these obligations: their replacement by another legal relation. The idea that obligations *erga omnes* can indeed be derogated from by *lex specialis* is defended by some commentators.[919] *Jus*

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914 See ch 1, p 65–66 n 284 and associated text, above.

915 H Waldock, 'Fifth Report on the Law of Treaties' (UN Doc No A/CN.4/183, YbILC 1966-II) 24 [2] (art 37).

916 See, eg, Koskenniemi (n 722) [79].

917 Alland (n 899) 1238 ('enhanced protection'); Kolb (n 899) 172–73; Gaja 2005 (I) (n 750) 128 ('enhanced').

918 Those that believe that *jus cogens* are hierarchically superior norms (eg *Furundzija* (n 875) [153]), might disagree with this statement. This will not be pursued further. The point discussed here, that *jus cogens* in article 53 VCLT and obligations *erga omnes* fulfil different functions, does not require such discussion.

919 See, eg, Byers (n 834) 233–34. See also Simma 1994 (n 731) 300 text associated to fn 236; Gaja 2005 (I) (n 750) 127–28; Villalpando (n 804) 108 fn 303. cf, eg, Cassese (n 889) 418. See further ch 2, pp 104–18, above.

cogens thus complements *certain* obligations *erga omnes*: it safeguards the integrity of the obligation by protecting it against fragmentation[920] through *lex specialis*.[921] *Jus cogens* and obligations *erga omnes* (*partes*) look at different aspects of the same legal situation but only when they overlap. Thus, since the prohibition of genocide has also achieved *jus cogens* status,[922] this **obligation** —*erga omnes*— also benefits from a **disability** —*jus cogens*— that disallows that the former is substituted, say, by a liberty to commit genocide.

In sum, a distinction could rightly be drawn between *jus cogens* and the legal relation (eg an obligation *erga omnes* or a liberty) whose 'set[ting] aside by another … norm'[923] *jus cogens* disallows.[924] This is the problem with identifying *jus cogens* and obligations *erga omnes* so fully. Again, it can readily be conceded that all examples of obligations *erga omnes* identified by the ICJ are *jus cogens*; but this does not mean that: **1)** all obligations analogous to obligations *erga omnes* are *jus cogens*, or **2)** that the concept of *jus cogens* has no meaningful existence beyond that of obligations *erga omnes* (*partes*) —and vice versa.

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920 Kolb (n 899) 50, 96.

921 Ragazzi 1997 (n 722) 59 ('… derogation denotes that a norm has replaced the validity of another norm with respect to certain relations') (emphasis added).

922 *Völkermordkonvention* (n 877) 976; *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6, 32 [64]; *Genocide 2007* (n 754) 104–05 [147]–[149].

923 Waldock, 'Treaties V' (n 915) 24 [2] (art 37).

924 And see Byers (n 834) 226 text associated to fn 59, 230, clearly distinguishing among different aspects of —the same— *jus cogens*/*erga omnes* rule. Using Hohfeld's schema, they can be separated. cf distinction between procedural aspects of public order (eg obligations *erga omnes*) and *jus cogens* in Kolb (n 899) 91–92, 172–74. cf also Voeffray (n 800) 1–2.

(c) Further Remarks on *Jus Cogens*

A further alleged similarity between *jus cogens* and obligations *erga omnes* is that *jus cogens* in the VCLT has some form of 'effect' *erga omnes*.[925] The *erga omnes* 'effect' of *jus cogens* could mean that the latter, like obligations *erga omnes*, would allow for generalised standing to invoke the invalidity of any provision contrary to *jus cogens*.[926] This argument cannot fully be answered by this thesis without much digression into *jus cogens*. But suffice it to point out that if this thesis' conception of *jus cogens* as a disability is correct, *States would have standing to invoke the invalidity of the treaty derogating from a jus cogens norm, rather than the wrongfulness of conduct pursuant to the treaty, which conduct additionally breaches obligations erga omnes*. A declaration that the treaty is invalid would suffice for this purpose. Compensation, restitution, and the like would not bring about the same result.

Furthermore, there are manifestations of *jus cogens* beyond the VCLT that cannot all be studied here. It would be problematic to do so because the notion of *jus cogens* has been employed to justify a myriad of legal relations. The same has been remarked of notions like 'diplomatic protection', formed as they are by aggregates of related, but different legal relations.[927] Thus if *jus cogens* complements obligations by

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925 *Völkermordkonvention* (n 877) 976 ('Erga omnes Wirkung kommt Normen der Qualität des Ius cogens zu.').

926 But see Tams (n 724) 146–47; Crawford 2006 (n 727) 430; Picone (n 722) 8. See also VCLT (n 733) arts 65(1) ('A party, which, under the Convention, invokes … a ground for impeaching the validity of a treaty … must notify other parties'), 66 (sub-par (a), especially), which seem to limit standing in this regard to the parties to treaty that conflicts with *jus cogens*. cf criticisms in Villalpando (n 804) 107.

927 See ch 1, p 15, above.

preventing their derogation through *inter se* agreements, it is understandable, say, that wrongfulness for the breach of such an obligation is never precluded.[928] A circumstance precluding wrongfulness shields the wrongdoing State from an otherwise successful claim of responsibility.[929] Thus if a primary obligation complemented by *jus cogens* cannot be displaced, the normal secondary legal relations that follow from the breach of that primary obligation will always follow from such breach.

Nevertheless, it is less clear that a State's enforcement jurisdiction must always be exercised whenever an individual commits a crime which, if authorised by a treaty, would result in the voidness of that treaty. In simpler words, it is not self-evident that the inability to, say, replace a *jus cogens* obligation with a liberty through a treaty determines that State agents cannot avail themselves of immunity before another State's courts.[930] Such a legal relation would not be impossible. However, it is submitted that this legal relation would not follow either obligations *erga omnes* (*partes*) —or otherwise— or from the aspect of *jus cogens* contained in the VCLT. Fully discussing these issues would require a digression into immunities and into *jus cogens*, which digression this thesis cannot undertake.

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928 ASR (n 786) art 26.

929 Crawford, *Commentaries* (n 725) 160 [1]–[2] (part I, ch V).

930 cf, eg, *Germany v Prefecture of Voiotia, representing 118 Persons from Distomo Village*, ILDC 287 (GR 2000) (Areios Pagos) (Greece) [12].

D CHAPTER CONCLUSION

In this chapter, the concept of obligations *erga omnes* has been distinguished from related, but ultimately different concepts. Furthermore, the concept of obligations *erga omnes* has been linked with the concept of obligations *erga omnes partes*: obligations owed 'to all' parties to a treaty or to all States among which a less-than-universal customary regime operates. This is an important insight. It suggests that the concept of obligations *erga omnes* is much wider than what the ICJ and some commentators would acknowledge.[931] And if obligations *erga omnes* and all manner of obligations *erga omnes partes* are similar, obligations *erga omnes* are not different '[b]y their very nature' from other obligations,[932] important or trivial as they may be.

Indeed, this chapter has taken the initial step of analysis that will present the concept of obligations *erga omnes* (*partes*) as similar to any other obligation. The more salient concepts whereby obligations *erga omnes* are set apart in this way will be questioned in the next chapter.

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931 cf Tams (n 724) 131, criticising an approach similar to this thesis's approach precisely because it entails this consequence.

932 cf *Barcelona Traction* (n 720) 32 [33].

CHAPTER 4 ON THE ESSENCE OF OBLIGATIONS *ERGA OMNES*

A INTRODUCTION

In chapter 2 it was discussed that a pattern existed in classic, **general** international law which begat obligations *inter partes*. This pattern was built around the notion of state sovereignty. However, it was shown that even in classic international law (second half 19th Century–1945), this pattern could be done away with through **conventional** international law. Thus international law, considered as a whole, could displace this pattern. It has also been argued that customary obligations *erga omnes partes* did exist.[933] In simpler words, even classic international law *could have* created obligations in a different manner, although it *did not do so*. The fact that it *could have done so* is the key. It means that, without changing nature or structure, international law could have created what are now obligations *erga omnes* (*partes*). Thus, general custom, a source of international law, now contemplates a type of obligations which general custom did not previously contain, but which international law as a whole could have created all along.[934]

This belies the notion that obligations *erga omnes* (*partes*) have arisen because international law as a whole has transformed. Since general international law followed a pattern designed to further specific values (sovereignty, independence, supremacy), the mere fact that this pattern has been done away with in certain cases may actually mean that international law now places a lower premium on these values than before. Obligations *erga omnes* (*partes*) are such instances.

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933 See ch 3, pp 201–03, above.

934 See ch 2, pp 126–29, above.

Nevertheless, many claim that obligations *erga omnes* (*partes*) either change the fabric of international law or that they are different in nature from other types of obligations. The purpose of this chapter is to reply to these contentions. The 'essential distinction' drawn between obligations *erga omnes* and other obligations on account of the values protected by the former has already been rejected.[935] This chapter will rather reply to three arguments: **1)** that reciprocity creates obligations *inter partes* and lack of reciprocity, for obligations *erga omnes* (*partes*), **2)** that international law is no longer a 'bilateralist' legal system (ie it can create legal relations in forms other than bilaterally) and **3)** that obligations are owed *erga omnes* (*partes*) because they further community interests.

In *Barcelona Traction*, the ICJ did not employ the term reciprocity. However, it cross-referred[936] to *Genocide 1951*.[937] In this advisory opinion, the Court had held that since the Genocide Convention[938] was established to prohibit genocide as a crime against international law and to protect groups of individuals, it followed that such convention **1)** contained *universal prohibitions*, binding on all States in general international law,[939] and **2)** that there was a need for *universal cooperation* in ridding

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935 See ch 3, pp 188–91, above.

936 *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (New Application: 1962)* (Judgment) [1970] ICJ Rep 3, 32 [34].

937 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15 (*Genocide 1951*) 23.

938 Convention on the Prevention and Punishment of the Crime of Genocide (opened for signature 1 January 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention).

939 cf *Genocide 1951* (n 937) 23 ('… hors de tout lien conventionnel').

humanity of genocide.[940] In a later case, cross-referring to this advisory opinion, the ICJ stated that because these two elements were present in the Genocide Convention, the rights and obligations enshrined in it were owed *erga omnes*[941] (*partes*)[942] and had attained *jus cogens* status.[943]

For the ICJ, it followed from the purely moral and civilising ends out of which the Genocide Convention was adopted that it did not feature '… avantages ou … désavantages individuels des États, non plus que … un exact équilibre contractuel à maintenir entre les droits et les charges.'[944] This 'exact' 'contractual balance' between the rights and obligations assumed by a party is what many commentators term **reciprocity**.

These two elements, **1)** the —alleged— lack of 'exact contractual balance' between the 'advantages' and 'disadvantages' procured by obligations *erga omnes* (or lack of reciprocity) and **2)** the 'community interests' —rather than 'individual interests'— furthered by obligations *erga omnes* will be the object of this section. To

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940 *Genocide 1951* (n 937) 23.

941 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Preliminary Objections) [1996] ICJ Rep 595 (*Genocide 1996*) 616 [31], quoted with approval in *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6, 31 [64].

942 Since the ICJ considered '… obligations consacrés par la convention', this reference is better conceived as a reference to obligations *erga omnes partes*.

943 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 (*Genocide 2007*) 111 [161].

944 *Genocide 1951* (n 937) 23.

explain them, this thesis must embrace related sets of other terms (eg 'bilateralism'/'multilateralism', 'reciprocal'/'interdependent'/'absolute' obligations, 'bilateralisable'/'integral' structures, etc) that appear in the literature. These terms are employed only to engage with the literature, rather than to complicate the subject further.

It is submitted that the lack of reciprocity and the furtherance of community interests are not of the essence of obligations *erga omnes* (*partes*), although they are not wholly unrelated to them. It is also submitted that obligations *erga omnes* (*partes*) have bilateral structures.

B ALLEGED LACK OF RECIPROCITY OF OBLIGATIONS *ERGA OMNES* (*PARTES*) AND THE INFLUENCE OF THIS CONCEPT IN THEIR STRUCTURE

1 Introduction

The first element to be considered here is the alleged '… exact équilibre contractuel à maintenir entre les droits et les charges'[945] that inheres in what this thesis calls obligations *inter partes*. This is what is more commonly known as reciprocity.

This subsection will refute the argument that reciprocity is relevant to the structure of obligations *erga omnes*. Many would have it that it is because of reciprocity that rights correlative to obligations *inter partes* are individual rights. For sure, the majority of obligations in classic, general international law, of which obligations *inter partes* were the paradigm, featured some form of reciprocity. Thus, States were bound to observe certain standards of treatment on other States' nationals, agents, property, etc; eg, that State A did not expropriate the nationals of State B without making provision for compensation. Simultaneously, States were entitled that their nationals, agents, property, etc, received the same treatment from those other States; eg that State B did not expropriate the property of State A's nationals without making provision for compensation.

By contrast, some obligations *erga omnes* (*partes*) are not reciprocal. For instance, as is well-known, general international law now obliges States not to commit genocide against individuals regardless of the conduct of other States. Since it is reciprocity that creates individual rights to observance of an obligation, the argument goes, and many obligations *erga omnes* (*partes*) are not reciprocal, it

945 *Genocide 1951* (n 937) 23.

follows that States hold no individual rights to the observance of those obligations *erga omnes* (*partes*). This thesis has defended a different position.[946]

In order to refute this argument, it will be necessary to discuss how the notion of standing to invoke responsibility for breach of obligations *erga omnes* (*partes*) differs from that of standing to invoke material breaches of obligations as a ground to suspend or terminate treaty regimes. As will be explained below, reciprocity is —or at least has been made— a relevant consideration when suspending or terminating treaties on account of material breaches. The problem is that many would use the legal relations that underpin the latter notion, notably those contained in article 60 VCLT, in order to analyse standing to invoke responsibility for obligations *erga omnes* (*partes*). For instance, the ILC drafted articles 42 and 48 ASR, concerning invocation of responsibility on the basis of article 60 VCLT,[947] including by copying some provisions *verbatim*.[948]

In this way, the ILC conflates standing to invoke responsibility for breaches of obligations *erga omnes* (*partes*) and standing to invoke material breaches as a ground to terminate and suspend treaties. This approach is misguided. Other authorities would take the same approach. Notably, Prof Tams would have it that since in the

946 See ch 2, generally; ch 5, generally.

947 J Crawford, 'Third Report on State Responsibility' (UN Doc No A/CN.4/507, YbILC 2000) [91]; J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (CUP, Cambridge 2002) 259–60 [12]–[14] (art 42), evidencing the influence of these two provisions of the VCLT in the ASR.

948 Cf. Annex, UNGA Res 56/83 (12 December 2001) UN Doc A/Res/56/83 (ASR) arts 42(b)(i), 42(b)(ii) with Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) arts 60(2)(b), 60(2)(c), respectively.

VCLT, certain obligations can only be suspended/terminated when a material breach 'specially affects' the State in question, where such a situation does not occur, eg where absolute obligations are involved,[949] '[r]edressing breaches … therefore becomes a matter of collective or institutionalised action pursuant to article 60, para. 2(a) [of the VCLT].'[950] In this passage, a conclusion as to general 'redress' of 'breaches' (eg standing to invoke responsibility) is made from a provision on the specific question of suspension/termination of obligations on account of material breaches. Coherently with this approach, Prof Tams repeatedly speaks of 'decentralised responses to breaches',[951] without distinguishing between responses or between breaches. Likewise, in the context of *inter se* agreements, Koskenniemi seems to make the same mistake. He would have it that article 60(2)(c) VCLT establishes '… a special rule on invoking breach', which the ILC associated with state responsibility[952] in a way he seems to approve of.[953]

Justice could not be done in this thesis like this one to all the problems that underlie these conceptions. This thesis will rather focus on one aspect of article 60 VCLT: article 60 VCLT is deeply influenced by considerations of reciprocity. This

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949 These are analogous to obligations *erga omnes* (*partes*). See p 250 n 1097, below.

950 Tams (n 956) 62 text associated to fn 73 (emphasis added).

951 Tams (n 956) 63. See also at pp 58–59, 80 text associated to fn 150, 308.

952 cf ASR (n 948) art 42(b)(ii); VCLT (n 948) art 60(2)(c).

953 M Koskenniemi, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of General International Law' (UN Doc No A/CN.4/L.682, YbILC 2006) [311].

feature is said to influence the structure of obligations *erga omnes* (*partes*), but it is not relevant to such structure.

Much of the analysis that underlies article 60 VCLT, including on reciprocity, can be traced to Sir Gerald Fitzmaurice's analysis of the structure[954] of primary,[955] multilateral obligations. This analysis is widely adopted by the legal authorities on the field and cannot be ignored. Fitzmaurice improved on existing classifications of such obligations[956] as part of his work as Special Rapporteur on the Law of Treaties. His analysis '… left manifest traces' in many provisions in the VCLT,[957] notable among them article 60 VCLT,[958] which, again, had a 'profound influence'[959] on the ILC's final conception of standing to invoke responsibility for breach of obligations *inter*

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954 B Simma, 'Reflections on Article 60 of the Vienna Convention on the Law of Treaties and its Background in General International Law' (1970) 20 ÖZöR 5, 46.

955 B Simma, 'From Bilateralism to Community Interest' (1994) 250 RdC 217, 337 ('…substantive obligations').

956 ie the distinction between 'contractual' and 'law-making' treaties. See CJ Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge Studies in International and Comparative Law No 44, CUP, Cambridge 2005) 54. See also J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law relates to Other Rules of International Law* (Cambridge Studies in International and Comparative Law No 29, CUP, Cambridge 2003) 56–58.

957 Pauwelyn (n 956) 59.

958 MM Gomaa, *Suspension or Termination of Treaties on Grounds of Breach* (Martinus Nijhoff, The Hague 1996) 83; Pauwelyn (n 956) 59; Tams (n 956) 53.

959 Tams (n 956) 54. See also Pauwelyn (n 956) 55.

partes and —crucially— on the ILC's conception of obligations *erga omnes* (*partes*).[960]

Reciprocity was central to Fitzmaurice's analysis. Although Fitzmaurice's analysis concerned the issue of suspension or termination of treaties on account of material breaches, many legal authorities transpose his basic assumptions to the —separate— issue of standing to invoke responsibility. Other authorities do not expressly acknowledge Fitzmaurice's influence in this regard, but make similar assumptions about the consequences of reciprocity for the notion of standing to invoke responsibility for breach of obligations *erga omnes* (*partes*).

In sum, legal authorities, including the ILC, who support the view that reciprocity decisively influences the structure of international obligations either conflate the notions of standing to invoke responsibility and standing to terminate or suspend treaties on account of material breaches or make the same assumptions. Both arguments are closely related; hence the need to consider both of them. They are also objectionable in many respects, as will be shown below.

2 Conflating the Notions of Standing to Invoke Responsibility for Breach of Obligations *Erga Omnes* (*Partes*) and Standing to Suspend or Terminate Treaties on Account of Material Breach

As discussed before, many authorities form their conceptions of standing to invoke responsibility for breach of obligations *erga omnes* (*partes*) on the basis of the notion of standing to suspend or terminate treaties on account of material breach, notably

960 M Koskenniemi, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of General International Law' (UN Doc No A/CN.4/L.682, YbILC 2006) [390]. The relevant articles can be found at Annex, UNGA Res 56/83 (12 December 2001) UN Doc A/Res/56/83 (ASR) arts 42, 48.

those contained in article 60 VCLT. In so doing, they make assumptions about the structure of obligations *erga omnes* (*partes*). Consequently, these analyses miscarry from the start. They are conceptually flawed for two reasons. **First**, suspension and termination of treaties on account of material breach fulfils a different role than the invocation of responsibility on account of breaches of primary obligations. **Second**, while the structure of international obligations are indeed relevant to both of these notions, States may be entitled to suspend or terminate treaties on account of material breaches in circumstances where they could not invoke responsibility for the same breaches. This is why a distinction should be made between the many types of 'decentralised responses to breaches'.[961]

Suspension and termination of treaties on account of material breach fulfils a different role than the invocation of responsibility on account of breaches of primary obligations. While all material breaches are wrongful acts,[962] not all wrongful acts rise to the level of material breaches.[963] Consequently, it is problematic to extend the legal consequences specific to material breaches to all types of wrongful acts.[964] A 'material breach' occurs when an obligation '… essential to the accomplishment of the object or purpose of the treaty'[965] has been violated, so that the object of the treaty

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961 Cf Tams (n 956) 63. See also at pp 58–59, 80 text associated to fn 150, 308.

962 Simma 1970 (n 954) 29.

963 S Rosenne, *Breach of Treaty* (Grotius, Cambridge 1985) 6, 8.

964 And see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, 65 [106].

965 *Gabčíkovo* (n 964) 67 [110].

has been 'destroy[ed]',[966] in a manner of speaking. Thus 'material breaches', which are 'gross',[967] 'serious'[968] breaches of a 'considerable extent',[969] are to be distinguished from 'minor',[970] 'trivial',[971] 'mere',[972] or 'ordinary'[973] breaches. The material breach of an obligation is not only conduct contrary to what that obligation requires; it also affects the very stability of the treaty regime that contains the obligation concerned.[974]

While the structure of international obligations are indeed relevant to both of these notions, States may be entitled to suspend or terminate treaties on account of

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966 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16 (*Namibia*) 47 [95]. See also Simma 1970 (n 954) 21; DN Hutchinson, 'Solidarity and Breaches of Multilateral Treaties' (1988) LIX BYIL 151, 196.

967 Simma 1970 (n 954) 31.

968 *Tacna-Arica Question (Chile v Peru)* (1922) II RIAA 921, 943–44; Simma 1970 (n 954) 28 ('seriously').

969 Simma 1970 (n 954) 61.

970 G Arangio-Ruiz, 'Third Report on State Responsibility' (UN Doc No A/CN.4/440 and Add.1, YbILC 1991-II(1)) 24 [75]; Gomaa (n 958) 47. See also G Fitzmaurice, 'Second Report on the Law of Treaties' (UN Doc No A/CN.4/107, YbILC 1957-II) 55 [127] (art 19) ('… not so major').

971 Simma 1970 (n 954) 61; Hutchinson (n 966) 196 ('… even an essential provision can be breached in a trivial way').

972 Crawford, *Commentaries* (n 947) 194 [3] (art 29).

973 M Spinedi, 'From One Codification to Another: Bilateralism and Multilateralism in the Genesis of the Codification of the Law of Treaties and the Law of State Responsibility' (2002) 13 EJIL 1099, 1104.

974 Tams (n 956) 22; J Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 RdC 325, 428. cf Rosenne (n 963) 44.

material breaches in circumstances where they could not invoke responsibility for the same breaches. This is why it is mistaken to conflate both notions, as the ILC has done.

It is notable that the structure of primary obligations is relevant to both standing to invoke responsibility for breach of that obligation and standing to suspend or terminate treaty obligations on account of material breach of that obligation..[975] Those who, like the ILC, analyse the former through the legal relations and concepts that underpin the latter are not wholly incorrect on this point.

Indeed, holding primary rights (ie, the structure of the correlative primary obligation) influences both the invocation of state responsibility on account of breach and the suspension or termination of a treaty on account of material breach. As discussed previously, the primary right-holder is ordinarily entitled:[976]

(1) To make claims for breach of the correlative obligation;
(2) To contract in or out of obligations and to protection against other States' purported powers to place the right-holder under obligation without its consent;
(3) To protection against countermeasures directed against other States; and
(4) To protection against suspension/termination of obligations by reason of material breaches committed by other States.

The key entitlements for the purposes of this discussion are **(1)** and **(4)**, both of which depend on the structure of the obligation breached or materially breached. Both the suspension of an obligation, which is provisional,[977] and the termination of

975 And see Crawford 2006 (n 974) 404.

976 See ch 1, pp 55–84, above.

977 VCLT (n 948) art 72, sub-ss (1)(a), (2) ('… during the period of the suspension').

the same, which is permanent,[978] lead to the same result: the abrogation of that obligation. Or, to put it in this thesis' terms, its replacement with a liberty:[979] its contradictory.[980] When an obligation is owed *inter partes*, States may suspend or terminate that obligation without fear of breaching the rights of other States. However, where the obligation is owed *erga omnes* (*partes*), suspension or termination of the obligation in question will lead to general default.

The key, again, is that the objects of each obligation *inter partes* are slightly different, as they concern the treatment of different classes of individuals. The structure of these obligations is such that suspension or termination will not affect the rights of other States. The same structure shapes the classic, paradigmatic invocation of responsibility by one State against another State; hence the overlap between standing to invoke responsibility and standing to suspend or terminate treaties. Again, obligations *inter partes* are structured[981] thus:

(1) Spain owes Canada certain treatment of Canadian nationals;
(2) Spain owes Belgium certain treatment of Belgian nationals;
(3) Spain owes Ethiopia certain treatment of Ethiopian nationals; and so on.

Assuming that Canada also owes Spain a certain treatment of Spanish nationals and that Canada commits a material breach of its obligations in this regard,

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978 See, eg, VCLT (n 948) art 70(1); Simma 1970 (n 954) 14.

979 R Provost, 'Reciprocity in Human Rights and Humanitarian Law' (1994) LXV BYIL 383, 406 ('... ceases to be mandatory').

980 See ch 1, pp 42–43, above.

981 On the meaning of 'structure' of a legal relation, see introduction, p 19, above.

Spain would then be justified in suspending or terminating obligation **(1)**, above.[982] For instance, if the obligation consists in Spanish or Canadian observance of tariffs at 6%, or less,[983] should Spain terminate/suspend this obligation vis-à-vis Canada successfully, Spain would be at liberty to, say, raise the level of the tariff to 10% for Canadian nationals. Spain's liberty to raise the tariff on Canadian nationals vis-à-vis Canada does not conflict, *prima facie*, with, say, Spain's obligation to keep the tariff on Belgian nationals at 6% vis-à-vis Belgium.

On the other hand, if this thesis is correct, obligations *erga omnes* (*partes*) consist of a series of identical obligations owed individually by one State to all others. The structure of these obligations is such that suspension or termination of these obligations will lead to general default. Were this thesis correct, that structure shapes the invocation of responsibility by many States against another State. This is why, again, the notions of standing to invoke responsibility and standing to suspend or terminate treaties do overlap to some extent.

Obligations *erga omnes* (*partes*), for instance those arising under the Washington Naval Treaty,[984] are structured as follows:

(1) The US owes Japan not to build capital ships heavier than 35,560 tonnes;
(2) The US owes the UK not to build capital ships heavier than 35,560 tonnes;
(3) The US owes France not to build capital ships heavier than 35,560 tonnes; and

982 VCLT (n 948) art 60(2)(b).

983 G Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points' (1957) XXXIII BYIL 203, 170–71.

984 Treaty between the British Empire, France, Italy, Japan and the United States of America for the Limitation of Naval Armament (opened for signature 6 February 1922, entered into force 17 August 1923) 117 BFSP 453 (Washington Naval Treaty).

(4) The US owes Italy not to build capital ships heavier than 35,560 tonnes.

If the US decided to build a capital ship heavier than the specified tonnage, it would simultaneously —but severally— break all its obligations with respect to Japan, Italy, France, and the UK.[985] This should give any of these States standing to invoke the responsibility of the US, were this thesis correct. Likewise, if the US suspended the obligation in question on account of a previous Japanese material breach, the legal relations of all other States should 'normally'[986] remain intact. Therefore, if the US terminated its treaty obligations vis-à-vis Japan on account of material breach, and consequently built capital ships heavier than the specified tonnage, the US would still commit a wrongful act against France, Italy, and the UK.

In this way, the structure of an obligation makes intersect the invocation of responsibility on account of its breach and its suspension/termination on account of its material breach. Those who analyse the former notion by drawing on the legal consequences that underpin the latter are not wholly incorrect in doing so.

However, such analysis ultimately miscarries. The invocation of state responsibility of a State and the invocation of a material breach as a ground for suspension/termination of treaties do not always go hand in hand. Each of these notions involves different considerations[987] and must be treated differently.[988]

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985 See ch 3, pp 205–15, above.

986 H Waldock, 'Second Report on the Law of Treaties' (UN Doc No A/CN.4/156 and Add 1–3, YbILC 1963-II) 76–77 [15] (art 20). See also at p 77 [17] (art 20)

987 Crawford, 'Responsibility III' (n 947) [60] ('… termination of the obligation violated … in case of a … material breach … of a bilateral treaty … has nothing to do with state responsibility.'), [61]. See also Crawford, *Commentaries* (n 947) 191 [1] (part II).

Standing to invoke responsibility is forthcoming in circumstances in which the 'right' (power) to suspend or terminate treaty regimes by reason of material breach is not. *More importantly, States owed no primary right could still suspend or terminate treaties when the correlative obligation is materially breached*.[989]

For instance, States other than those 'specially affected' by a material breach, under articles 60(2)(a) and 60(2)(b) VCLT can suspend or terminate treaties in circumstances in which they have no standing to invoke responsibility for the same breaches. Under article 60(2)(b) VCLT, a party 'specially affected' by a breach of an obligation contained in a multilateral treaty may suspend the obligation in question, importantly, '… in the relations between itself and the defaulting State'.[990] That such relations can be terminated/suspended between State A, specially affected State, and —only— State B, wrongdoer State,[991] is important because it hints at this obligation being owed *inter partes*. A disarmament obligation cannot be suspended between one party and another only, as suspension affects the legal relations of all parties, it should be remembered.[992] Such an obligation is owed *erga omnes* (*partes*).

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988 cf Tams (n 956) 62–63, not distinguishing between '… decentralised responses to breaches' (emphasis added).

989 Hutchinson (n 966) 189.

990 VCLT (n 948) art 60(2)(b).

991 And see Tams (n 956) 60 fn 64.

992 cf ch 3 pp 195–200, above.

The 'specially affected State' is thus the classic primary-right-holder: '... the party at the other end of the bilateral relationship'[993] created under the multilateral rule. Certainly, primary-right-holders may be 'specially affected States',[994] although not all 'specially affected States' are primary right-holders.[995] The 'specially affected State' is the one who suffers 'actual damage'.[996] And, importantly, the specially affected State may be one whose 'sovereign rights' are affected by the breach of an obligation.[997]

In effect, the 'specially affected State' is the party to which the obligation is owed, among all other parties to the rule in question. Retaking the example above, State A is owed the obligation that a tariff of 6% is observed on its nationals;[998] State A thus has standing to invoke responsibility if this obligation is breached.[999] Since States B, C … Z are not owed the relevant obligation, they would ordinarily have no

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993 Pauwelyn (n 956) 54. See also Tams (n 956) 45; G Gaja, 'Obligations and Rights Erga Omnes in International Law (First Report)' (2005) 71 (I) AIDI 117, 133. See further Hutchinson (n 966) 188–89, in light of 151–56, 151–52 (especially), and at pp 189–90 text associated to fn 47. See further Simma 1994 (n 955) 351.

994 Gomaa (n 958) 103. See also A De Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (Kluwer Law International, The Hague 1996) 185.

995 Gomaa (n 958) 103. See also Crawford, 'Responsibility III' (n 947) [97], considering Belgium as 'specially affected' in *Barcelona Traction*.

996 Crawford 2006 (n 974) 428.

997 Tams (n 956) 46.

998 See pp 230–31, above.

999 cf ch 1, pp 56–82, above.

standing to invoke responsibility. Yet, if the breach vis-à-vis State A rises to the level of material breach, States B, C … Z would be able collectively[1000] to suspend or terminate the treaty regime with respect to the wrongdoer[1001] or in general[1002] regardless of their lack standing to invoke responsibility for the same material breach.

In sum, **1)** standing to invoke the breach of an obligation and **2)** the power to terminate/suspend treaty obligations or regimes for material breach of the same are not identical notions. Exceptionally, they overlap in that the structure of obligations are relevant to both notions. However, the ultimate differences between both notions are the main reason why joining together all forms of 'decentralised responses to breaches'[1003] —without distinguishing between responses or between breaches, as Prof Tams does— or with transposing whole passages of the VCLT onto the ASR[1004] —as the ILC did—, leads to faulty reasoning.

3 Fitzmaurice's Structural Analysis

(a) Introduction

Fitzmaurice's analysis hinges on the notion of reciprocity: the 'exact contractual balance' referred to before.[1005] This balance is struck between the obligations

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1000 VCLT (n 948) art 60(2)(a) ('…by unanimous agreement').

1001 VCLT (n 948) art 60(2)(a)(i).

1002 VCLT (n 948) art 60(2)(a)(ii).

1003 Tams (n 956) 63. See also at pp 58–59, 80 text associated to fn 150, 308.

1004 Cf. ASR (n 948) arts 42(b)(i), 42(b)(ii) with VCLT (n 948) arts 60(2)(b), 60(2)(c), respectively.

1005 See p 220, above.

assumed by one party and the identical or equivalent rights it receives as consideration. Reciprocity is thus associated with the Latin maxims *quid pro quo*[1006] and *do ut des*[1007] or, more informally, with phrases such as 'tit for tat'[1008] or 'give and take'.[1009]

Reciprocity speaks to what Simma has called 'sociological characteristics' of obligations.[1010] These 'sociological characteristics' aptly explain what they were meant to explain: the termination and suspension of treaties by reason of 'material' breaches. But when they are 'spill[ed] … over'[1011] into the realm of standing to invoke responsibility,[1012] problems immediately arise. In very general terms,

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1006 ie 'something for something.' See, eg, Simma 1970 (n 954) 22, 39, 56; W Riphagen, 'Sixth Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles); and "Implementation" (*Mise en Œuvre*) of International Responsibility and the Settlement of Disputes (Part 3 of the Draft Articles)' (UN Doc No A/CN.4/389, YbILC 1985-II(1)) 11 [4] (art 6); C Annacker, 'The Legal Regime of Erga Omnes Obligations in International Law' (1994) 46 AJPIL 131, 142–43, 139; Simma 1994 (n 955) 343; ID Seiderman, *Hierarchy in International Law: The Human Rights Dimension* (School of Human Rights Research Series No 9, Intersentia-Hart, Antwerpen 2001) 126; Koskenniemi, 'Fragmentation' (n 953) [391].

1007 ie 'I give so that you may give.' Waldock, 'Treaties II' (n 986) 58 [23] (art 14); Simma 1970 (n 954) 20, 56; W Riphagen, 'Third Report on the Contents, Forms and Degrees of State Responsibility (Part 2 of the Draft Articles)' (UN Doc No A/CN.4/354, YbILC 1982-II(1)) 30 [52]; W Riphagen Riphagen W, 'Fourth Report on the Contents, Forms and Degrees of State Responsibility (Part 2 of the Draft Articles)' (UN Doc No A/CN.4/366, YbILC 1983-II(1)) 18 [96]; Simma 1994 (n 955) 335.

1008 Crawford, 'Responsibility III' (n 947) [328].

1009 Simma 1994 (n 955) 339, 365; Pauwelyn (n 956) 75 ('… gives and takes … bilateral and mutual') (emphasis added).

1010 Simma 1994 (n 955) 365, approved of by Tams (n 956) 62 fn 74 and associated text. See also Simma 1970 (n 954) 70 ('social categories').

1011 Simma 1994 (n 955) 365.

1012 cf for instance the influence of article 60 VCLT on the ASR, at ch 5, pp 331, below.

reciprocal obligations are considered as correlatives of individual State rights.[1013] Non-reciprocal obligations (eg obligations *erga omnes*[1014] and most obligations *erga omnes partes*) are deemed not to give rise to individual State rights. This is incorrect. Consequently, it is misguided to use article 60 VCLT to explain standing to invoke responsibility are incorrect on this point.

(b) Reciprocal Obligations

Fitzmaurice first distinguished between the structures of 'reciprocal' obligations and what other commentators have called 'integral' structures.[1015] For Fitzmaurice, obligations of the 'reciprocating type'[1016] consist of '... a mutual and reciprocal interchange of benefits and concessions between the parties'.[1017] They consist of 'bargains',[1018] 'barter[s]'[1019] or 'concessions'.[1020] One of the properties of these

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1013 cf Riphagen, 'Responsibility III' (n 1007) 30 [52] ('… separate interests of each individual State') (emphasis added).

1014 See, eg, U Linderfalk, 'International Legal Status Revisited — The Status of Obligations Erga Omnes' (2011) 80 Nord JIL 1, 7.

1015 See, eg, K Sachariew, 'State Responsibility for Multilateral Treaty Violations: Identifying the "Injured State" and its Legal Status' (1988) 35 NILR 273, 276; Arangio-Ruiz, 'Responsibility III' (n 970) 25 [81]; Pauwelyn (n 956) 56, 59. The terminology in this regard is far from uniform, however.

1016 G Fitzmaurice, 'Third Report on the Law of Treaties' (UN Doc No A/CN.4/115 and Corr. 1, YbILC 1958-II) 27 (art 18(2)), 47 [76] (art 18).

1017 Fitzmaurice, 'Treaties II' (n 970) 30 [art 18(1)(a)], and also at pp 53 [120] (art 18), 54 [124] (art 19); Fitzmaurice, 'Treaties III' (n 1016) 27 (art 18(2)).

1018 Crawford 2006 (n 974) 361.

1019 Riphagen, 'Responsibility III' (n 1007) 30 [52], 43 [123].

obligations, then, is that they are 'synallagmatic'[1021] or 'contractual'.[1022] Examples include obligations concerning diplomatic and consular law,[1023] extradition,[1024] most commercial obligations.[1025] Many insist that obligations *erga omnes* are not reciprocal obligations.[1026]

1020 Fitzmaurice, 'Treaties II' (n 970) 30 [art 18(1)(a)], also 53 [120] (art 18), 54 [124] (art 19); Pauwelyn (n 956) 58 ('concessionary').

1021 *Prosecutor v Kupreškić* (Judgment) Case No IT-95-16-T, T Ch II (14 January 2000) [519]. For commentators, see Arangio-Ruiz, 'Responsibility III' (n 970) 17 [50] text associated to fn 103; Provost (n 979) 384; J Crawford, 'Second Report on State Responsibility' (UN Doc No A/CN.4/498, YbILC 1999) [318]; P-M Dupuy, 'Quarante Ans de Codification du Droit de la Résponsabilité Internationale des États. Un Bilan' (2003) 107 RGDIP 305, 332; Pauwelyn (n 956) 52, 65–66; Koskenniemi, 'Fragmentation' (n 953) [472].

1022 Fitzmaurice, 'Treaties II' (n 970) 53 [120] (art 18); Seiderman (n 1006) 126; D Shelton, *Remedies in International Human Rights Law* (2nd edn OUP, Oxford 2005) 97. See also Riphagen, 'Responsibility III' (n 1007) 43 [123] ('… synallagmatic contracts').

1023 Tams (n 956) 55; Koskenniemi, 'Fragmentation' (n 953) [312]. See also Pauwelyn (n 956) 61. See further Simma 1994 (n 955) 337–38.

1024 Tams (n 956) 55.

1025 *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Second Phase)* (Judgment) [1966] ICJ Rep 6, 20 [11]; *Kupreškić 1999* (n 1021) [518]. See also Pauwelyn (n 956) 66.

1026 Annacker (n 1006) 146–47; Provost (n 979) 386; Seiderman (n 1006) 145; Pauwelyn (n 956) 81, 83; Gaja 2005 (I) (n 993) 127; Tams (n 956) 129; Koskenniemi, 'Fragmentation' (n 953) [391]; J Alcaide Fernández, 'Orden Público y Derecho Internacional: Desarrollo Normativo y Déficit Institucional' in A Salinas de Frías and M Vargas Gómez-Urrutia (eds) *Soberanía del Estado y Derecho Internacional: Homenaje al Profesor Juan Antonio Carrillo Salcedo* (Servicio de Publicaciones de la Universidad de Córdoba, Sevilla 2005) 94. See further M Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford Monographs in International Law, Clarendon Press, Oxford 1997) 17; P Picone, 'La Distinzione tra Norme Internazionali di *Jus Cogens* e Norme che producono Obblighi *Erga Omnes*' (2008) XCI RDI 5, 7.

The analysis of reciprocal obligations now underlies articles 60(2)(a) and 60(2)(b) [1027] VCLT. This is telling, as it suggests that reciprocal obligations are owed *inter partes*. [1028] Under these articles it is possible to confine the effects of suspension of the obligation materially breached between the suspending State(s) and the 'defaulting' [1029] or wrongdoing State. [1030] Fitzmaurice insisted on this. [1031] He also insisted that a conflict of treaties featuring reciprocal obligations does not necessarily lead to conflicts of obligations. [1032] As stated before, the ability to suspend or terminate an obligation is influenced by the structure of that obligation. [1033] The legal effects of the suspension/termination of obligations *inter partes* are confined to two States. The suspension/termination of obligations *erga omnes* (*partes*) affects all relevant parties —but severally. [1034] The same consequences have been deduced from the conflict of obligations —or lack thereof— that results from *inter se* modifications

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1027 Tams (n 956) 60 fn 64 and associated text.

1028 And see Fitzmaurice, 'Treaties III' (n 1016) 27 (art 18(2)), contrasting reciprocal obligations and obligations *erga omnes* (*partes*).

1029 VCLT (n 948) arts 60(2)(a)(ii), 60(2)(b).

1030 See also discussion on the 'specially affected State', at pp 233–35, above.

1031 Fitzmaurice, 'Treaties II' (n 970) 31 [art 19(1)(ii)(a)], 54 [124] text associated to fn 70 (art 19); Fitzmaurice, 'Treaties III' (n 1016) 44 [91] (art 19). See also G Fitzmaurice, 'Fourth Report on the Law of Treaties' (UN Doc No A/CN.4/120, YbILC 1959-II) 46 [art 20 paras (1)–(2)], 71 [104] (art 20). See also Arangio-Ruiz, 'Responsibility III' (n 970) 17 [50].

1032 Fitzmaurice, 'Treaties III' (n 1016) 44 [93] (art 19). See also Koskenniemi, 'Fragmentation' (n 953) [312], [472].

1033 See ch 1, pp 55, 83–84, above.

1034 cf pp 232–33, above.

of obligations *erga omnes* (*partes*).[1035] Indeed, many legal authorities would equate reciprocal obligations with bilateral obligations,[1036] owed *inter partes* as they are.[1037] Unsurprisingly, reciprocal obligations are deemed the standard or traditional type of obligations in international law,[1038] as are obligations *inter partes*[1039] and bilateral obligations.[1040] The obligation to respect other States' sovereignty has also been deemed reciprocal,[1041] which is telling in light of this thesis's discussions on sovereignty.[1042] In *Exchange of Greek and Turkish Populations*, the PCIJ refused to consider the relevant treaty a violation of Turkish sovereignty in part because Turkish

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1035 See ch 2, pp 105–18, 117 (especially), above.

1036 See, eg, B Stern, 'Et si on utilisait le Concept de Préjudice Juridique? Retour sur une Notion Delaisée à l'Occasion de la Fin des Travaux de la CDI sur la Responsabilité des États' [2001] AFDI 3, 14; Dupuy 2003 (n 1021) 308; Pauwelyn (n 956) 52, 54–55, 61; Tams (n 956) 129–30. See also Fitzmaurice, 'Treaties III' (n 1016) 27 [art 18(2)], 41 [78] (art 18), 44 [91] (art 19); *Ireland v UK* (App no 5310/71) (1978) 2 EHRR 25 (ECtHR) [239]; Koskenniemi, 'Fragmentation' (n 953) [210]. See also 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, 1059–60 ('... bilateral, interdependent, and integral obligations.') (emphasis added), 1071; Linderfalk (n 1014) 12. See further n 1167, below.

1037 See ch 3, pp 172–73, above.

1038 Fitzmaurice, 'Treaties III' (n 1016) 44 [91] (art 19); Fitzmaurice, 'Treaties IV' (n 1031) 66 [82] (art 18), for whom the condition of reciprocity is '… normally ... read into all treaties'; LA Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002) 13 EJIL 1127, 1137. See also Simma 1970 (n 954) 7, on reciprocity as a general principle of international law; Simma 1994 (n 955) 229; Seiderman (n 1006) 126. On reciprocity as a principle underlying 'many' international obligations, see Provost (n 979) 383 fn 1.

1039 See ch 2, p 89, above.

1040 cf ch 3, pp 172–73, above.

1041 *Re Caneba* (1969) 75 ILR 222 (Rome Court of Appeals) 225. cf similarly *Compania Naviera Vascongado v SS Cristina and others* [1938] AC 485 (HL) 502–03 (Lord Wright).

1042 See ch 2, especially at pp 93–122, above.

obligations to make its national laws conform to the relevant treaty were offset by identical obligations assumed by other parties.[1043]

In sum, reciprocal obligations are widely believed to correlate to individual rights. Their breach only affects one State.[1044] Annacker would even have it that it is synallagmas themselves (ie the confrontation of individual legal positions) that create individual rights.[1045] Similarly, Tams believes that 'decentralised' (ie non-collective; individual) reactions to breaches are possible only when an exchange of benefits occurs.[1046] Fitzmaurice believed treaties that featured reciprocity contained '… for … the parties … rights and obligations for each involving specific treatment at the hands of and towards each of the others individually.'[1047] He would thus have agreed with this contention.

(c) 'Integral' Obligations

That said, Fitzmaurice's main innovation consisted in making a distinction between two types of non-reciprocal obligations.[1048] Some commentators have called them

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1043 *Exchange of Greek and Turkish Populations* (Advisory Opinion) PCIJ Rep Series B No 10, 28.

1044 And see *Kupreškić 1999* (n 1021) [519]. See also Pauwelyn (n 956) 52–53; Shelton (n 1022) 97; Crawford 2006 (n 974) 422–23; Koskenniemi, 'Fragmentation' (n 953) [385] ('… owed by States to each other in a network of reciprocal relationships') (emphasis added).

1045 Annacker (n 1006) 146–48, 147 (especially).

1046 Tams (n 956) 63.

1047 Fitzmaurice, 'Treaties III' (n 1016) 27 [art 18(2)]. See also Fitzmaurice, 'Treaties IV' (n 1031) 70 [102] (art 20), on the consequences of reciprocity for individual reactions by States.

1048 Tams (n 956) 55.

'integral' obligations or obligations with an 'integral' structure.[1049] For Fitzmaurice, an '**integral**' obligation was only one type of what commentators have termed 'integral' obligations: the so-called 'absolute' obligations, dealt with below.[1050] Nevertheless, both types of 'integral' obligations are owed *erga omnes* (*partes*),[1051] as will be seen shortly. It is telling, therefore, that they are grouped in the same category, although most would insist that both categories are fundamentally different.[1052]

'**Interdependent**' obligations are the first type of 'integral' obligations.[1053] They are wrongly said to depend on a corresponding performance of the same obligation by all other parties;[1054] hence the 'mutual interdependen[ce]' of these

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1049 Sachariew (n 1015) 276; Arangio-Ruiz, 'Responsibility III' (n 970) 25 [81], 27 [91]. See also Pauwelyn (n 956) 59, assimilating both types of these —different— obligations; Tams (n 947 56 text associated to fn 34.

1050 Fitzmaurice, 'Treaties II' (n 970) 30, art 18(1)(b), 31 (art 19(1)(iv)); Fitzmaurice, 'Treaties III' (n 1016) 28 (art 19(b)); Fitzmaurice, 'Treaties IV' (n 1031) 46 (art 18(3)(e)). And see Pauwelyn (n 956) 52.

1051 And see Pauwelyn (n 956) 66 ('… integral or *erga omnes (partes)*'), 70, 85, passim. See also at p 59, equating both categories of such obligations.

1052 cf, eg, Tams (n 956) 131–32; E Katselli Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (Routledge, London 2010) 49.

1053 Fitzmaurice, 'Treaties II' (n 970) 31 [art 19(1)(ii)]; Fitzmaurice, 'Treaties III' (n 1016) 27 (art 19(a)); Fitzmaurice, 'Treaties IV' (n 1031) 46 (art 18(3)(e)).

1054 Fitzmaurice, 'Treaties II' (n 970) 30 [art 18(1)(b)], 54 [126] (art 19); Fitzmaurice, 'Treaties III' (n 1016) 44 [91] (art 19). See also, eg, Simma 1970 (n 954) 76 text associated to fn 323; Annacker (n 1006) 149; Simma 1994 (n 955) 336, 342, 351; J Crawford, 'Fourth Report on State Responsibility' (UN Doc No A/CN.4/517, YbILC 2001) [38] ('… all-or-nothing fashion'); Sicilianos 2002 (n 1038) 1134; Spinedi (n 973) 1105 fn 21; Tams (n 956) 56–57, 61 text associated to fn 66, 132 fn 69; Koskenniemi, 'Fragmentation' (n 953) [262], [312]; J Crawford, 'The System of International Responsibility' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 23 ('… necessary condition'). See further Dupuy 2003 (n 1021) 333.

obligations and their correlative rights.[1055] The analysis of these obligations now underlies article 60(2)(c) VCLT.[1056] Commentators widely identify disarmament obligations as interdependent.[1057] This is correct; but the problem in extending Fitzmaurice's analysis beyond suspension of treaties on account of material breach starts to become apparent at this point. It is understandable that State A would wish to suspend its obligations, say, '… not to exceed a certain level of armaments'[1058] for its armed forces where State B starts an arms race. State A —or any other State— has agreed to reduce their arsenals in pursuit of a certain military balance.[1059] The party that undermines this balance leaves the other parties in a vulnerable position if they remained bound by those obligations. A material breach of these obligations 'radically changes' the position of each party with respect to continued performance of the treaty, as article 60(2)(c) VCLT conveys. It could thus be said that interdependent obligations are assumed by States with an expectation of reciprocity

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1055 Fitzmaurice, 'Treaties IV' (n 1031) 66 [82] (art 19) ('... mutually interdependent rights and obligations.').

1056 See, eg, Simma 1970 (n 954) 76–77; Annacker (n 1006) 144; Alcaide Fernández (n 1026) 95 fn 22, 101 fn 58; Tams (n 956) 61, 80 fn 150 and associated text.

1057 Fitzmaurice, 'Treaties II' (n 970) 54 [126] (art 19). See also, eg, Simma 1970 (n 954) 75; Annacker (n 1006) 149; Crawford, 'Responsibility IV' (n 1054) [38]; Dupuy 2002 (n 1036) 1071; Sicilianos 2002 (n 1038) 1133–34; Spinedi (n 973) 1105 fn 21; Pauwelyn (n 956) 60; Tams (n 956) 57; Koskenniemi, 'Fragmentation' (n 953) [262], [312].

1058 Fitzmaurice, 'Treaties II' (n 970) 54 [126] (art 19).

1059 Sicilianos 2002 (n 1038) 1134–35.

by all other States:[1060] 'global'[1061] or 'collective'[1062] reciprocity. For Dupuy, reciprocity reaches its highest state for this type of obligations.[1063]

That said, none of the above affects the structure of interdependent obligations. An obligation is interdependent '… by reason of the character of the treaty' in which it is contained.[1064] As stated before, a rule and an obligation are different notions.[1065] Obligations are only deemed interdependent by looking at issues beyond the obligation in question; eg the implied understanding that the purpose of the obligation or the regime that contains it cannot be achieved without performance by all parties.[1066] *The fulfilment of other States' —related, but different— obligations*

1060 cf K Zemanek, 'New Trends in the Enforcement of Erga Omnes Obligations' [2000] 4 MPUNLY 1, 6; Linderfalk (n 1014) 12.

1061 Sicilianos 2002 (n 1038) 1135; L-A Sicilianos, 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 1139. See also Dupuy 2002 (n 1036) 1071.

1062 A Orakhelashvili, *Peremptory Norms in International Law* (Oxford Monographs in International Law, OUP, Oxford 2006) 92.

1063 Dupuy 2002 (n 1036) 1071; Dupuy 2003 (n 1021) 332–33. cf Simma 1994 (n 955) 351 ('… treaties embodying genuine reciprocity') (emphasis added).

1064 Fitzmaurice, 'Treaties II' (n 970) 31 [art 19(1)(ii)(b)] (emphasis added). See also VCLT (n 948) art 60(2)(c) ('… if the treaty is of such a character') (emphasis added). See, further, W Riphagen, 'Preliminary Report on the Contents, Forms and Degrees of State Responsibility (Part 2 of the Draft Articles on State Responsibility)' (UN Doc No A/CN.4/330, YbILC 1980-II(1)) 119 [64]; Riphagen, 'Responsibility III' (n 1007) 37 fn 81; Simma 1994 (n 955) 370 ('... not only the formal rights and obligations but also the resulting interactions of States are integrally connected.') (emphasis added)

1065 See introduction, pp 7–8, above.

1066 Tams (n 956) 57.

is taken into account.[1067] Teleological considerations of the treaty, eg the 'military balance' created by disarmament treaties,[1068] are also at play here which should[1069] have no direct bearing on the structure of the obligation itself. It is submitted that Simma's 'sociological characteristics'[1070] belong here, as interdependent obligations can only be considered as such by looking to their 'context'[1071] rather than to the obligations themselves.

As far as the structure of an interdependent obligation is concerned, the paramount consideration is that State A's termination or suspension of an interdependent obligation vis-à-vis State B, the defaulting State, will eventually lead State A to default in its respective obligations against States C, D … Z.[1072] States bear interdependent obligations against all other right-holders.[1073] *Inter se* modifications of

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1067 See, eg, Crawford, 'Responsibility IV' (n 1054) [38] ('… complete collective restraint is necessary'); Sicilianos 2002 (n 1038) 1134. See also Annacker (n 1006) 149.

1068 Sicilianos 2002 (n 1038) 1134.

1069 cf the distinction between rule and obligation in introduction, pp 7–8, above.

1070 See pp 235–37, above.

1071 Koskenniemi, 'Fragmentation' (n 953) [86] ('… constructions about how the context should be understood').

1072 Fitzmaurice, 'Treaties III' (n 1016) 27–28 (art 19(a)), 44 [91], [93] (especially) (art 19); ILC, 'Draft Articles on the Law of Treaties: Text as finally adopted by the Commission on 18 July 1966' (18 July 1966) UN Doc A/CN.4/190 (YbILC-1966(II)) 255 [8] (art 57). See also Simma 1970 (n 954) 75–76; Annacker (n 1006) 144; Simma 1994 (n 955) 352; Tams (n 956) 56. See further Crawford, 'Responsibility III' (n 947) fn 195, [280]; Spinedi (n 973) 1105 fn 21.

1073 Dupuy 2003 (n 1021) 333. See also Simma 1994 (n 955) 336, 342, 351; Sicilianos 2002 (n 1038) 1134–35; Spinedi (n 973) 1105 fn 21; Koskenniemi, 'Fragmentation' (n 953) [312], [472] (interdependent obligations as owed *erga omnes partes*). cf similar remarks in Tams (n 956) 56, 61, 131–32, text associated to fn 70 especially; R Huesa Vinaixa, 'Plurality of

treaties containing interdependent obligations lead to conflicts of obligations.[1074] It has been suggested above that this is the case.[1075] It is only when this is appreciated that the purpose of article 60(2)(c) VCLT's power to suspend or terminate the treaty '… with respect to itself' —ie to leave it altogether— becomes clear. This provision aims to prevent States default against other States.[1076] *And since an interdependent obligation gives rise to general default despite being reciprocal, the idea that Fitzmaurice's 'reciprocal obligations' lead to default vis-à-vis only one right-holder <u>because</u> they are reciprocal*[1077] *should have been questioned more thoroughly.* Again, the legal effects of suspension, termination, *inter se* modification, or default of an obligation are related to the individual —or otherwise— nature of the rights correlative to that obligation: to their structure.[1078]

Injured States' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 952 text associated to fn 17.

1074 Koskenniemi, 'Fragmentation' (n 953) [312], [385]. A controversial example was the 1935 Anglo-German Naval Agreement. Exchange of Notes between the United Kingdom and Germany regarding the Limitation of Naval Armaments (opened for signature 18 June 1935, entered into force 18 June 1935) 139 BFSP 182 (Anglo-German Naval Agreement). This treaty allowed, as between Germany and the UK only, the enlargement of the German Navy, in detriment of applicable disarmament provisions. See Treaty of Peace between the Allied and Associated Powers and Germany (opened for signature 28 June 1919, entered into force 10 January 1920) 112 BFSP 1 (Treaty of Versailles) Part V s II, arts 181, 190 (especially). This drew protests from France and Italy, parties to the Treaty of Versailles. On these protests and divisions of opinion among members of the British Government, including Fitzmaurice, see A Carty and RA Smith, *Sir Gerald Fitzmaurice and the World Crisis: A Legal Advisor in the Foreign Office, 1932–1945* (Kluwer Law International, The Hague 2000) 177 ff, 195 (especially).

1075 See pp 232, above.

1076 See, eg, E Schwelb, 'The Nuclear Test Ban Treaty and International Law' (1964) 58 AJIL 642, 664.

1077 cf pp 235–37, above.

1078 See pp 228–29, above; ch 1, pp 55–84, above..

But there is more to this. State A's disarmament obligations, eg under the Washington Naval Convention,[1079] are borne by States over their own armed forces. Traditionally, State A's obligation would have concerned, say, respect for jurisdictional immunities of *other States' armed forces*. The obligation of disarmament concerns the obligation-bearer's own agents, over which it ordinarily has organisational supremacy.[1080] If State B equips its armed forces in a manner forbidden by that obligation, it could not be said that State B did so only with respect to State A, but not with respect to State C or State R or State X. However, State B could breach the obligation to uphold the immunity of State A's agents while simultaneously respecting that of the agents of States C, R, and X. Other examples of interdependent obligations follow this pattern.

Demilitarisation obligations have also been identified as interdependent obligations.[1081] The Antarctic Treaty, for instance, lays down a prohibition of the use of 'Antarctica' for military purposes.[1082] The provisions of this treaty apply to all areas south of 60° South Latitude,[1083] as opposed to any right-holding-State's

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1079 (n 984) art V.

1080 See ch 2, pp 161–65, above.

1081 Annacker (n 1006) 149.

1082 Antarctic Treaty (opened for signature 1 December 1959, entered into force 23 June 1961) 402 UNTS 71 (Antarctic Treaty) art I(1). On the interdependent character of this obligation, see Crawford, 'Responsibility IV' (n 1054) [38]; Tams (n 956) 57 fn 41 and associated text; Crawford 2010a (n 1054) 24.

1083 Antarctic Treaty (n 1082) art VI.

territory, as would have been the case under the classic conception of sovereignty.[1084] The parties either use 'Antarctica' for military purposes or they do not. The areas over which these parties advance claims of sovereignty are also part of 'Antarctica'. Therefore, any breach of this obligation leads to general default. Other examples of interdependent obligations include the protection of common resources [1085] (eg resources over which no State could claim supremacy), the LTBT, [1086] denuclearisation treaties,[1087] treaties forbidding the use of certain weapons,[1088] among others.[1089]

The second type of 'integral' obligation is what Tams calls '**absolute**' obligations. [1090] As was the case with 'integral' obligations, for Fitzmaurice the

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1084 See ch 2, pp 129–36, 134–35 n 561 and associated text, above. And see Antarctic Treaty (n 1076) art III, whereby the treaty does not prejudice claims to sovereignty over Antarctica.

1085 Annacker (n 1006) 149. cf Dupuy 2002 (n 1036) 1071, citing fishing bans in certain areas.

1086 Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water (opened for signature 5 August 1963, entered into force 15 October 1963) 480 UNTS 43 (LTBT). See Hutchinson (n 966) 185 fn 114.

1087 Sicilianos 2002 (n 1038) 1134. eg the Treaty on the Non-Proliferation of Nuclear Weapons (opened for signature 12 June 1968, entered into force 5 March 1970) 729 UNTS 161, regarded as interdependent by Annacker (n 1006) 144.

1088 Simma 1970 (n 954) 75.

1089 Obligations contained in the 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 (Outer Space Treaty) have also been deemed interdependent. See Crawford, 'Responsibility IV' (n 1054) [38]; Tams (n 956) 57. So have environmental obligations, possibly wrongly. See E Wyler and A Papaux, 'The Different Forms of Reparation: Satisfaction' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 626.

1090 Tams (n 956) 55. See also Crawford 2010a (n 1054) 23 fn 32.

'absolute' character of these obligations was one of their properties.[1091] They are also known as 'objective' obligations.[1092] What the 'absolute' and 'integral' character of absolute obligations meant to convey was **1)** that they had to be performed by all parties independently, without any consideration of reciprocity,[1093] **2)** that they could not be suspended vis-à-vis the wrongdoer State or its nationals,[1094] even if that State has committed a material breach of the same obligation with respect to the right-holder or its nationals, and **3)** that —only for some authorities— they could not be contracted out of (eg through *inter se* modifications or agreements).[1095] The analysis already miscarries at **1)**, as all obligations have to be performed independently, regardless of considerations of reciprocity, as will be discussed below.[1096] For now, Fitzmaurice's analysis will be taken on in its own terms.

1091 Fitzmaurice, 'Treaties II' (n 970) 30 (art 18(1)(b)) (especially); Fitzmaurice, 'Treaties III' (n 1016) 28 (art 19(b)).

1092 Simma 1994 (n 955) 364–69; Orakhelashvili (n 1062) 84 ff; Wyler and Papaux (n 1089) 626–27.

1093 Fitzmaurice, 'Treaties II' (n 970) 31 (art 19(1)(iv)), 54 [126] (art 19); Fitzmaurice, 'Treaties III' (n 1016) 28 (art 19(b)). See also Simma 1970 (n 954) 24; Provost (n 979) 392; Crawford, 'Responsibility II' (n 1021) [327] text associated to fn 639; Dupuy, 2002 (n 1030) 1071–72; Sicilianos 2002 (n 1038) 1135; Pauwelyn (n 956) 64; Tams (n 956) 56–57, 61, 69, 132 fn 69; Koskenniemi, 'Fragmentation' (n 953) [312]; Crawford 2010a (n 1054) 23 fn 32. cf Simma 1994 (n 955) 365, 375.

1094 Fitzmaurice, 'Treaties II' (n 970) 31 (art 19(1)(iv)(a)–(b)).

1095 See, eg, *Kupreškić 1999* (n 1021) [511], stressing absolute obligations' supposed non-derogable character. See also Ragazzi 1997 (n 1026) 85, 88 ('… absolute validity'), 179 ('… "absolute" terms'), 183, text associated to fns 82–83 (especially), for whom absolute obligations (and obligations *erga omnes*) admit of no exceptions. cf Koskenniemi, 'Fragmentation' (n 953) [385], admitting the possibility of *inter se* modification, a process fraught with difficulties.

1096 See pp 250–57, below.

Obligations *erga omnes* are examples of 'absolute' obligations.[1097] Some would also include obligations *erga omnes partes* in this category.[1098] While all obligations *erga omnes* are absolute, not everyone agrees that all absolute obligations are owed *erga omnes*.[1099] Likewise, some of the identified examples of 'absolute' obligations —obligations '…of the social or humanitarian kind, the principal object of which is the benefit of individuals'[1100] as they are— are also examples of obligations *erga omnes*; for instance, human rights[1101] and humanitarian law[1102] obligations. Furthermore, as absolute obligations are said to be self-existent or non-dependent on other parties' performance, they are '… so to speak, an obligation towards all the world rather than towards particular parties.'[1103] This is yet another analytical miscarriage. The implication is that absolute obligations —eg some

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1097 Provost (n 979) 389; Ragazzi 1997 (n 1026) 183; Dupuy 2003 (n 1021) 333. See also Seiderman (n 1006) 145; Wyler and Papaux (n 1089) 627.

1098 Ragazzi 1997 (n 1026) 201; Sicilianos 2002 (n 1038) 1137; Koskenniemi, 'Fragmentation' (n 953) [472].

1099 See Tams (n 956) 133, text associated to fn 74 (especially).

1100 Fitzmaurice, 'Treaties IV' (n 1031) 46 fn 12 (art 18(3)(e)). See also Fitzmaurice, 'Treaties III' (n 1016) 44 [91] (art 19). And see VCLT (n 948) art 60(5).

1101 Fitzmaurice, 'Treaties II' (n 970) 54 [125] (art 19). See also Simma 1970 (n 954) 70; Simma 1994 (n 955) 337, 352; Dupuy 2002 (n 1036) 1072; Tams (n 956) 57; Koskenniemi, 'Fragmentation' (n 953) [248]–[249], [262], [312], s G(1); Crawford 2010a (n 1054) 23 fn 32.

1102 Fitzmaurice, 'Treaties II' (n 970) 54 [125] fn 71 and associated text (art 19), on article 2 common to all Geneva Conventions. See also Provost (n 979) 408; Koskenniemi, 'Fragmentation' (n 953) [262], s G(1).

1103 Fitzmaurice, 'Treaties II' (n 970) 54 [126] (art 19) (emphasis added). See also Simma 1994 (n 955) 230 ('…in the absolute, *urbi et orbi*').

obligations *erga omnes* (*partes*)— do not create individual rights for States,[1104] at primary level, or do not entitle them to 'respond to breaches' unilaterally,[1105] at further levels. The idea that it was the confrontation of synallagmas that created individual rights[1106] should be remembered here.

As stated before, obligations created without regard to supremacy are owed *erga omnes* (*partes*).[1107] Many of the identified examples of absolute obligations fit within this category. Thus, human rights obligations protect all individuals regardless of nationality,[1108] contrary to what was the case in classic, general international law.[1109] Other examples include: **1)** Obligations concerning the enactment of uniform laws within *obligation-bearing-States' own municipal legal systems*,[1110] **2)** obligations requiring compliance with certain standards,[1111] for example safety

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1104 And see Pauwelyn (n 956) 65, on absolute obligations as a promise to a collective rather than to individual States. See further Zemanek (n 1060) 42; Tams (n 956) 56.

1105 Tams (n 956) 61.

1106 See pp 241, above.

1107 See ch 2, especially at pp 136–41, 151–61, 163–65, above.

1108 And see Koskenniemi, 'Fragmentation' (n 953) [391], for whom the assumption of obligations with respect to all persons is decisive in this respect. However, the statements at [392], the true context within which [391] is stated, do not apply to general international law. And cf treaty claims at ch 2, pp 151–61, above.

1109 See ch 2, pp 141–51, above.

1110 Simma 1994 (n 955) 337; Tams (n 956) 58. See also Sachariew (n 1015) 281.

1111 Fitzmaurice, 'Treaties II' (n 970) 31 (art 19(1)(iv)); Tams (n 956) 57.

standards at sea[1112] (ie where obligation-bearers impose standards '… upon the vessels sailing under their flags',[1113] *inter alia*).

The more striking illustration of the rationale behind absolute obligations can be seen in Provost's interpretation of obligations establishing labour standards. If labour standards are established for all workers, regardless of nationality or of acceptance of the same standards by the State of nationality, Provost would consider these obligations as absolute[1114] —and thus, if this thesis is correct, as *erga omnes* (*partes*). But if the obligations establish standards only for workers who are *foreign nationals*, he would consider these obligations as reciprocal,[1115] and thus, as owed *inter partes*. The obligations assumed vis-à-vis foreign nationals in the latter case are analogous to the obligations concerning diplomatic protection, owed *inter partes* and created out of respect of the national State's supremacy/sovereignty.[1116]

1112 Fitzmaurice, 'Treaties II' (n 970) 54 [125] (art 19). See also Tams (n 956) 57.

1113 RR Churchill and AV Lowe, *The Law of the Sea* (Melland Schill Studies in International Law, 3rd edn Manchester University Press, Manchester 1999) 265. See also, eg, International Convention on the Safety of Life at Sea (opened for signature 1 November 1974, entered into force 25 May 1980) 1184 UNTS 276 (SOLAS 1974) arts I(b), II, VIII(d)(i)–(ii).

1114 Provost (n 979) 385. And see Fitzmaurice, 'Treaties II' (n 970) 54 [125] (art 19).

1115 Provost (n 979) 385.

1116 cf ch 2, pp 141–51, above.

4 Fitzmaurice's Analysis and Obligations *Erga Omnes*

Fitzmaurice's conception of absolute obligations as 'self-existent'[1117] is the greatest obstacle to employing his analysis to explain obligations *erga omnes* (*partes*). Because they are 'self-existent',[1118] absolute obligations do not depend on any corresponding performance of other States' analogous obligations under the same regime.[1119] The implication, then, is that interdependent obligations (eg disarmament ones) and reciprocal obligations are dependent on performance of any other parties' corresponding obligations.[1120] Others would insist that a distinction must be drawn between an obligation **dependent** on reciprocity (as are reciprocal obligations) and an obligation **conditioned** on reciprocity[1121] (as are interdependent obligations). Since an element or concept which depends on another is also conditioned on it in more than one sense, it is hard to see how the distinction makes any grammatical[1122] or logical sense.

1117 Fitzmaurice, 'Treaties II' (n 970) 31 (art 19(1)(iv)); Fitzmaurice, 'Treaties III' (n 1016) 28 (art 19(b)).

1118 Fitzmaurice, 'Treaties II' (n 970) 31 (art 19(1)(iv)) ('… so that the obligation is of a self-existent character') (emphasis added).

1119 See also Fitzmaurice, 'Treaties II' (n 970) 54 [126] (art 19); Fitzmaurice, 'Treaties III' (n 1016) 28 (art 19(b)).

1120 Fitzmaurice, 'Treaties II' (n 970) 54 [126] (art 19) ('… self-existent, as opposed to concessionary, reciprocal or interdependent obligations'). See also Riphagen, 'Responsibility IV' (n 1007) 18 [96].

1121 Provost (n 979) 383 fn 1. cf Pauwelyn (n 956) 69, who does not insist on 'dependence' .

1122 cf University of Oxford, 'Oxford English Dictionary: The Definitive Record of the English Language' <http://www.oed.com/> accessed 17 November 2009, ('depend', v.[1]; 2) ('To hang *upon* or *from*, as a result or consequence is contingently attached to its condition or cause; to be contingent on or conditioned by.'); ('contingence', 7b); ('condition', n.; 1a, 4a); ('condition', v.; 3, 4b).

In any case, no obligation is dependent or conditioned on performance of an analogous obligation by any other subject. The regime underlying article 60 VCLT evidences this well. *The material breach of an obligation does not make other obligations in the treaty regime in question disappear automatically*.[1123] Other parties 'may or may not'[1124] suspend or terminate the treaty regime after the material breach occurs.[1125] This suggests that between **1)** the material breach of an obligation and **3)** the moment when an obligation or treaty regime is terminated/suspended *there is **2)** an intermediate stage*[1126] *during which both this obligation and its reciprocal mirror retain full validity*. At this intermediate stage, at least in practical terms,[1127] the right-holder, victim of the material breach, has nothing but burdens to bear;[1128] the basis for its further compliance with the relevant treaty is 'destroyed'.[1129] That is, reciprocity ceases to exist. However, the obligation materially breached and its reciprocal counterpart both retain full validity. The fact that States could also invoke

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1123 Simma 1970 (n 954) 26, 63; Gomaa (n 958) 95 text associated to fn 1; Crawford, *Commentaries* (n 947) 194 [3] text associated to fn 425 (art 29). See also ADM McNair, *The Law of Treaties* (Clarendon Press, Oxford 1961) 553; Fitzmaurice, 'Treaties II' (n 970) 53 [119] (art 18); Rosenne (n 963) 24, 43 (also at p 23).

1124 McNair (n 1123) 553. See also Crawford, *Commentaries* (n 947) 194 [3] (art 29).

1125 And see VCLT (n 948) art 60(1) ('A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.') (emphasis added). See also 'entitlements to suspend' or 'terminate' throughout the rest of article 60.

1126 And see Fitzmaurice, 'Treaties IV' (n 1031) 68–69 [87], [89] (art 18).

1127 Simma 1970 (n 954) 29.

1128 Simma 1970 (n 954) 21.

1129 *Namibia* (n 966) 47 [95] ('destroys'). See also Simma 1970 (n 954) 21.

responsibility for breach of the obligation materially breached[1130] also supports this conclusion. The breach of a valid obligation is a condition for a successful claim[1131] and the validity of an obligation is not prejudiced by the wrongful act which gives rise to it.[1132]

This insight is critical. If an obligation can subsist despite the material breach of its reciprocal mirror, both obligations actually are independent one from the other. As Provost observes, the existence of a corresponding obligation is no bar to the binding force of that obligation.[1133] Hohfeld would decidedly agree. The US's obligation towards Japan not to build warships of a certain tonnage under the Washington Naval Treaty[1134] is actually independent from Japan's analogous obligation towards the US. Classifying them as 'interdependent' misses this point. It is perfectly understandable why the US would desire to terminate or suspend the treaty in force between them if Japan entered a naval arms race: to counter the arms race and properly to defend itself. It is also obvious why States should not suspend or terminate absolute obligations —eg human rights obligations— under article 60(5) VCLT. A rule that would allow State B to reciprocate genocide against State A's

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1130 Simma 1970 (n 954) 5, 42; Gomaa (n 958) 62; Crawford, *Commentaries* (n 947) 194 [3] (art 29); Crawford 2010a (n 1054) 22 text associated to fn 23. See also Fitzmaurice, 'Treaties IV' (n 1031) 68 [88], 69 [89], [91] (art 18), allowing for the possibility of countermeasures ('reprisals') to take place; Rosenne (n 963) 24.

1131 ASR (n 948) art 13.

1132 ASR (n 948) art 29.

1133 Provost (n 979) 384, in which case his remarks cited at p 253 n 1121, above, are contradictory.

1134 (n 984).

nationals because State A has committed a material breach of the Genocide Convention[1135] on State B's nationals would be abhorrent.[1136] Here —and only here— is when Simma's 'sociological' considerations[1137] are relevant and Fitzmaurice's classification is useful.

However, since all obligations can subsist in these circumstances, it follows that all obligations are self-existent.[1138] They remain valid despite breach of other, related obligations. Thus, it is hard to see how the analysis of absolute obligations holds any water or whether it can be extrapolated to the analysis of obligations *erga omnes* (*partes*). To put it bluntly, it would be strange if the UK could only 'individually react' to Norwegian 'breaches' of a hypothetical obligation not to fortify the Svalbard Islands if the UK also agrees not to fortify the Channel Islands. If the UK does not so agree, it would be allowed no 'individual responses to breaches',[1139] as this obligation of disarmament would be absolute: self-existent, non-reciprocal, etc. Presumably, then, the UK would need to obtain the consent of, say, the other parties to the relevant treaty in order to 'react' to Norway's 'breaches'. This is far-

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1135 (n 938).

1136 However, such a rule would not be inconceivable. Humanitarian law once depended on reciprocity, for instance. See Convention with Respect to the Laws and Customs of War (opened for signature 29 July 1899) 187 CTS 429, art 2.

1137 See p 245, above.

1138 And see Pauwelyn (n 956) 69.

1139 cf pp 227, above.

fetched and inaccurate: at least one analogous claim has been considered for which collective consent was not sought.[1140]

An obligation of disarmament would become an absolute obligation on disarmament only because in the latter case the obligation-bearer would not receive analogous treatment by the right-holder(s). That is, the obligation would change **essence** and **structure** by the addition of an analogous and related obligation which is ultimately independent and different from it. This seems incorrect.

5 Preliminary Conclusion

The picture that emerges is that the reference to the '… exact équilibre contractuel à maintenir entre les droits et les charges'[1141] of obligations *inter partes* has no bearing on the structure of either obligations *inter partes* or obligations *erga omnes* (*partes*). This being the case, reciprocity is not of the essence of either type of obligation. Expectations of reciprocity may play a decisive role in the creation and the desire to assume obligations, even absolute ones.[1142] In this role, reciprocity is a —very important, albeit mere— motive. As these obligations can subsist without any reciprocal exchange, reciprocity is not a decisive consideration as to the structure of these obligations. Therefore, reciprocity will not be used to determine the entity to which obligations *erga omnes* are owed.[1143]

1140 See ch 2, pp 163–65, above.

1141 *Genocide 1951* (n 937) 23.

1142 Simma 1970 (n 954) 7; Tams (n 956) 56.

1143 See question raised in introduction, pp 4–5, above.

C 'BILATERALISM', 'MULTILATERALISM' AND THE STRUCTURE OF OBLIGATIONS *ERGA OMNES* (*PARTES*)

Aside from reciprocity, a second aspect of the structure of obligations is that of 'bilateralism'. Again, the term has not been coined by this thesis in order to complicate the argument further. 'Bilateralism' is an alleged feature of classic international law whereby all obligations, even those contained in multilateral rules (eg multilateral treaties or custom) would always beget bilateral obligations between pairs of States.[1144] In other words, for those who comment on bilateralism, classic international law was **systemically incapable** of creating anything other than obligations *inter partes* or bilateral obligations.

This is ultimately incorrect, but it is also unsurprising by now. In chapter 2, the reasons why obligations *inter partes* were created have already been advanced. A pattern in classic, general international law was discerned which follows three 'rules-of-thumb': **first**, a State held liberties to act respecting individuals/things over which no State —or no other State but itself— would have supremacy; **second**, a State bore obligations to act in certain ways respecting individuals/things over which other States did have supremacy, and **third**, these obligations would be established out of deference to the supremacy/sovereignty of the correlative-right-holding State only.[1145] This pattern is the 'character of the system' which is said to create

[1144] Simma 1994 (n 955) 232, commenting on how bilateralism allows for the precise identification of primary-right-holders.

[1145] See ch 2, pp 98–101, above.

obligations *inter partes*.[1146] Classic, general international law only created obligations *inter partes* because of the way it was set up: because of its structure.[1147]

If this is the case, it is unsurprising that these structural traits of classical international law are described in terms of principles than to legal relations. Some would describe them as an 'understanding' of international law, [1148] a 'grounding' upon which international law was built, [1149] as '… a deeply ingrained view of international law', [1150] or the 'classical paradigm', [1151] among other descriptions.[1152]

1146 Crawford 2006 (n 974) 346, 402 ('systematic elements')

1147 See, eg, Simma 1994 (n 955) 232; I Feichtner, 'Community Interest' (MPEPIL) <http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1677&recno=1> accessed 22 July 2009, [47] ('... bilateralist structure of public international law').

1148 M Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 Nord JIL 211, 231. See also Simma 1994 (n 955) 239.

1149 Simma 1994 (n 955) 229, 249 ('…bilateralist infrastructure'), 251 ('traditional edifice'). See also Katselli Proukaki (n 1052) 12.

1150 Crawford 2006 (n 974) 345.

1151 Alcaide Fernández (n 1026) 95. See also pp 96, 108. See further Simma 1994 (n 955) 239, 244; Crawford, 'Responsibility III' (n 947) [83] ('… paradigm of bilateral relations'); I Scobbie, 'The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law"' (2002) 13 EJIL 1201, 1212–13, 1215 ('bilateral paradigm'); A-L Vers-Chaumette, 'The International Community as a Whole' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 1027 text associated to fn 26.

1152 Riphagen, 'Responsibility III' (n 1007) 36 [91] text associated to fn 79 ('… bilateral-minded'), 38 [97]; Sachariew (n 1015) 273 ('… traditional bilateralist approach'), 274 ('bilateralist patterns'); Hutchinson (n 966) 153; G Arangio-Ruiz, 'Fourth Report on State Responsibility' (UN Doc No A/CN.4/444, YbILC 1992-II(1)) 44 [131] ('pattern of bilateralism'); Byers (n 1148) 231; Crawford 2006 (n 974) 426 ('bilateral paradigm); Simma 1994 (n 955) 232, 239 ('…bilateralist … paradigm'), 247 text associated to fn 62, 311, 315, 344 ('traditional bilateral instinct'). See also Arangio-Ruiz, 'Responsibility IV' (n 1152) 43 [130] ('traditional view'); D Alland, 'Countermeasures of General Interest' (2002) 13 EJIL 1221, 1227 ('Classic bilateral'); J Crawford, 'First Report on State Responsibility' (UN Doc No A/CN.4/490, YbILC 1998) [63] ('… "classical" idea of bilateral norms'), [109]

What this thesis calls obligations *inter partes* have been described as 'standard',[1153] 'traditional',[1154] 'classic',[1155] 'normal',[1156] 'ordinary',[1157] or 'stereotypical'[1158] obligations. Bilateralism thus reduces all obligations contained in multilateral sources into 'bundles',[1159] 'aggregates',[1160] 'bunch[es]',[1161] 'compilation[s]',[1162] 'clusters',[1163]

('tradition'); Crawford, 'Responsibility IV' (n 1054) [40] ('… classical "bundle" of bilateral obligations'); S Villalpando, *L'Émergence de la Communauté Internationale dans la Responsabilité des Etats* (Publications de l'Institut Universitaire de Hautes Études Internationales, PUF, Paris 2005) 283 ('… principe bilatéral'); Feichtner (n 1147) [47] ('… bilateralist structure of public international law'); Crawford 2010a (n 1054) 24 ('… older tendency'); M Koskenniemi, 'Theories of State Responsibility' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 48 text associated to fn 16 ('…"classical" international law'); Sicilianos 2010 (n 1061) 1137.

1153 Crawford, *Commentaries* (n 963) 79 [4] (art 1).

1154 Arangio-Ruiz, 'Responsibility IV' (n 1145) 44 [130]; Annacker (n 1006) 134; Koskenniemi, 'Fragmentation' (n 953) [388]; Scobbie (n 1151) 1204. See also Simma 1994 (n 955) 232, 243, 257; G Nolte, 'From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations' (2002) 13 EJIL 1083, 1094.

1155 Annacker (n 1006) 150. See also Simma 1994 (n 955) 240, 257; Nolte (n 1154) 1094–95.

1156 Crawford, 'Responsibility III' (n 947) [227].

1157 Byers (n 1148) 232. See also Koskenniemi, 'Fragmentation' (n 953) s G(1) (at p 250).

1158 Scobbie (n 1151) 1204.

1159 Sachariew (n 1015) 277 fn 16; Simma 1994 (n 955) 336; G Perrin, 'La Détermination de l'État Lésé. Les Régimes Dissociables et les Régimes Indissociables' in J Makarcyzk (ed) *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Kluwer Law International, The Hague 1996) 243 ('faisceau'); Crawford, 'Responsibility IV' (n 1054) [40]; Tams (n 956) 45; Villalpando (n 1152) 98 ('faisceau'); Crawford 2010a (n 1054) 24; Huesa Vinaixa (n 1067) 950. See also Crawford 2006 (n 974) 42.

1160 Provost (n 979) 384.

1161 Annacker (n 1006) 136.

or 'networks'[1164] of bilateral relations. Consequently, bilateralism was said to create only obligations *inter partes*.[1165]

This reliance on traditional processes of law-making and obligations *inter partes* was also discussed with respect to reciprocal obligations.[1166] Reciprocity and bilateralism are closely associated in the literature,[1167] integral structures[1168] are contrasted with bilateral/bilateralisable structures,[1169] and bilateralism is automatically and intuitively read into the interpretation of international

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1162 Pauwelyn (n 956) 54, 71.

1163 Seiderman (n 1006) 127.

1164 Seiderman (n 1006) 127; Koskenniemi 2010 (n 1146) 48 text associated to fn 16.

1165 See, eg, W Riphagen, 'Seventh Report on State Responsibility' (UN Doc No A/CN.4/397, YbILC 1986-II(1)) 5 [2] (art 5).

1166 See p 240 n 1038 and associated text, above.

1167 See, eg, Riphagen, 'Responsibility III' (n 1007) 38 fn 91; Riphagen, 'Responsibility VI' (n 1006) 7 [14] (art 5); Stern 2001 (n 1036) 14; Dupuy 2002 (n 1036) 1069; Dupuy 2003 (n 1021) 308; Pauwelyn (n 956) 52, 54–55, 66 ('… reciprocal or bilateral'), passim; F Voeffray, *L'Actio Popularis ou la Défense de l'Intérêt Collectif devant les Juridictions Internationales* (Publications de l'Institut Universitaire de Hautes Études Internationales, Genève, PUF, Paris 2004) xx ('… bilatéralisme synallagmatique'), 117 ('… bilatéraux réciproques'); Alcaide Fernández (n 1026) 94 ('bilateralidad/reciprocidad'); Tams (n 956) 129–30, 131 ('non-reciprocal … or non-bilateralisable'), 134; Villalpando (n 1152) 255 ('… bilatéral ou synallagmatique'); Koskenniemi, 'Fragmentation' (n 953) [311] ('… that could not be broken into bilateral relationships … non-reciprocal treaties'), [383]; Wyler and Papaux (n 1089) 626. See also Seiderman (n 1006) 126. See further *Ireland v UK* (n 1036) [239] ('mutual'); Provost (n 979) 384; Katselli Proukaki (n 1052) 10, 12 text associated to fn 14, 14, passim; Sicilianos 2002 (n 1038) 1139 text following fn 6; n 1030, above.

1168 See p 243, above.

1169 See, eg, Seiderman (n 1006) 128, 142; Tams (n 956) 61; Koskenniemi, 'Fragmentation' (n 953) [248], [311].

obligations[1170] —especially customary obligations—,[1171] like reciprocity is.[1172] This last statement is important. It should be remembered that most obligations — especially those arising in general international law— are 'abstract' in that they give no indication of to whom they are owed.[1173] Nevertheless, obligations *inter partes* came to be the paradigm of classic, general international law; a pattern has been discerned that explains this.[1174] *'Bilateralism' is short-hand for this pattern*; hence the importance of its being 'read into' traditional obligations and the importance of its relation to reciprocity. This may be the reason why, again, the creation of obligations *erga omnes* (*partes*) is perceived by many as a change in the structure of the international legal system and why obligations *erga omnes* (*partes*) are perceived as qualitatively different from obligations *inter partes*, 'bilateral' obligations,[1175] and 'reciprocal' obligations.[1176]

1170 Pauwelyn (n 956) 67 ('… the starting point or presumption must be that obligations are of a bilateral or reciprocal nature.'). See also Hutchinson (n 966) 151 ('It is commonly supposed that, when an obligation under a multilateral treaty falls to be performed, it is owed by one party … to one other party … or else to a limited number of the States parties.') (emphasis added); Provost (n 979) 384 ('… reciprocity moves from a bilateral to a systemic level') (emphasis added).

1171 Riphagen, 'Responsibility III' (n 1007) 40 [107].

1172 See 237 n 1038 and associated text, above.

1173 See introduction, pp 4–5, above.

1174 See ch 2, generally.

1175 See ch 3, pp 172–73, above.

1176 cf pp 253–57, above.

It goes without saying that bilateralism has also been associated with individual —as opposed to collective— rights;[1177] many conceive reciprocal obligations —as opposed to integral obligations— in a similar way.[1178]

Conversely, there is also the notion of 'multilateralism'.[1179] The term may denote the process of conclusion of multilateral treaties, as opposed to that of bilateral treaties. The latter process was, historically, the default way of crafting even conventions involving multiple parties.[1180] But for what is relevant here, 'multilateralism' is the antithesis of 'bilateralism'. Indeed, obligations *erga omnes* are considered a departure from the 'strait-jacket' bilateralism creates.[1181] As stated before, it is partly correct to state that obligations *erga omnes* (*partes*) derogate from some of the traditional systemic features of international law. However, it is often asserted that structures that consist of 'bundles' of bilateral legal relations are incompatible with the structure of obligations *erga omnes*[1182] (*partes*).[1183]

1177 See, eg, Dupuy 2002 (n 1036) 1072; Dupuy 2003 (n 1021) 308, 333 text associated to fn 111; Koskenniemi, 'Fragmentation' (n 953) [382]–[383]. See also G Gaja, 'The Concept of an Injured State' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 944; Linderfalk (n 1014) 10–11.

1178 See p 241, above.

1179 See, eg, Stern 2001 (n 1036) 15; Dupuy 2002 (n 1036) 1065; Spinedi (n 973) 1109.

1180 Crawford 2006 (n 974) 346, 349 ff. See also Sachariew (n 1015) 277 fn 16.

1181 Scobbie (n 1151) 1204, 1209. See also at p 1220. See further Voeffray (n 1167) xx ('carcan').

1182 This is widely believed. See, eg, Annacker (n 1006) 135–36; Seiderman (n 1006) 129, 134; Dupuy 2002 (n 1036) 1056; Gaja 2005 (I) (n 993) 157 [4], 158 [8] (Lady Fox); Crawford 2006 (n 974) 423; Koskenniemi, 'Fragmentation' (n 953) [388], [391], [395]. See also P Weil, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 413, 432; Alcaide Fernández (n 1026) 94.

Three criticisms to the conception of bilateralism are called for here.

First, the 'bilateralist'[1184] (ie the many legal relations that result from 'bilateralism', among them the traditional obligations *inter partes*) should not be confused with the 'bilateralisable'. Again, this thesis has not coined either adjective.[1185] The pattern followed in classic, general international law that allowed only for obligations *inter partes* to be created is 'bilateralism' —and thus the 'bilateralist'. However, a legal situation or concept presents a **bilateralisable**[1186] **structure** when the many legal relations it is composed of are reducible to bilateral legal relations.[1187] Clusters of obligations —or any other legal relation— are 'bilateralisable' if they are formed by obligations which must be performed between two parties only. In this sense, then, Hohfeldian legal relations all present 'bilateralisable structures', as they bind two subjects of law only.[1188]

1183 *Prosecutor v Blaskic* (Judgment on the the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997) ICTY-95-14, App Ch (29 October 1997) [26].

1184 See, eg, Simma 1994 (n 955) 232, 311, 315; Koskenniemi, 'Fragmentation' (n 953) [382]–[383], [388], [391].

1185 See, eg, Annacker (n 1006) 136 ('… non-bilateralizable structure'); Sicilianos 2002 (n 1030) 1134 ('… bilateral or bilateralizable'); Alcaide Fernández (n 1026) 91; J Crawford and S Olleson, 'The Nature and Forms of International Responsibility' in MD Evans (ed) *International Law* (2nd edn OUP, Oxford 2006) 474; Koskenniemi, 'Fragmentation' (n 953) [285].

1186 See, eg, Provost (n 979) 384; Seiderman (n 1006) 127; Sicilianos 2002 (n 1038) 1133–34; Tams (n 956) 45; Alcaide Fernández (n 1026) 91. See also Riphagen, 'Responsibility III' (n 1007) 43 fn 135 ('… obligation … bilateralized'); Byers (n 1148) 232 ('… bilateralised rights and obligations.').

1187 See, eg, Provost (n 979) 385 (reasoning *a contrario* from definition of non-bilateralisable); Tams (n 956) 45.

1188 See ch 1, pp 18–21, above.

In sum, a distinction must be made between the principled approach that classical international law was said to follow in creating obligations (bilateralism) and the legal relations that result from this process. It is justified to maintain this distinction between the process and its results. It may be the case that the classic approach to creating obligations in general international law has changed. But it does not strictly follow from there that the legal relations that now exist in general international law do not present 'bilateralisable' structures.

Indeed, there is a more or less general confusion between the 'bilateralist' — ie whatever results from 'bilateralism'— and the 'bilateralisable'. Again, obligations *erga omnes* (*partes*) do depart from the traditional way of creating obligations that resulted in obligations *inter partes*: from 'bilateralism'. However, it does not follow from there that the obligations thereby created are not clusters of bilateral legal relations that *individually* oblige/entitle members of a group. The greater mistake, therefore, is to deny a *bilateral structure* to clusters of obligations that depart from 'bilateralism'. The existence of identical, bilateral obligations among every possible pair of States could also explain both the existence of obligations *erga omnes* (*partes*)[1189] and the number of States with standing to enforce their breach. This has been insisted on before.[1190]

In simpler words, it is incorrect simply to distinguish between obligations owed to one State *individually* and obligations owed to all States *collectively* if

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1189 See Byers (n 1148) 232. But see analysis of this approach at ch 5, pp 327–30, below. See also Picone (n 1026) 17, opposing this idea but describing it well.

1190 cf ch 2, pp 93–122, above.

obligations can *individually* be owed to many States. For instance, in *Blaskic*, the ICTY stated that an obligation in its statute had to be performed by all UN members vis-à-vis all others, the legal relations thus created *not being bilateral*.[1191] For Annacker, an obligation that is non-bilateralisable is one that has to be performed vis-à-vis all States, rather than vis-à-vis individual States;[1192] these obligations are not bilateral. Ragazzi would deny the existence of individual rights to the respect of obligations *erga omnes* because they are owed to the international community, rather than to particular States;[1193] he does not seem to acknowledge that individual rights could exist among members of a group. Prof Crawford distinguishes between obligations owed to individual States or obligations '*à deux*' and collective or multilateral obligations, owed to a community of States.[1194] When commenting on obligations *erga omnes*, Prof Koskenniemi distinguishes between individual rights and '... rights as members of some more or less general idea of an international public realm.'[1195] Prof Tams comments approvingly on the proposition that because obligations *erga omnes* are neither reciprocal nor bilateralisable, the consequences of

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1191 *Blaskic* (n 1183) [26]. See also Riphagen, 'Responsibility III' (n 1007) 44 [129]. See further Villalpando (n 1152) 143 text associated to fn 493, 261.

1192 Annacker (n 1006) 135.

1193 Ragazzi 1997 (n 1026) 179. See also p 212 ('…denial of justice is a damage invariably inflicted on a particular State, and not on States generally.') (reasoning *a contrario*) (emphasis added).

1194 Crawford, 'Responsibility III' (n 947) [9], [106], [294].

1195 Koskenniemi, 'Fragmentation' (n 953) [393]. See also [395]. But cf [396].

their breach exceed '… the reciprocal legal relations between pairs of States';[1196] and so on.[1197]

Again, a 'bilateralist' approach to obligations *erga omnes* (*partes*) reconciles them better with positive international law.[1198] There are three advantages to such an approach. First, the idea of individual and bilateral rights conform better with the rest of positive, modern international law (eg the ability validly to derogate integral obligations *inter se*) and gives a more nuanced view of the different kinds of reactions States are entitled to take in response to breaches of obligations.[1199] Second, bilateralism explains better the diverging —individual and/or altruistic— interests of States in enforcing obligations *erga omnes* (*partes*) and how the apathy of certain States towards the enforcement of these obligations has no legal effect for other States. Third, obligations *erga omnes* (*partes*) can be directly related to norms which originated in classic, general international law that have endured to the present. A radical break with the past is averted. Therefore, the concept of obligations *erga omnes* —it is hoped, at least— becomes less assailable.

1196 Tams (n 956) 129. See also p 56. cf Nolte (n 1154) 1085.

1197 See also Pauwelyn (n 956) 306.

1198 cf ch 2, pp 109–10, above.

1199 cf ch 2, generally.

Certainly, this thesis has already shown how obligations *erga omnes* (*partes*) can indeed be conceived as bundles of bilateral obligations. For instance, obligations *erga omnes partes* in article I LTBT[1200] have been represented thus:

(1) State A owes State B not to detonate nuclear devices under any/all bodies of water;

(2) State A owes State C not to detonate nuclear devices under any/all bodies of water;

(3) State A owes State D not to detonate nuclear devices under any/all bodies of water; **(…)**

(25) State A owes State Z not to detonate nuclear devices under any/all bodies of water.

The key, again, is that the object of all obligations *erga omnes* (*partes*) is identical. Here lies the **second** criticism: the main difference between a 'bilateralist' obligation (ie one that results from so-called 'bilateralism'; eg an obligation *inter partes*) and a 'non-bilateralist' obligation (eg obligations *erga omnes*) does not exist at primary level but rather at secondary level. *It is the legal effect of breaching the primary obligation —thus, secondary relations— that cannot be contained between two parties only for obligations erga omnes* (*partes*).[1201] It is in this sense that multilateral obligations have been defined.[1202]

The **third** criticism is related to this point as well. The departure from the way in which classic, general international law created obligations *inter partes* — 'bilateralism' or the 'bilateralist'— has not gone so far as to modify the many legal

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1200 (n 1086).

1201 See, eg, Tams (n 956) 129 ('… as far as the consequences triggered by breaches are concerned … responsibility for violations of obligations *erga omnes* exceeds the reciprocal legal relations between pairs of States') (emphasis added).

1202 See ch 3, pp 174–75, above.

relations which arise as a consequence of holding a primary right.[1203] Primary obligations *erga omnes* (*partes*) can still be modified bilaterally *inter se* [1204] —thus non-collectively—, *jus cogens* excepted.[1205] Additionally, it is still the case that claims where multiple States have been injured can be presented individually.[1206] Any change that departing from 'bilateralism' may have brought to the 'bilateralisable' structure of primary obligations is nullified, in practice, by the continued existence of these other legal relations.

This being the case, arguments supporting the lack of bilateralisable structure of obligations *erga omnes* (*partes*) can be done away with.

1203 See ch 2, pp 105–22, above.

1204 See ch 2, pp 105–18, above.

1205 See ch3, pp 205–15, above.

1206 See ch 2, pp 118–22, above.

D THE ALLEGED RISE OF COMMUNITY INTERESTS AND THE STRUCTURE OF OBLIGATIONS *ERGA OMNES* (*PARTES*)

The need for *universal cooperation* in ridding humanity of genocide,[1207] highlighted at the very start of this chapter should be remembered here. Many commentators would have it that a legal system that creates bilateral legal relations would be insufficient to deal with problems that require such coordinated cooperation.[1208] It is thus often said that obligations *erga omnes* (*partes*) satisfy 'community interests',[1209] which interests —allegedly— transcend bilateralism.[1210] They are part of the 'multilateral age';[1211] they represent a transit to 'universality'.[1212] Judge Simma would even have it that community interests and bilateralism are antithetical.[1213] Likewise, community interests are also associated to public law (as opposed to

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1207 *Genocide 1951* (n 937) 23.

1208 Sachariew (n 1015) 273. See also Ragazzi 1997 (n 1026) 17; Spinedi (n 973) 1105–06; Koskenniemi, 'Fragmentation' (n 953) [480], on rights and obligations that have a backing in public interests (cf, eg, [383]). See further CD Gray, *Judicial Remedies in International Law* (Oxford Monographs in International Law, Clarendon Press, Oxford 1990) 214, on the effect of bilateral claims for declaratory remedies on collective problems. cf Crawford, 'Responsibility III' (n 947) [105]; Stern 2001 (n 1036) 16.

1209 See, eg, Simma 1994 (n 955) 250; Ragazzi 1997 (n 1026) 179; Gaja 2005 (I) (n 993) 127; Katselli Proukaki (n 1052) 10.

1210 Sachariew (n 1015) 273–74; Simma 1994 (n 955) 233, 236; Voeffray (n 1167) xvii (Condorelli). See also Arangio-Ruiz, 'Responsibilty IV' (n 1152) 44 [131]; Sicilianos 2002 (n 1038) 1135. See further, on the transit from bilateralism to community interests, Alcaide Fernández (n 1026) 99, 101; Villalpando (n 1152) 214.

1211 Dupuy 2002 (n 1036) 1054.

1212 Alcaide Fernández (n 1026) 96 ('universalidad').

1213 Simma 1994 (n 955) 233.

private/civil law)[1214] and to solidarity (as opposed to the egotism/individualism said to inhere in traditional international law).[1215]

It should also be remembered that obligations *erga omnes* are the concern of (ie of interest to) all States.[1216] Community interests have been conceived as either the sum total of all individual interests[1217] or as more than the sum total of individual interests.[1218] That the interests of the community are affected means, for many, that obligations *erga omnes* (*partes*) cannot be allocated to individual States; many even

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1214 See, notably, Annacker (n 1006) 138. See also Seiderman (n 1006) 126–27; Koskenniemi, 'Fragmentation' (n 953) [386], [395], [480]; Katselli Proukaki (n 1052) 11; Linderfalk (n 1014) 4. See also Pauwelyn (n 956) 66–67. See further Villalpando (n 1152) 213–14. On community interests and public order, see, eg, J Delbrück, '"Laws in the Public Interest" — Some Observations on the Foundations and Identification of *Erga Omnes* Norms in International Law' in V Götz, P Selmer and R Wolfrum (eds) *Liber Amicorum Günther Jaenicke — Zum 85 Geburtstag* (Beitrage zum ausländischen öffentlichen Recht und Völkerrecht No 135, Springer, Berlin 1998) 18 text associated to fn 6; Dupuy 2003 (n 1021) 339; Katselli Proukaki (n 1052) 15 text associated to fn 25. On obligations *erga omnes* as a reflection of public order, R Kolb, *Théorie du Ius Cogens International: Essai de Relecture du Concept* (Publications de l'Institut universitaire de hautes études internationales, PUF, Paris 2001) 172–74.

1215 Simma 1970 (n 954) 49 text associated to fn 179, 68; Koskenniemi, 'Fragmentation' (n 953) [307]. On obligations *erga omnes* as 'solidary' obligations, see M Ragazzi, 'International Obligations *Erga Omnes*: Their Moral Foundation and Criteria of Identification in Light of Two Japanese Contributions' in GS Goodwin-Gill and S Talmon (eds) *The Reality of International Law: Essays in Honour of Ian Brownlie* (Clarendon Press, Oxford 1999) 459. On solidarity as an atithesis to bilateralism, see Simma 1994 (n 955) 233; Spinedi (n 973) 1106; Villalpando (n 1152) 32, in light of pp 27–29; Crawford 2006 (n 974) 346 ('…as bilateral or as multilateral, as separate or solidary') (emphasis added). cf statements by Stern and Crawford at n 1202, above.

1216 *Barcelona Traction* (n 936) 32 [33] ('… concernent tous les États').

1217 Annacker (n 1006) 136.

1218 Provost (n 979) 387; Crawford, 'Responsibility III' (n 947) [92]; Dupuy 2002 (n 1036) 1054; Pauwelyn (n 956) 62–63. And see *Pulp Mills in the River Uruguay (Argentina v Uruguay)* (Merits) 2010 <http://www.icj-cij.org/docket/files/135/15877.pdf> accessed 5 October 2011, [184], distinguishing between the actions of parties to a bilateral treaty individually and the collective actions of the same parties.

speak of 'extra-State' interests.[1219] Therefore, a breach of obligations *erga omnes* (*partes*) affects all relevant States, rather than States individually considered. This is the same failure to distinguish between the '(non-)bilateralist' and the 'bilateralisable', but in another guise.[1220] However, this amounts to arguing that community interests have a bearing on the structure of obligations *erga omnes* (*partes*). For Kawasaki, for instance, community interests beget collective rights to the observance of obligations *erga omnes*.[1221]

Indeed, many would have it that obligations *erga omnes* (*partes*) are owed to all States or give rise to general standing **because** they further community interests.[1222] They state so in many ways. Thus, for Annacker, community interests protect the interests of the community and are owed to the community for that reason.[1223] She also states that community interests determine the way obligations

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1219 The phrase was originally coined by W Riphagen, 'Second Report on the Contents, Forms and Degrees of State Responsibility (Part 2 of the Draft Articles)' (UN Doc No A/CN.4/344, YbILC 1981-II(1)) 86 [61]; Riphagen, 'Responsibility IV' (n 1007) 21 [114]. See also Provost (n 979) 387; Seiderman (n 1006) 127; K Kawasaki, 'The "Injured State" in the International Law of State Responsibility' (2000) 28 Hitotsubashi Journal of Law and Politics 17, 18; Sicilianos 2002 (n 1038) 1135; Villalpando (n 1152) 297 text associated to fn 1047; Alcaide Fernández (n 1026) 96.

1220 See pp 264–68, above.

1221 Kawasaki (n 1219) 22–23. See also Pauwelyn (n 956) 66, 71–73, 72 ('… may affect a number of members individually, but it does not ammount to an offence of the collective right or conscience of all state parties') (especially), passim.

1222 And see Pauwelyn (n 956) 78 ('… in the collective interest and, for that reason, must be integral in nature.') (emphasis added).

1223 Annacker (n 1006) 131. cf similar statements in Riphagen, 'Responsibility VI' (n 1006) 8 [21] (art 5); *Blaskic* (n 1183) 26.

erga omnes are performed (ie their structure).[1224] Delbrück would have it that the furtherance of a 'public' interest is decisive in creating *erga omnes* effects for obligations that feature them.[1225] Prof Stern would allow standing for breach of obligations that further community interests.[1226] For Ragazzi, obligations *erga omnes* are so owed because they protect fundamental moral values which, in turn, are instrumental to the achievement of the main political aims of the present time (eg protection of human rights).[1227] Community interests could be identified with these aims.

Finally, many would have it that community interests create legal relations by themselves. Thus, for Simma, community interests are '... a consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individually or *inter se*'.[1228] Therefore, this consensus creates disabilities/immunities by itself. For Delbrück, the need for compliance with obligations that protect the ozone layer are 'so compelling' that even third parties

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1224 Annacker 1994 (n 956) 149.

1225 Delbrück (n 1214) 32.

1226 Stern 2001 (n 1036) 13.

1227 Ragazzi 1999 (n 1215) 465, 475. See Ragazzi 1997 (n 1026) 91 (public policy considerations), 133–34, 215; also at pp 72 (using these values to identify obligations *erga omnes*), 130 fn 53 (on moral and social values protected as reasons behind the *erga omnes* effect prohibition of racial discrimination).

1228 Simma 1994 (n 955) 233.

must comply with them.[1229] The compelling nature of this interest thus creates obligations/rights, and so on.

Some criticisms are apposite here.

First, the existence of a community interest may be a *good reason* to create a certain legal norm, but it does not by itself determine that a legal norm has been created or that it is to assume a certain content/structure. A distinction should first be drawn between a 'right' and an 'interest'. Even if all rights protect an interest for the right-holder,[1230] the converse is not always true. A State may be *interested* that another State carries out a certain action or that a situation is resolved in a certain way. However, this does not mean that the same State is *entitled* to this. The distinction between 'simple' and 'legal' interests should be remembered.[1231] Thus, an abundance of Spanish interests created no rights for Spain or obligations for France in *Lac Lanoux*.[1232] If interests can exist where 'rights' (including claim-rights/obligations) do not, it is hard to see why the mere existence of a community interest would create rights and obligations. For instance, it is hard to argue that the prohibition of aggression, an obligation *erga omnes*,[1233] was not adopted as a way to

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1229 Delbrück (n 1214) 27.

1230 See, eg, MH Kramer, 'Rights without Trimmings' in MH Kramer, NE Simmonds and H Steiner (eds) *A Debate over Rights: Philosophical Enquiries* (Clarendon Press, Oxford 1998) 62, commenting on the 'interest theory' to rights.

1231 On which see ch 3, pp 175–81, above.

1232 *Affaire du Lac Lanoux* (Spain v France) (1957) XII RIAA 281, 316 [24]. See also at pp 311 [18], 315 [22]–[23].

1233 *Barcelona Traction* (n 936) 32 [34].

'…contribute to the strengthening of international peace and security'.[1234] But, this does not, by itself, determine that State rights existed or clarify the extent of those rights. As is well-known, aside from the general idea that aggression is forbidden, not much else has been agreed upon by States. Some defendants during the Nuremberg Trials were convicted of waging wars of aggression.[1235] Progress has recently been made in reaching a definition of aggression specific to the Rome Statute.[1236] But in between the end of these trials and the recent agreement reached at Kampala, the content of the notion of aggression was unclear, despite the fact that a community interest existed that aggression was forbidden since at least 1945.

Again, while a community interest might be a *good reason* to effect a change in the law, it is no substitute for legislative processes.

By the same token, community interests alone cannot help to predict the structure of any legal relation that arises as a consequence of this process. This is the **second** criticism to the notion of community interests. Something akin to community interests also underlies less-than-universal sources, notably treaties; it may be said to

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1234 UNGA Res 3314 (XXIX) 'Definition of Aggression' UN Doc A/Res/3314 (14 December 1974), ann, preamble.

1235 ie of 'crimes against peace'; eg Hermann Göring. See *Trial of the Major War Criminals* (1946) 41 AJIL 172, 272–73, 275, 333 (Count 1). See also Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis (opened for signature 8 August 1945, entered into force 8 August 1945) 82 UNTS 279 (London Agreement)) annex, art 6(a).

1236 Conference of Parties to the Rome Statute, 'The Crime of Aggression', Res RC/Res. 6 <http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf> accessed 24 November 2011. And see Rome Statute of the International Criminal Court (opened for signature 17 July 1978, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art 5 pars. (1)(d), (2).

underlie any treaty, in fact.[1237] Some argue that, like obligations *erga omnes* (*partes*), bilateral treaties also further community interests.[1238] From this it does not follow that all States in the international community hold entitlements under a bilateral treaty. However, this does show that a bilateral source can protect community interests and, thus, that it is possible to create bilateral relations even where community interests are involved.

The same is true of treaties with a larger number of parties. Striking examples are the VCDR[1239] and VCCR [1240] provisions at issue in *Hostages*.[1241] For the ICJ, the seizure of the US diplomatic premises in Iran was carried out in so 'serious'[1242] a way as to '… undermine the edifice of law … the maintenance of which is vital for the security and well-being of the complex international community of the present day'. [1243] The Court felt compelled to draw the attention of the international

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1237 Riphagen, 'Responsibility III' (n 1007) 30 [52]; Riphagen, 'Responsibility VI' (n 1007) 7 [14] (art 5). See also State Responsiblity: Comments and Observations received from Governments (19 March 2001) UN Doc A/CN.4/415, 64 (art 43) (Japan).

1238 Crawford, 'Responsibility IV' (n 1054) [40].

1239 Vienna Convention on Diplomatic Relations (opened for signature 18 April 1961, entered into force 24 April 1964) 500 UNTS 95 (VCDR).

1240 Vienna Convention on Consular Relations (opened for signature 24 April 1963, entered into force 19 March 1967) 596 UNTS 261 (VCCR).

1241 *United States Diplomatic and Consular Staff in Tehran (USA v Iran)* (Judgments) [1980] ICJ Rep 3 (Hostages).

1242 *Hostages* (n 1241) 36 [76] ('… even more serious').

1243 *Hostages* (n 1241) 43 [92]. See also at p 48 (SO Lachs).

community to the situation in Iran arising from VCDR/VCCR breaches.[1244] At least on one reading, these statements would evidence that the breach of the VCDR in this case affected community interests.[1245] There is no need to question these assertions. It is arguable that community interests could be affected even by the breach of some of the most classic, bilateral obligations (eg exercising jurisdiction on another State's territory, against its will). In fact, that is precisely the point: community interests, by themselves, do not influence the structure of international obligations. As Annacker observes,[1246] the ICJ in *Hostages* kept to a very traditional, bilateral form of responsibility, violations of the VCDR only giving rise to responsibility between the US and Iran.[1247]

This solution is correct. The VCDR, like the VCCR, establishes obligations/rights between the sending and receiving States only. The provisions breached by Iranian conduct[1248] refer to the receiving State's obligations towards 'missions'.[1249] 'Missions' represent sending States and are its agents.[1250] Therefore, these VCDR rights and obligations are arguably owed *inter partes*. Indeed, classic

1244 *Hostages* (n 1241) 43 [92].

1245 eg Simma 1994 (n 955) 337–38.

1246 Annacker (n 1006) 134.

1247 See also Gaja 2010 (n 1177) 943 text following fn 6.

1248 *Hostages* (n 1241) 30–32 [62], [67], 36 [77].

1249 VCDR (n 1239) arts 22, 24–27. See also arts 29, 31(1) ('diplomatic agent') in light of art 1(e).

1250 VCDR (n 1239) art 3(1). cf VCCR (n 1240) arts 28 ('consular post'), 31, 33–35, 40, in light of arts 1(1)(a), 5.

diplomatic and consular obligations are often cited as paradigmatic examples of obligations *inter partes*.[1251] It is notable, however, that European institutions encouraged EC members to take countermeasures against Iran in response to these breaches and in solidarity with the US.[1252] However, the legality of such measures has been questioned.[1253]

On another order of thought, the Lusaka Ceasefire Agreement[1254] sought to end the Second Congo War (1998–2003). This war was one of the deadliest since World War II, involving the armed forces —and proxies— of a number of Sub-Saharan African countries. This undeniably furthered community interests. However, the treaty only had six States (DRC, Uganda, Angola, Namibia, Zimbabwe, and Rwanda). Calls, for example, by Australia, for the agreement to be respected,[1255] may testify to the collective interest furthered by the treaty. However, Australia could not derive rights from it.[1256] Likewise, the Lusaka Ceasefire Agreement featured obligations which would not be out of place in more classic treaties. For instance, article III(15) enjoined all parties to respect the territorial integrity and sovereignty of the DRC, which obligation the treaty did not affect. By contrast, comparable interests

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1251 cf p 235 n 1037 and associated text, above. See also Annacker (n 1006) 136; Simma 1970 (n 954) 336; Simma 1994 (n 955) 336; Pauwelyn (n 956) 61; Tams (n 956) 45. See further Provost (n 979) 384–85; Kawasaki (n 1219) 22.

1252 Tams (n 956) 226–27; Katselli Proukaki (n 1052) 141–44.

1253 See, eg, Sachariew (n 1015) 279–80.

1254 Agreement for a Ceasfire in the Democratic Republic of Congo (opened for signature 10 July 1999, entered into force 11 July 1999) 2312 UNTS 255 (Lusaka Ceasefire Agreeement).

1255 (1999) 20 Austr Ybk IL 469, 469.

1256 VCLT (n 948) art 36.

drove States to adopt the Genocide Convention,[1257] which resulted in the creation of obligations *erga omnes partes*.

Furthermore, individual and collective interests are so intertwined in the creation of treaty regimes that favouring either classification for any one regime may be quite artificial.[1258] Thus the Treaty of Berlin 1878,[1259] by protecting minorities, arguably furthered community interests. But Austro-Hungarian interests in the Balkan crisis that led to the 1877–1878 war were driven by the benefit its own industrialists would receive from projected railways in the Balkans and by fear of the strengthening of a rival, Great Serbian State.[1260] The UK wanted to keep Russia out of the Eastern Mediterranean, in part because of the importance of the Suez Canal.[1261] Russia wanted a port in the Mediterranean, an ancestral policy objective and one of the reasons for the 1877–1878 war. Russia also wanted —and obtained— possession of the part of Bessarabia that Russia had lost at the end of the Crimean War (1853–1856).[1262]

1257 (n 938). See, eg, [1946–47] YbUN 254, 255 (Cuba; UK).

1258 cf Linderfalk (n 1014) 9.

1259 Treaty between Austria-Hungary, France, Germany, Great Britain, Italy, Russia and Turkey for the Settlement of Affairs in the East (opened for signature 13 July 1878, entered into force 3 August 1878) 153 CTS 171 (Treaty of Berlin 1878).

1260 See, eg, AJP Taylor, *The Struggle for Mastery in Europe: 1848–1918* (Oxford Paperbacks, OUP, Oxford 1971) 231.

1261 cf Taylor (n 1260) 228.

1262 cf General Treaty for the re-Establishment of Peace between Austria, France, Great Britain, Sardinia and Turkey, and Russia (opened for signature 30 March 1856, entered into force 27 April 1856) 114 CTS 409 (Treaty of Paris 1856) arts XX–XXI; Treaty of Berlin 1878 (n 1259) art XLV.

Likewise, article VI of the GABC 1885,[1263] in prohibiting slavery in the Congo River Basin, furthered what would now be conceived as a community interest. And yet when presenting its claim,[1264] the UK Government was mindful of factors other than compliance with the GABC 1885. It was admitted that no similar claims had been presented against France and Germany for mistreatment against natives in their respective colonies in the Congo Basin partly because Belgian abuses had '… provoked longer and louder complaints, and had attracted wider attention'[1265] — including domestic public opinion, quite possibly.[1266] Consequently, the UK Government, when taking up its claims, was not only mindful of 'humanitarian grounds',[1267] but also of placating its own constituency.

In sum, the idea that all States in the international community are owed obligations *erga omnes* **because** these obligations further community interests is probably incorrect. So is the idea that community interests could not be protected through less than multilateral obligations or even through bilateral obligations,

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1263 General Act of the Conference of Plenipotentiaries of Austria-Hungary, Belgium, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, Sweden-Norway, and Turkey (and the United States) respecting the Congo (opened for signature 26 February 1885, entered into force 19 April 1886) 165 CTS 485 (GABC 1885).

1264 cf ch 2, pp 157–58, above.

1265 *Africa No 1 (1906): Correspondence respecting the Report of the Commission of Inquiry into the Administration of the Independent State of the Congo* (Cd 3002, 1906) 9, referring also to the absolute character of the Free State's Government, as opposed to the parliamentary character of the Government in French and German colonies. See also approval by Foreign Office at p 10.

1266 cf episode related in M Ewans, *European Atrocity, African Catastrophe: Leopold II, the Congo Free State and its Aftermath* (Routledge Curzon, London 2002) 204–05.

1267 cf *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Preliminary Objections) [1962] ICJ Rep 319, 425 (SO Jessup).

although it could well be argued that such protection would be inefficient or somewhat defective. Again, obligations *erga omnes* and obligations arising in classic, general international law overlap in very important respects.[1268] The more important difference between them is that obligations *erga omnes* are established, in custom, over individuals or things that would not have received protection in classic, general international law.[1269] The key is what they protect, not the values that they further. In fact, classic obligations, eg the international minimum standard, may further the same values as obligations *erga omnes* (*partes*) (eg by protecting individuals' lives).

[1268] eg they are of the same nature and present similar structures.

[1269] cf ch 2, pp 141–51, above.

E CHAPTER CONCLUSION

In this chapter, the idea that obligations *erga omnes* (*partes*) are different in essence from other obligations has been criticised more fully than in previous chapters. It has been explained that obligations *erga omnes* (*partes*) can be described as aggregates of bilateral legal relations. It has also been questioned that the mere fact that the more salient of obligations *erga omnes* (*partes*) are not reciprocal or satisfy some form of a community interest accounts for the structure of these obligations. Most of all, two aspects have been shown. **First**, reciprocity, bilateralism and community interests are *automatically* —and incorrectly— assumed to influence the structure of obligations *erga omnes*. And **second**, recourse to the concepts of reciprocity, bilateralism and community interests is an attempt to explain the rise of obligations *erga omnes* as departures from the paradigm that existed in classic, general international law. The implication, then, is that these concepts are automatically —ie necessarily— assumed to explain the structure of obligations *inter partes*.

It has been stated many times before, especially throughout chapter 2, that obligations *inter partes* resulted from the particular way in which classic, general international law apportioned obligations and rights for States. Commentators and authorities are right to assume that obligations *inter partes* are paradigmatic. But they are wrong to assume that exceptions to the paradigm automatically result in changes to the legal system as a whole. This chapter has questioned this notion. The next chapter will discuss the practical results of this conceptual mistake. Paradoxically, those who support rival conceptions of obligations *erga omnes* and who would have it that they represent a radical break with classic, general international law still cling to the law-creating processes that existed in classic, general international law. In rejecting these processes, they embrace them fully. Thus, where classic international

law left liberties to States and modern international law creates obligations *erga omnes* (*partes*), these authorities believe that the rights correlative to the latter type pf obligations are a degraded form of rights, despite how full obligations have now replaced these liberties. The legal contradictory of former sovereign liberties have replaced them. However, the scheme that brought about these liberties is still — implicitly— applied even to the legal contradictories that have replaced these liberties.

CHAPTER 5 DIFFERENT CONCEPTIONS OF OBLIGATIONS *ERGA OMNES* (*PARTES*)

A INTRODUCTION

Having discussed, in chapter 2, how obligations *erga omnes* (*partes*) form a distinct concept and, in chapters 3–4, how obligations *erga omnes* (*partes*) are not different, in essence, from any other obligation, it is time to consider this thesis' conception of obligations *erga omnes* (*partes*) in more detail. Throughout this thesis, it has been asserted that obligations *erga omnes* (*partes*) are primary obligations. They feature individual, correlative, primary rights for States. But this conception is not universally accepted. Debates basically turn on who is owed primary obligations *erga omnes* (*partes*), which States are entitled to under obligations *erga omnes* (*partes*), and whether different kinds of entitlements exist for different kinds of States (eg how the legal position of the State of nationality of victims of human rights compares with that of other States).

The purpose of this final chapter is to explain how the conception of obligations *erga omnes* (*partes*) favoured by this thesis works in practice. It will also critique alternative conceptions of these obligations. This thesis has taken the approach that any conception is defensible if it is not fatally flawed[1270] or does not make unwarranted claims of sufficiency or necessity.[1271] Thus, it has been conceded that Hohfeldian analysis may not be the only way in which legal relations can be

[1270] cf criticisms of the 'essential distinction' at ch 3, pp 188–92, above; ch 4, generally.

[1271] See ch 4, generally.

analysed. Regardless, Hohfeldian analysis is a useful tool and one that is relevant to international law; it has been used in this thesis extensively.[1272]

The same can be said of alternative conceptions of obligations *erga omnes* (*partes*). They are neither unworkable nor indefensible. Some have even received support from States. But these conceptions present serious conceptual and practical defects. Furthermore, while these conceptions reject, say, bilateralism, they would support the notion that States are individually entitled to invoke responsibility for breaches of obligations *erga omnes*. Therefore, bilateralism is rejected in theory, but re-introduced through other means, in practice. This thesis would agree with most of the results of these conceptions. However, this thesis fully embraces concepts that others reject. Conversely, the fact that proponents of alternative conceptions reject these conceptions but accept the actual consequences of, say, bilateralism (ie individual or otherwise non-collective standing to invoke responsibility for breaches of obligations *erga omnes* (*partes*)), shows that proponents of alternative conceptions do not have a clear idea of the role such notions play in international law.

This is why this thesis's conception of obligations *erga omnes* (*partes*) is defensible. This thesis has discussed with precision what it means to be owed an obligation, the consequences that follow from this, and how these consequences fit in with notions such as 'bilateralism', 'reciprocity' and so on. It is submitted that this position at least reflects how **1)** obligations *erga omnes* (*partes*) could be reconciled with traditional international law and **2)** the pitfalls and inconsistencies of alternative conceptions of these obligations.

[1272] See ch 1, especially.

B OBLIGATIONS *ERGA OMNES* (*PARTES*) AND CORRELATIVE PRIMARY RIGHTS

1 Introduction

Like this thesis, some regard obligations *erga omnes* (*partes*) as legally **indivisible**[1273] primary obligations, a concept used by many[1274] but not univocally. A rule is said to contain indivisible obligations when those obligations 'simultaneously' bind each State that subscribes to this rule; [1275] this in contrast to **divisible** obligations, which bind the wrongdoer to one other State[1276] or to a small number of States only.[1277] Again, all obligations bind one State to another State. But, in any case, divisible obligations are owed *inter partes*. Divisible obligations can also be identified with reciprocal obligations.[1278]

1273 G Arangio-Ruiz, 'Fourth Report on State Responsibility' (UN Doc No A/CN.4/444, YbILC 1992-II(1)) 34 [92].

1274 *Nuclear Tests (New Zealand v France)* ICJ Pleadings, 265 (Finlay, NZ); W Riphagen, 'Preliminary Report on the Contents, Forms and Degrees of State Responsibility (Part 2 of the Draft Articles on State Responsibility)' (UN Doc No A/CN.4/330, YbILC 1980-II(1)) 120 [65]; B Simma, 'From Bilateralism to Community Interest' (1994) 250 RdC 217, 336, 370; Arangio-Ruiz, 'Responsibility IV' (n 1273) 34 [92]; G Perrin, 'La Détermination de l'État Lésé. Les Régimes Dissociables et les Régimes Indissociables' in J Makarcyzk (ed) *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Kluwer Law International, The Hague 1996) passim (*indissociable*); A Orakhelashvili, *Peremptory Norms in International Law* (Oxford Monographs in International Law, OUP, Oxford 2006) 93.

1275 Arangio-Ruiz, 'Responsibility IV' (n 1273) 34 [92]. See also K Sachariew, 'State Responsibility for Multilateral Treaty Violations: Identifying the "Injured State" and its Legal Status' (1988) 35 NILR 273 281. cf Simma 1994 (n 1274) 336–37.

1276 G Arangio-Ruiz, 'Third Report on State Responsibility' (UN Doc No A/CN.4/440 and Add.1, YbILC 1991-II(1)) 25 [81]; Arangio-Ruiz, 'Responsibility IV' (n 1273) 43 [130].

1277 Arangio-Ruiz, 'Responsibility IV' (n 1273) 43 [130].

1278 Arangio-Ruiz, 'Responsibility III' (n 1273) 25 [81]. See also Perrin (n 1274) 243.

Conversely, indivisible obligations are by and large identifiable with this thesis's conception of obligations *erga omnes* (*partes*). The salient feature of indivisible obligations is their 'integral' structure.[1279] They are assumed towards all other States[1280] between which the rule/source (eg multilateral treaty or custom) that contains the indivisible obligation operates.[1281] Indivisible obligations were said to create primary rights for all parties other than the obligation-bearer,[1282] an idea that drew criticism from many sides.[1283] Therefore, just as divisible obligations could be identified with obligations *inter partes* or their equivalents, indivisible obligations could be identified with obligations *erga omnes* (*partes*) and their equivalents.[1284] They are said to be non-reciprocal, [1285] non-bilateralisable, [1286] and infused by community interests. However, Arangio-Ruiz, who supported this conception, was

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1279 On the meaning of 'integral' structures, see ch 4 p 242, above.

1280 Sachariew (n 1275) 281, Arangio-Ruiz, 'Responsibility IV' (n 1273) 34 [92], 44 [131], [132] ('*omnium* rights'); Simma 1994 (n 1274) 336, 342, 351.

1281 Sachariew (n 1275) 281; Arangio-Ruiz, 'Responsibility IV' (n 1275) 44 [131]; Perrin (n 1274) 244. See also Simma 1994 (n 1274) 314.

1282 Arangio-Ruiz, 'Responsibility IV' (n 1273) 44 [132] ('*omnium* rights').

1283 See Riphagen, 'Responsibility Preliminary' (n 1274) 120 [65]. See also D Alland, 'Countermeasures of General Interest' (2002) 13 EJIL 1221, 1229; P Picone, 'La Distinzione tra Norme Internazionali di *Jus Cogens* e Norme che producono Obblighi *Erga Omnes*' (2008) XCI RDI 5, 12. Furthermore, this criticism is implied in J Crawford, 'Third Report on State Responsibility' (UN Doc No A/CN.4/507, YbILC 2000) [279]. See, finally, K Kawasaki, 'The "Injured State" in the International Law of State Responsibility' (2000) 28 Hitotsubashi Journal of Law and Politics 17, 20, 22, commenting on the DASR 1996, but positing different degrees of injury.

1284 On which see G Gaja, 'Obligations and Rights Erga Omnes in International Law (First Report)' (2005) 71 (I) AIDI 117, 184.

1285 Arangio-Ruiz, 'Responsibility III' (n 1276) 25 [81].

1286 Sachariew (n 1275) 271, 288.

criticised for not departing from bilateralism in explaining indivisible obligations.[1287] Arangio-Ruiz would not have agreed,[1288] but the charge is correct. As approved in 1996, what later became the ASR would treat injury by breach of indivisible obligations as a State-to-State matter.[1289] Again, this thesis would agree with this position.

The description of obligations *erga omnes* (*partes*) as indivisible, binding 'simultaneously towards all', is somewhat metaphorical. As stated before, divisible obligations (obligations *inter partes*) are structured [1290] in such a way that they create correlative rights for one State only. However, the rule (eg treaty or custom) that contains these obligations operates between more than two States. Therefore, each correlative right-holder is apportioned, as it were, a discrete piece of what results from the rule in question. By contrast, indivisible obligations bind all parties simultaneously. Thus, the breach of indivisible obligations by the State that bears them will also impair the correlative right of every other State simultaneously. This being the case, 'division' among right-holders becomes impossible. The metaphor is reinforced by those who believe that *one* indivisible obligation begets *many*

1287 See post-1996 references in n 1283, above. See also 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, 1069; P-M Dupuy, 'Quarante Ans de Codification du Droit de la Résponsabilité Internationale des États. Un Bilan' (2003) 107 RGDIP 305, 331.

1288 Arangio-Ruiz, 'Responsibility IV' (n 1273) 44 [131] ('Rules that do not fit this pattern …').

1289 ILC, 'Part 1 of the Draft Articles Adopted by the Commission on First Reading at its Thirty-Second Session, in 1980, and Titles and Texts of Parts 2 and 3 of the Draft Articles as provisionally Adopted by the Drafting Committee on First Reading at the Forty-Eighth session' (3 July) UN Doc A/CN.4/L.524 and Corr.2 (YbILC 1996-I, 133) (DASR 1996) art 40(2), sub-ss (e)(iii), (f).

1290 On the meaning of structure of international obligations, see introduction, p 19, above.

correlative rights.[1291] From this viewpoint, the indivisibility of the one obligation is almost literal.

In short, (in)divisibility is the preferred conception of obligations *inter partes* and obligations *erga omnes* (*partes*) in this thesis. However, indivisibility was not the preferred conception of States or, ultimately, of the ILC. The greater criticism levelled at Arangio-Ruiz was that he failed to distinguish between different types of States 'injured' by the breach of indivisible obligations.[1292] Arangio-Ruiz regarded all States as equally injured when an obligation *erga omnes* [1293] (*partes*) [1294] was breached. However, Arangio-Ruiz's position [1295] is more in line with a recent development in the law of state responsibility: that damage is no longer a precondition for the invocation of state responsibility.

It is submitted that **1)** if a distinction is made between injury (ie the breach of a right, and thus the fact that a right is held by the injured State) and damage (ie loss

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1291 Sachariew (n 1275) 275.

1292 State Responsiblity: Comments and Observations received from Governments (25 March 1998) UN Doc A/CN.4/488, 97 (art 40) (France), 100 (art 40) (Germany) (also at p 95 (Austria), 98 (UK), 99, 101–03 (US) (art 40) (cf p 100 (art 40) (Switzerland)); State Responsiblity: Comments and Observations received from Governments (19 March 2001) UN Doc A/CN.4/415, 62 (art 43) (Republic of Korea), 62 (art 43) (Slovakia), 64 (art 43) (US) (also p 16 (general remarks), 69 (art 43) (Austria) (cf p 61 (art 43) (Netherlands)).

1293 DASR 1996 (n 1289) art 40(e)(iii).

1294 See mention of multilateral treaties and their parties in DASR 1996 (n 1289) art 40(e), 40(f).

1295 DASR 1996 (n 1289) art 40 was actually drafted by Willem Riphagen. See W Riphagen, 'Sixth Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles); and "Implementation" (*Mise en Œuvre*) of International Responsibility and the Settlement of Disputes (Part 3 of the Draft Articles)' (UN Doc No A/CN.4/389, YbILC 1985-II(1)) 5–6 (art 5). But cf Riphagen's conception of injury, as secondary entitlements, at W Riphagen, 'Fourth Report on the Contents, Forms and Degrees of State Responsibility (Part 2 of the Draft Articles)' (UN Doc No A/CN.4/366, YbILC 1983-II(1)) 21 [112].

caused by the breach of an obligation, and thus by injury) and **2)** if injury can be held to exist where no damage has occurred, Arangio-Ruiz's conception is defensible.

2 Distinguishing Injury from Damage

Damage is *loss* suffered by a State,[1296] whether material or moral,[1297] by reason of a wrongful act. **Injury** consists of a '... legal wrong done to another arising from a breach of obligation'.[1298] That is to say, it is the impairment of a State's legal[1299] position as a result of the breach of a primary obligation/right.[1300] Thus, by way of example, let State A breach its obligation not to search the diplomatic bags of State B

1296 J Crawford, 'First Report on State Responsibility' (UN Doc No A/CN.4/490, YbILC 1998) [105]. See also I Brownlie, *System of the Law of Nations: State Responsibility (Part I)* (Clarendon Press, Oxford 1983) 199; A De Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (Kluwer Law International, The Hague 1996) 155 ('… damage or loss'). See further Simma 1994 (n 1274) 337 ('… actual harm'); Crawford, 'Responsibility I' (n 1296) [105] text associated to fn 133 ('… actual harm suffered').

1297 Annex, UNGA Res 56/83 (12 December 2001) UN Doc A/Res/56/83 (ASR) art 31(2); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 (*Genocide 2007*) 234 [462].

1298 J Crawford, 'Fourth Report on State Responsibility' (UN Doc No A/CN.4/517, YbILC 2001) [33]. See also Brownlie 1983 (n 1296) 199, on injury 'in the broad sense'.

1299 Crawford, 'Responsibility I' (n 1296) [105] ('… "legal injury" or *injuria*'). See also Simma 1994 (n 1274) 337 ('… injured … legally speaking … irrespective of … actual harm').

1300 Crawford, 'Responsibility III' (n 1283) [111]. See also R Ago, 'Quatrième Rapport sur la Résponsabilité des États' (UN Doc No A/CN.4/264, YbILC 1972-II) 107 [69]; Riphagen, 'Responsibility Preliminary' (n 1274) 113 [32]; Riphagen, 'Responsibility IV' (n 1295) 23 [123(a)]; Arangio-Ruiz, 'Responsibility IV' (n 1273) 43 [129]; MM Gomaa, *Suspension or Termination of Treaties on Grounds of Breach* (Martinus Nijhoff, The Hague 1996) 65. See further Sachariew (n 1275) 276; Dupuy 2002 (n 1287) 1073 ('… injured in their subjective rights … injured in their objective interests.'); Dupuy 2003 (n 1287) 334, 335 fn 121; LA Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002) 13 EJIL 1127, 1138; M Spinedi, 'From One Codification to Another: Bilateralism and Multilateralism in the Genesis of the Codification of the Law of Treaties and the Law of State Responsibility' (2002) 13 EJIL 1099, 1112, 1122; J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law relates to Other Rules of International Law* (Cambridge Studies in International and Comparative Law No 29, CUP, Cambridge 2003) 63.

without State B's consent. In the course of that search, State A's agents destroy assets found within State B's diplomatic bags. The breach of the obligation, and thus the impairment of the correlative right, constitutes 'injury'. State B's right that State A does not open its diplomatic bags has been impaired by State A's opening of the bags.

In simpler words, claims of injury or lack thereof are claims that primary rights owed to the relevant State have been impaired or not. Claims of damage or lack thereof are claims that *the manner in which those primary rights were impaired* has caused loss to a certain entity or not. Thus the destruction of the assets found within State B's diplomatic bags would represent 'material damage' or 'material harm';[1301] that is, financially assessable loss resulting, eg from partial or total destruction, of a State's (or its nationals') property. Material damage is redressed through compensation[1302] wherever restitution is impossible.[1303] Additionally, State B has suffered moral damage, which results from non-material considerations.[1304] Moral damage results, for example, from violations of a State's sovereignty,[1305] from

1301 Crawford, 'Responsibility I' (n 1296) [16].

1302 ASR (n 1297) arts 36 (1) ('… obligation to compensate for the damage'), 36(2).

1303 ASR (n 1297) arts 35(a), 36(1).

1304 Crawford, 'Responsibility III' (n 1283) [181]; Dupuy 2003 (n 1287) 326.

1305 B Stern, 'Et si on utilisait le Concept de Préjudice Juridique? Retour sur une Notion Delaisée à l'Occasion de la Fin des Travaux de la CDI sur la Responsabilité des États' [2001] AFDI 3, 12.

causing affront to a State's '… dignity and prestige',[1306] or from causing pain or suffering to an individual (eg loss of loved ones).[1307]

Indeed, injury and damage could be treated separately. Injury could be defined defensibly as the breach of a State's primary right,[1308] although injury is not a univocal term. Again, treaties aside, responsibility is invoked by the entity that can justify holding a primary right. It is the entity to which a primary obligation is owed that has standing to invoke its breach. This entity should also be injured by the mere breach of an obligation *erga omnes* (*partes*) owed to it.[1309] However, it is now accepted that a State can invoke the responsibility of another State even if the invoking State has suffered no damage.[1310] Consequently, injury can be suffered (ie a

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1306 *Rainbow Warrior (New Zealand v France)* (1990) XX RIAA 215, 267. See also G Arangio-Ruiz, 'Second Report on State Responsibility' (UN Doc No A/CN.4/425 and Add.1, YbILC 1989-II(1)) 3 [4].

1307 J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (CUP, Cambridge 2002) 202 [5] (art 31); Crawford, 'Responsibility III' (n 1283) [181].

1308 And see J Crawford, 'The System of International Responsibility' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 23.

1309 And see G Gaja, 'The Concept of an Injured State' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 945 ('… the legal position of the States to whom the integral obligation is owed, and hence the status of injured State, should not depend on the significance of the breach') (emphasis added).

1310 See, eg, Crawford, 'Responsibility I' (n 1296) [16]; E Wyler, 'From "State Crime" to Responsibility for "Serious Breaches of Obligations under Peremptory Norms of General International Law"' (2002) 13 EJIL 1147, 1153; A Pellet, 'The Definition of Responsibility' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 9, 11, 13, 15. See also B Stern, 'The Elements of an Internationally Wrongful Act' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 194. This is the main argument in B Bollecker-Stern, *Le Préjudice dans la Théorie de la Responsabilité Internationale* (Publications de la RGDIP, A Pedone, Paris 1973).

primary right can be infringed) without suffering damage. Thus, the status of being owed the obligation breached (injury), which alone justifies standing, and the status of suffering loss —or not— by breach of the same obligation can be thought of as different statuses, with different legal consequences. Consequently, they will be referred to under different names, although injury and damage are sometimes used interchangeably in the literature.[1311] *Prof Pellet would even define injury as damage*.[1312]

3 Practical Interest of the Distinction between Damage and Injury for Breaches of Obligations *Erga Omnes* (*Partes*)

Whereas States now hold primary rights that individuals or things over which they have no supremacy are treated in a certain way, States cannot yet claim damages for loss inflicted by the mistreatment of these individuals or things. Contrary to what is the case for injury, damage can only be justified when what is lost shares with States any of the 'special links' which helped create rights in classic, general international law. Thus, a State suffers damage when its own property is lost; but it can hardly be expected to receive a monetary benefit from the loss of another State's property. The same can still be said of loss provoked by mistreatment of a State's own nationals. In *Diallo Merits*, the ICJ found violations of human rights obligations against Mr Diallo, but ordered that compensation be paid to Guinea for those violations.[1313] The UK, for

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1311 In Alland (n 1283), cf statement at p 1222 ('... not suffered damage in the classical sense') with statement at p 1227 ('... in no way "injured" in the most classical sense').

1312 A Pellet, 'The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 77 ('… injury (ie material or moral damage)'. See also *Genocide 2007* (n 1297) 234 [462] ('… injury … consisting of all damage'). See further De Hoogh (n 1296) 185, distinguishing 'specific injury' —by suffering damage— from 'multilateral injury'

1313 *Ahmadou Sadio Diallo (Guinea v DRC)* (Merits) 2010 <http://www.icj-cij.org/docket/files/103/16244.pdf> accessed 6 June 2011, [165](2)–(3), 6. And cf pp 345–51,

instance, could not claim damages for infringement of Mr Diallo's human rights. However, nothing forbids that the UK is owed an obligation that Mr Diallo's rights be respected, in the same manner as the obligations underlying the *Peace Treaties* advisory opinions, for instance.[1314]

Therefore, by removing damage as one of the requirements for invoking state responsibility, it becomes possible to invoke state responsibility for the infringement of rights concerning the treatment of individuals or things over which the injured State has no supremacy. Such is the case for obligations *erga omnes* (*partes*). As such, the distinction between injury and damage makes defensible the conception of obligations *erga omnes* (*partes*) as primary obligations.

The best way to explain this is by way of example. It was stated before that among the main obligations in article I(1)(a) of the LTBT,[1315] there are the obligations not to detonate nuclear devices 'underwater'. These obligations are owed *erga omnes partes*.[1316] For State A, obligation-bearer, this prohibition extends to all bodies of water, including: **1)** *State B's* internal waters, territorial seas, contiguous zone and EEZ, **2)** *State A's* own internal waters, territorial seas, contiguous zone and EEZ, **3)** *State C's* internal waters, territorial seas, contiguous zone and EEZ, and **4)**

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below, on the role of human rights for alternative conceptions of obligations *erga omnes* and the state of general international law on the subject.

1314 See ch 2, pp 159–61, above.

1315 Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water (opened for signature 5 August 1963, entered into force 15 October 1963) 480 UNTS 43 (LTBT).

1316 See ch 3, pp 195–200, above.

the high seas. In simpler words, these obligations create individual, bilateralisable, primary rights for each of States B, C … Z.

Now, let State A test a nuclear device in the high seas, as a result of which certain fish banks, also located in the high seas, are partially destroyed. That is, fish that States B and C would otherwise be entitled freely to exploit[1317] become lost as a direct cause of State A's wrongful act. States B and C are both owed the obligation not to detonate nuclear artefacts 'underwater'. They have a right that no nuclear device is detonated 'underwater' in the course of a test. To this extent, and only to this extent, they are 'injured' by State A's wrongful act. Injury, again, is the impairment of a primary right. However, neither of States B or C can justify material damage in this case and thus cannot claim compensation for this breach. The key is the nature of State B's and C's entitlements to the fish lost. States B and C each have a 'freedom of fishing'[1318] either themselves (ie through their agents) or a freedom to let their nationals (eg ships flying their flag) to fish.[1319] This is an entitlement for them that they carry out —or that they let their nationals carry out— certain conduct, viz exploitation of high seas living resources; ie a liberty.[1320]

1317 United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) arts 87(1)(e), 116 ff.

1318 UNCLOS (n 1317) art 87(1)(e).

1319 This is implicit in, eg, UNCLOS (n 1317) arts 117 ('…measures for their … nationals as may be necessary in the conservation'), 118 ('States whose nationals exploit') (emphasis added).

1320 See ch 1, pp 44–43, above.

But in the high seas, an area over which no State could claim supremacy, liberties are mostly unprotected by perimeters of rights/obligations.[1321] As such, like any ordinary liberty, they can be interfered with.[1322] Thus, aside from injury caused by breach of the LTBT, the loss of these fish through breach of the LTBT is no different than a situation where, say, State D had fished them first. In both cases, fish otherwise freely exploitable by States B and C are lost to them as a direct result of the actions of another State.

As far as damage is concerned, the situation would be different for State B if State A's underwater tests in the high seas also partly destroyed fish stocks found within State B's EEZ. Although State B also has a liberty to exploit —and let its nationals exploit— living resources found within its EEZ,[1323] State B's EEZ liberty is exclusive.[1324] There is, therefore, only one State which could exploit these fish: State B. Consequently, State B could lawfully claim to have suffered material damage, aside from injury, when State A violates the LTBT. This would in turn give State B the right that State A compensates it for such material damage/loss.

The scenario above in no way detracts from State C's entitlement that State A does not detonate nuclear devices 'underwater'. By extension, it does not detract from State C's injury should its primary right be impaired. In both scenarios, State C's primary rights are impaired by State A's actions; State C could thus be considered an

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1321 cf ch 2, p 133 nn 549–51 and associated text, above.

1322 See ch 1, pp 27–28, above.

1323 UNCLOS (n 1317) art 56(1)(a).

1324 UNCLOS (n 1317) art 56(1)(a) ('… sovereign rights') (emphasis added).

'injured State' in this conception. State B's primary rights would also be impaired by State A's wrongful acts. Thus, State B would also be injured in both scenarios. *And if State B's and State C's primary rights are identical, State B and State C could be considered as equally injured*. However, beyond mere injury, State B would *additionally* suffer material damage if its own EEZ is affected by State A's wrongful acts. *Thus, although State B's and State C's primary rights would be affected in equal measure,*[1325] *State B's secondary entitlements would be different from State C's entitlements if State B suffers damage*[1326] *alongside injury*.

4 The Distinction between Injury and Damage in General Customary Law

The distinction between the impairment of a primary right (injury) and loss resulting from such impairment (damage) is arguably part of customary law.

Traditionally, many considered a State's suffering material/moral damage a requirement of their ability to invoke the responsibility of the wrongdoing State.[1327] However, the ILC rejected this when formulating what is now article 1 ASR. That '[e]very wrongful act of a State' entails its responsibility is significant as much for what it says as for what it does not say.[1328] Article 1 conveys, by omission, that there

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1325 cf, on pollution of the high seas, Gaja 2010 (n 1309) 947 ('… the breach exists in respect of all other States, but among these the coastal State … is to be considered as 'specially' affected.') (emphasis added).

1326 This limited point is made in Responsibilty Comments 2001 (n 1292) 63 (art 43) (UK), confusing 'harm' (damage) with injury, but —seemingly— discussing the former.

1327 See, eg, Wyler (n 1310) 1151 text to fn 25; Pellet 2010a (n 1310) 11.

1328 Crawford, 'Responsibility I' (n 1296) [109].

is no prerequisite to invoke state responsibility other than the wrongful act itself.[1329] Indeed, the idea that responsibility could be invoked where damage has not occurred was eventually accepted by most States that commented on the ASR;[1330] *opinio juris* against this notion was also expressed, however.[1331] Likewise, for the ILC, '[i]njury includes … damage'.[1332] Therefore, the ILC might not agree with the distinction maintained here between injury as pure impairment of a primary right and damage as loss occasioned by the manner in which this primary right is infringed.

However, the distinction between the impairment of a right and loss incidentally caused by that impairment can indeed be maintained. It is noteworthy that the historical claims considered in chapter 2 (eg claims underlying the *Peace Treaties* advisory opinions)[1333] were advanced without the right-holder having to prove any damage. Furthermore, two recent cases filed with the ICJ are relevant here.

In *Habré*, Belgium demanded that Senegal complies with the obligation to prosecute or extradite Mr Hissène Habré, a former president of Chad (1982–1990)

1329 Crawford, 'Responsibility I' (n 1296) [16]. And see R Ago, 'Deuxième Rapport sur la Responsabilité des États' (UN Doc No A/CN.4/233, YbILC 1970-II) 208 [54]; R Ago, 'Troisième Rapport sur la Responsabilité des États' (UN Doc No A/CN.4/246, YbILC 1971-II) 234–35 [73]–[74].

1330 Responsibility Comments 1998 Responsibility Comments 1998 (n 1292) 25 (general remaks) (Switzerland) (also p 32 (art 1) (Germany)); State Responsiblity: Comments and Observations received from Governments (10 February 1999) UN Doc A/CN.4/492, 13 (art 40) (Japan); Responsibility Comments 2001 (n 1292) 59 (pt II-bis, ch 1), 63 (art 43), speaking of '… harm or injury' (UK) (emphasis added).

1331 Responsibility Comments 1998 (n 1292) 31–32 (art 1), 100 [3(a)(b)] (art 40) (France) (cf p 98 (art 40) (UK)).

1332 cf ASR (n 1297) art 31(2).

1333 See ch 2, pp 159–61, above.

who has been accused of human rights abuses before Belgian tribunals.[1334] Neither Belgium nor Senegal has thus far advanced any theory on the distinction between injury and damage. However, Belgium seeks compliance with an obligation whose violation has not caused it material or moral damage, Belgium wants Senegal to either prosecute Mr Habré or to extradite him to Belgium.[1335] Belgium could not justify material or moral damage in Senegal's refusal to set in motion Senegal's own legal system to this effect. Likewise, only some of the plaintiffs are Belgian nationals. Furthermore, at the time the alleged crimes were committed all claimants were Chadian nationals. That is, these actions were committed by Chad against Chadian nationals in Chadian territory. However, Belgium seeks to enforce Senegal's obligation prosecute or extradite Mr Habré.

If it is correct that Belgium can claim a right that Mr Habré is prosecuted or extradited, the impairment of that right alone —ie Senegal's refusal to observe its correlative obligation to prosecute or extradite Mr Habré— would justify considering Belgium as an injured State. If it is still true that the entity holding a right (ie being owed an obligation) has standing to invoke responsibility for its breach[1336] but that damage is not a condition for the resulting claim to be made, the fact that Belgium cannot justify damage is irrelevant for Belgium's standing. Furthermore, that Belgium has presented a claim despite being unable to show damage shows that the

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1334 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Pending) Application instituting Proceedings <http://www.icj-cij.org/docket/files/144/15053.pdf/> accessed 8 February 2011.

1335 *Habré Application* (n 1334) 9.

1336 See ch 1, pp 56–82, above.

idea that damage is not a condition for the invocation of responsibility is gaining traction, at least.

It also bears noting that Senegal has questioned the admissibility of the Belgian application, but not —or not yet, perhaps— for want of standing. Rather, Senegal claims that the obligation previously to negotiate and arbitrate the dispute in question before seising the ICJ was not fulfilled.[1337]

The other case of interest is the *Whaling Case*.[1338] This case is at an early stage. However, Australia's claim concerns the killing of whales in Antarctic waters that were not part of Australia's or Japan's EEZs.[1339] And indeed, the relevant treaty provisions treat Antarctic waters (the 'Southern Ocean Sanctuary') as a whole.[1340] These provisions are strikingly similar to those of the Antarctic Treaty,[1341] owed *erga omnes partes*.[1342] Indeed, reading the treaty on its face, it does not appear that this sanctuary was created to further the supremacy of any State.

1337 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Pending) CR 2009/9, 35–40. And cf Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (opened for signature 10 December 1984, entered into force 26 June 1987) 1465 UNTS 112 (Torture Convention) art 30(1).

1338 *Whaling in the Antarctic (Australia v Japan)* (Pending) (ICJ).

1339 *Whaling in the Antarctic (Australia v Japan)* (Pending) Application instituting Proceedings <http://www.icj-cij.org/docket/files/148/15951.pdf> accessed 18 October 2011, 7–10.

1340 International Convention for the Regulation of Whaling (opened for signature 2 December 1946, entered into force 10 November 1948) 161 UNTS 72 (Whaling Convention) Sch, [7(b)]. Available at <http://cil.nus.edu.sg/rp/il/pdf/1946%20IC%20for%20the%20Regulation%20of%20Whaling-pdf.pdf> accessed 18 October 2011.

1341 Antarctic Treaty (opened for signature 1 December 1959, entered into force 23 June 1961) 402 UNTS 71 (Antarctic Treaty).

1342 See ch 4, p 247–48, above.

In sum, as the law stands today, there is support for the notion that injury can occur where damage has not. The concepts of injury, as impairment of a primary right, and damage, as loss caused by that impairment, can indeed be treated separately one from the other.

5 The Problem of the so-Called 'Indirect' Injury resulting from Breach of Obligations *Erga Omnes* (*Partes*)

That said, the problem many would have with distinguishing between injury and damage in this way is that all States could be regarded as 'equally injured' by breaches of obligations *erga omnes* (*partes*). Arangio-Ruiz believed this. He made no distinction between different types of injured States in his proposed article 40 of what later became the ASR,[1343] for instance. He distinguished —albeit not constantly—[1344] between the wrongful act itself (and thus the resulting injury) from any infliction of damage/loss.[1345] The latter notion did not necessarily follow the former.[1346] Therefore, for Arangio-Ruiz, some States could rightly feel more affected than others when an obligation *erga omnes* (*partes*) was breached. However, if all States are owed the same primary obligation, the different degrees to which these States are

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1343 DASR 1996 (n 1289).

1344 cf uses of material/moral injury/damage in G Arangio-Ruiz, 'Preliminary Report on State Responsibility' (UN Doc No A/CN.4/416, YbILC 1988-II(1)) 11 [21], 12 [24], 18 [50]; Arangio-Ruiz, 'Responsibility II' (n 1306) 5 [C], [13]. cf also Arangio-Ruiz, 'Responsibility II' (n 1306) 3 [3], 12 [34].

1345 Arangio-Ruiz, 'Responsibility IV' (n 1273) 43 [129]. See also, in a different context, Arangio-Ruiz, 'Responsibility Preliminary' (n 1344) 22 [67] ('… compensation … due to the injured party for … loss suffered')

1346 Arangio-Ruiz, 'Responsibility IV' (n 1273) 43 [129].

affected could not be pinned down to questions of injury, but rather to questions of damage.[1347]

Many would resist the idea that all States are equally injured by breaches of obligations *erga omnes* (*partes*). But they do so deficiently: they assume that States that are unable to justify damage are also unable to justify injury. But when damage is made a requirement of injury, classic, general international law is projected onto modern, general international law despite very important differences between both systems.

Indeed, obligations '… in which damage to individual States cannot be expected, would be difficult to prove or is not of the essence of the obligation[s]'[1348] are atypical from the standpoint of classic international law. Human rights obligations[1349] are assumed over individuals in general, without regard to nationality, including a State's own citizens[1350] and stateless individuals.[1351] Disarmament obligations[1352] are assumed over a State's own armed forces.[1353] Some '… world

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1347 Arangio-Ruiz, 'Responsibility IV' (n 1273) 44–45 [134], text associated to fn 304 (especially). See also Simma 1994 (n 1274) 337, text associated to fn 344.

1348 Crawford, 'Responsibility I' (n 1296) [118].

1349 Crawford, 'Responsibility I' (n 1296) [118].

1350 And see Crawford, 'Responsibility I' (n 1296) [118] ('… or of other obligations undertaken by the State to its own citizens'). See also, eg, De Hoogh (n 1296) 167, for whom no damage accrues to States for breaches of the human rights of its own citizens; M Koskenniemi, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of General International Law' (UN Doc No A/CN.4/L.682, YbILC 2006) [393], advancing the same point.

1351 cf ch 2, pp 141–45, below.

1352 Crawford, 'Responsibility I' (n 1296) [118].

heritage' obligations[1354] are assumed by States over artefacts and places located in their territories.[1355] Obligations to adopt uniform laws[1356] are assumed over a State's own legal system. The emission of pollutants into the atmosphere and other environmental obligations[1357] may involve conduct over 'global commons'[1358] or a State's own jurisdiction;[1359] and so on.

This is why concepts such as 'direct' or 'indirect' injury are problematic. A State is '**directly injured**' when it has also undergone 'some kind of damage'[1360] aside from the mere breach of an obligation owed to it.[1361] That is, direct 'injury' is defined through the concept of damage. These States are also known as (in)directly

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1353 cf ch 2, pp 161–65, above.

1354 Crawford, 'Responsibility I' (n 1296) [118].

1355 cf Convention for the Protection of the World Cultural and Natural Heritage (opened for signature 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151 (World Heritage Convention) arts 4–5, 6(1).

1356 Crawford, 'Responsibility I' (n 1296) [118].

1357 Crawford, 'Responsibility I' (n 1296) [118].

1358 Pauwelyn (n 1300) 73 fn 145, defined at p 66. See also A-L Vers-Chaumette, 'The International Community as a Whole' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 1024–25 ('collective goods').

1359 See pp 313–14, below.

1360 Kawasaki (n 1283) 22. See also at p 26.

1361 See also Sachariew (n 1275) 285, on injury suffered through material damage; Dupuy 2002 (n 1287) 1073. See further the conception of 'specific injury' in De Hoogh (n 1296) 185. cf De Hoogh's conception of the position of the victim of an armed attack, at p 185.

affected States.[1362] The concept of the 'specially affected State' should be remembered here: this is a State owed primary obligations, among others.[1363] And, indeed, the examples of directly 'injured' States would not stand out in a catalogue of States traditionally owed obligations in general international law; eg the victim of an armed attack,[1364] the State of nationality of individuals mistreated abroad,[1365] the coastal State in cases of pollution,[1366] etc.

1362 NHB Jørgensen, *The Responsibility of States for International Crimes* (Oxford Monographs in International Law, OUP, Oxford 2000) 182. 'Indirect' injury may also refer to injury caused unto a State for breaches of international law on its nationals. See W Riphagen, 'Second Report on the Contents, Forms and Degrees of State Responsibility (Part 2 of the Draft Articles)' (UN Doc No A/CN.4/344, YbILC 1981-II(1)) 96 [135]; D Shelton, *Remedies in International Human Rights Law* (2nd edn OUP, Oxford 2005) 59; E Wyler and A Papaux, 'The Different Forms of Reparation: Satisfaction' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 628–29.

1363 See ch 4, pp 232–35, above.

1364 R Ago, 'Cinquième Rapport sur la Responsabilité des États' (UN Doc No A/CN.4/291, YbILC 1976-II(1)) 30 [89]; M Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 Nord JIL 211, 238.

1365 Byers (n 1364) 238; S Villalpando, *L'Émergence de la Communauté Internationale dans la Responsabilité des Etats* (Publications de l'Institut Universitaire de Hautes Études Internationales, PUF, Paris 2005) 319. cf Shelton (n 1364) 59.

1366 De Hoogh (n 1296) 185; Villalpando (n 1365) 319; Crawford 2010a (n 1308) 23.

C ALTERNATIVE CONCEPTIONS OF OBLIGATIONS *ERGA OMNES* (*PARTES*)

1 Introduction

Two major alternative conceptions to obligations *erga omnes* (*partes*) will be considered in this thesis.

The first major group would conceive rights correlative to obligations *erga omnes* (*partes*) as either 'subjective' or 'objective'. Subjective rights are no different from traditional rights. They are held, say, by the State of nationality of victims of human rights abuses that infringe obligations *erga omnes*. 'Objective' rights are held by all other States. They entitle States *to observance of international law*. What objective-right-holders seek is that international law is respected. Full reparation for breaches of human rights abuses (eg granting compensation for victims of human rights abuses) cannot be sought by objective-right-holders.

The second major group would have it that States other than those traditionally owed primary obligations are not owed primary obligations *erga omnes* (*partes*). For them, obligations *erga omnes* (*partes*) are not about primary legal relations, but rather about secondary legal relations. States other than those traditionally owed obligations would only have standing to invoke responsibility for breach of obligations *erga omnes* (*partes*), despite the fact that these obligations are not owed to them directly or individually. Therefore, this second group of conceptions of obligations *erga omnes* (*partes*) would override the rule of standing in general international law.[1367]

[1367] cf ch 1, pp 56–82, above.

2 'Objective' Rights and 'Subjective' Rights to the Observance of Obligations *Erga Omnes* (II)

(a) Introduction: 'Objective' and 'Subjective' Rights

The first alternative conception of obligations *erga omnes* (*partes*) conceives of entitlements for States arising under obligations *erga omnes* as 'subjective' or 'objective', as the case may be. These terms are mostly used by commentators in whose native language the same word is used for the 'Law' —as in the legal system as a whole— and for a 'Right':[1368] *droit*, in French;[1369] *Recht*, in German[1370] and in Dutch;[1371] *diritto*, in Italian,[1372] and so on. What in English is termed the 'Law' as a whole is often called 'Objective' Law/Right,[1373] whereas a subject's entitlements or 'rights' —in English— are termed 'Subjective' Law/Right.[1374] Thus any of Hohfeld's entitlements could be considered 'subjective right'.

1368 This idea is taken from CJ Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge Studies in International and Comparative Law No 44, CUP, Cambridge 2005) 32.

1369 eg Perrin (n 1274); Stern 2001 (n 1305); Dupuy 2003 (n 1287); Villalpando (n 1365).

1370 eg C Annacker, 'The Legal Regime of Erga Omnes Obligations in International Law' (1994) 46 AJPIL 131.

1371 eg De Hoogh (n 1296) 20, a supporter of a conception of obligations *erga omnes* as secondary entitlements; ID Seiderman, *Hierarchy in International Law: The Human Rights Dimension* (School of Human Rights Research Series No 9, Intersentia-Hart, Antwerpen 2001), who comments on this conception but supports that which conceives obligations *erga omnes* as secondary entitlements.

1372 Gaja 2005 (I) (n 1284); Picone (n 1283).

1373 R Ago, 'Additif au Huitième Rapport sur la Responsabilité des États' (UN Doc No A/CN.4/318/Add.5-7, YbILC 1980-II(1)) 18 [9] ('… le "droit" au sens "objectif", à savoir l'ordre juridique').

1374 Perrin (n 1274) 244 ('… droit conféré par une règle de droit … à la personne internationale que constitue l'État'); Stern 2001 (n 1305) 14; Dupuy 2003 (n 1287) 308. See also R Ago, 'Sixième Rapport sur la Responsabilité des États' (UN Doc No A/CN.4/302, YbILC 1977-II(1)) 24 [52]; Ago, 'Responsibility VIII Addendum' (n 1371) 18 [9]. See further: Crawford,

Supporters of this conception believe that obligations *erga omnes* (*partes*) entitle all States to demand observance of obligations *owed to the traditionally injured States*. However, there are two types of right-holders to any obligation *erga omnes* (*partes*). First, there are '**subjective**' or '**first-level**' [1375] right-holders. Subjective rights are at issue in cases of 'ordinary breaches'.[1376] In short, subjective-right-holders are those traditionally owed primary obligations. Thus State B's subjective rights are breached if State A, obligation-bearer, mistreats State B's nationals,[1377] for instance. This right would be no different than traditional rights in classic, general international law.[1378]

*By contrast States C, D … Z would only hold a —'**objective**'*[1379] *or '**second-level**'—*[1380] *right that State A fulfil its obligation not to commit genocide towards State B*. Objective rights are entitlements for States C, D … Z. Therefore, the

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'Responsibility III' (n 1283) [84], [94] ('… "subjective" or individual rights'); Crawford, *Commentaries* (n 1307) 25 ('… independent ("subjective") rights.')

1375 DN Hutchinson, 'Solidarity and Breaches of Multilateral Treaties' (1988) LIX BYIL 151, 160 ff.

1376 Seiderman (n 1371) 138, 140. cf ch 4, pp 260–63, above, on the 'ordinary', 'traditional', 'classical' character of bilateral conceptions of rights and obligations.

1377 Hutchinson (n 1375) 160–61, fn 30 (especially).

1378 Dupuy 2002 (n 1287) 1073, assimilating subjective rights with classic rights (Anzilotti's classic rights). And see D Anzilotti, 'La Responsabilité Internationale des États à Raison des Dommages Soufferts par des Étrangers' (1906) XIII RGDIP 5, 13 ff, establishing a system whereby rights are correlative to duties in a bilateral context.

1379 Annacker (n 1370) 147; Stern 2001 (n 1305) 14; Dupuy 2003 (n 1287) 335 fn 121. 'Objective' is an equivocal term; it is used in widely different contexts. cf 'objective regimes' at ch 3, pp 182–84, above; absolute obligations as 'objective' obligations, ch 4, p 249 n 1092 and associated text, above.

1380 Hutchinson (n 1375) 160 ff.

objective right to demand observance of obligations *erga omnes* (*partes*) is also a subjective right, in a sense.[1381] The difference between objective and subjective rights is rather that *the holder of objective rights is only entitled to respect for the legal regime under acquires objective rights arise*. As stated before, the law as a whole is deemed in some legal families as an objective system.[1382] The interest furthered by 'objective' rights is thus an interest in respect for the law,[1383] as opposed to any truly (subjective) right of the claimant's.[1384] When invoking responsibility for the breach of an objective right, the right-holder defends international legality,[1385] so to speak, rather than a right or an interest of its own.[1386]

Subjective and objective rights can be linked to the notions of reciprocity, bilateralism[1387] and community interests, discussed before.[1388] Subjective rights are

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1381 Perrin (n 1274) 246; Dupuy 2003 (n 1287) 332 text associated to fn 118, 334 ('... droit dont elles sont elles mêmes titulaires.') (emphasis added); Villalpando (n 1365) 311 ('… prérogative … personnelle'), 312, 316, passim; Picone (n 1283) 13. This is especially so if the definition of 'subjective right' is very wide. See, eg, Ago, 'Responsibility VI' (n 1374) 24 [52] ('Droit, au sens subjectif du terme, signifie essentiellement faculté d'exiger d'autrui un comportement ou une prestation.') (emphasis added). See also Ago, 'Responsibility VIII Addendum' (n 1371) 18 [9]; Stern, 2001 (n 1310) 14.

1382 See p 307, above.

1383 Annacker (n 1370) 149 text associated to fn 103; Stern 2001 (n 1305) 13–14; F Voeffray, *L'Actio Popularis ou la Défense de l'Intérêt Collectif devant les Juridictions Internationales* (Publications de l'Institut Universitaire de Hautes Études Internationales, Genève, PUF, Paris 2004) 128.; Villalpando (n 1365) 996 text associated to fn 996, 303, 309–12, passim. See also Dupuy 2002 (n 1287) 1073 ('… respect for the objective legality').

1384 Dupuy 2003 (n 1287) 332.

1385 Perrin (n 1274) 245; Dupuy 2002 (n 1287) 1072 ('… objective legality'); Stern 2001 (n 1305) 13 ('… garantie de l'ordre juridique international').

1386 Hutchinson (n 1375) 161.

1387 cf Stern 2001 (n 1305) 15.

some times described as 'individual', [1389] 'classic', [1390] 'traditional', [1391] or 'genuine' [1392] rights. The invocation of responsibility for breach of a subjective right has been deemed a 'normal' type of claim. [1393] Many described 'bilateralist' obligations, reciprocal obligations, and those that did not further community interests in the same manner. By contrast, objective rights to the observance of obligations *erga omnes* (*partes*) are described as non-contractual, [1394] 'impersonal'. [1395] Many described rights not resulting from bilateralism, not imbued with reciprocity, and not furthering community interests in the same manner.

(b) Subjective Rights, Objective Rights and Secondary Legal Relations

The distinction between a right of the right-holder's and a right that the law is respected has important consequences for secondary legal relations. This thesis would rather have it that rights correlative to obligations *erga omnes* (*partes*) are not

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1388 See ch 4, generally.

1389 Crawford, 'Responsibility III' (n 1283) [94].

1390 Dupuy 2002 (n 1287) 1073, identifying subjective rights with classical international law rights theory. See also Dupuy 2003 (n 1287) 334.

1391 A Gattini, 'A Return Ticket to "Communitarisme", please' (2002) 13 EJIL 1181, 1192–93.

1392 Sicilianos 2002 (n 1300) 1138, contrasting a '… genuine subjective right' with a simple legal interest in the observance of obligations *erga omnes*.

1393 Seiderman (n 1371) 140.

1394 cf *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90, 131 (SO Ranjeva) ('… [objective rights] ne sont pas de nature contractuelle ou subjective.') (emphasis added). cf also Simma 1994 (n 1274) 372.

1395 *East Timor* (n 1394) 131 (SO Ranjeva).

necessarily different in nature than traditional rights.[1396] This thesis would posit a right for *State C's that State A does not commit genocide against the nationals of State B*, rather than State C's right that State A *respects an obligation* (*erga omnes*) actually or primarily owed to State B.

By contrast, proponents of objective rights fear that this interpretation would make it impossible to distinguish between the legal positions of so-called directly injured States or specially affected States and those of indirectly injured States. Thus the arguments developed in this thesis could —theoretically— justify that States M, P or Z are accorded compensation for mistreatment of State B's nationals or pollution of State B's territorial seas. Seen from this point of view, a lack of distinction between the relative positions of different States seems 'absurd'. [1397] Proponents of this conception would accept that all States are affected by breaches of obligations *erga omnes* (*partes*). This much they share with the arguments advanced in this thesis. However, proponents of objective rights would have it that different States are affected in different rights and interests when obligations *erga omnes* (*partes*) are breached. This is how they justify withholding or according different types of secondary entitlements to different types of States.[1398]

1396 See ch 2, pp 126–28, above; ch 4, generally; pp 291–305, above. See also Picone (n 1283) 12–13, criticising Arangio-Ruiz precisely because he treated as identical the primary entitlements of all States to the observance of obligations *erga omnes*.

1397 Sicilianos 2002 (n 1300) 1139.

1398 See, eg, Dupuy 2002 (n 1287) 1070, on differences in the way States can 'sue' for breaches of human rights on the basis of different types of injury suffered; Dupuy 2003 (n 1287) 332 (especially), 334, 335 fn 121. See similar statements in Picone (n 1283) 12 text associated to fn 15. See further, statements in Sicilianos 2002 (n 1300) 1138–39, who supports a different conception of obligations *erga omnes*.

More concretely, proponents of this conception are averse to recognising a right for the objective right-holder to receive compensation for breaches of obligations *erga omnes* (*partes*).[1399] Only the holder of the subjective right should be entitled to the 'whole panoply'[1400] of secondary rights of redress. Objective-right-holders would only be entitled to secondary rights that guarantee that obligations *erga omnes* (*partes*) are observed on the subjective-right-holder. Thus, objective-right-holders are entitled to request cessation[1401] or assurances of non-repetition.[1402] Some would add restitution if it does not enrich the objective-right-holder (eg by requesting that medical treatment is afforded to victims of human rights abuses).[1403]

By contrast, if all primary rights to the observance of obligations *erga omnes* (*partes*) are identical, as advanced in this thesis, differences in certain secondary entitlements cannot be justified by the concept of injury. Again, injury is the breach of a primary right. Consequently, by advancing different categories of primary rights to explain different degrees of entitlements, proponents of this conception would posit different types of injury for breaches of obligations *erga omnes* (*partes*). Indeed,

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1399 See, eg, Seiderman (n 1371) 140. See also Annacker (n 1370) 154, on the slightly different context of objective-right-holding States becoming unjustly enriched by receiving compensation for damage suffered by individuals and peoples.

1400 Hutchinson (n 1375) 151, 160 ('… full range'), 165. See also Sicilianos 2002 (n 1300) 1139 ('…entire range … full range'); he supports a different conception of obligations *erga omnes*.

1401 Annacker (n 1370) 148, 154; Seiderman (n 1371) 139; Gaja, 2005 (I) (n 1284) 136.

1402 Annacker (n 1370) 154; Gaja 2005 (I) (n 1284) 136.

1403 Annacker (n 1370) 154. Under the ASR, this is not possible in all cases. See pp 343–45, below.

Prof Dupuy seems to believe that subjective rights are impaired (ie injury occurs) every time a State can justify damage.[1404]

This thesis would rather look to damage in order to determine what kinds of secondary entitlements could redress breaches of obligations *erga omnes* (*partes*). With the arguments advanced in this thesis, it could not be ruled out that any State could be entitled to compensation for breach of obligations *erga omnes* (*partes*). But, as stated before, if a distinction is drawn between injury and damage, the possibility that objective-right-holders could be afforded compensation for breaches of these obligations is merely theoretical. The remoteness of a State to a wrongful act (eg those caused on another State's agents) or its consequences (eg when the consequences of the act spill over to another State's territorial seas) has a bearing on whether such State could claim damages. Again, objective rights are vested in, say, States other than the State of nationality, when an individual is mistreated by the State of which that individual is national. They are also vested in States other than the coastal State, when any part of the EEZ or the high seas is polluted; and so on. A wrongful act of this sort would rarely cause damage to an objective-right-holder.

Thus, other than injury arising from the impairment of the primary right itself, objective-right-holders do not suffer the main effects (eg physical effects, such as pollution or destruction of property) of a wrongful act. The more remote the State is to the wrongful act and its effects, the less likely it is to suffer damage as a result of that wrongful act. And since justifying damage is a condition of any claim to

[1404] Dupuy 2002 (n 1287) 1073 ('All states are injured: the former because they have undergone damage … affecting their subjective rights').

compensation,[1405] the less likely the possibility to justify such damage is, the less likely it is that a claim to compensation will succeed.[1406]

In simpler words, proponents of this conception have rebelled against a problem which does not exist. The law has not changed to the point that State Z could justify damage for mistreatment of other States' nationals or territories.[1407] Therefore, again, it is theoretically possible that State Z is afforded compensation for wrongful acts concerning, say, State B's territorial seas. This thesis would not rule out this secondary right. But because of the state of the law on damages, such possibility would rarely[1408] materialise.

(c) Provenance, Function, and Nature of Objective Rights

Commentators differ as to what it is that the objective-right-holder actually accomplishes when it vindicates obligations *erga omnes*.

One line of argument would have it that the objective-right-holder acquires this right as a member of the international community,[1409] rather than in its individual capacity. Again, obligations *erga omnes* are owed to the 'international community as

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1405 ASR (n 1297) arts 27(b), 36(1) ('… compensate for damage caused').

1406 See pp 291–305, above.

1407 And see Gaja 2005 (I) (n 1284) 137, discussing that States other than those owed subjective rights in the traditional sense would rarely be able to justify damages.

1408 Gaja 2005 (I) (n 1284) 137 would allow compensation for a State which, in defence of the international community, cleans up massive pollution caused by another State to the high seas. This seems correct.

1409 Annacker (n 1370) 147; Dupuy 2003 (n 1287) 310, 334; Gaja 2005 (I) (n 1284) 126.

a whole'. [1410] Therefore, proponents of this conception believe that when the objective-right-holder invokes responsibility for breach of an obligation *erga omnes*, it does not seek redress for a wrongful act affecting it individually (*ut singuli*). Rather, the objective-right-holder acts on behalf of the whole of the international community [1411] to redress a wrongful act against members of the international community, but collectively considered (*ut universi*).[1412]

The social function served by this right may then explain why some commentators believe that objective rights to the performance of obligations *erga omnes* are collective rights,[1413] rather than individual rights. Some would even have it that these rights cannot be vindicated by States individually, when breached, but rather by all States collectively[1414] or through a collective body (eg the UN).[1415] By contrast, others would have it that these rights are conferred on States

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1410 *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (New Application: 1962)* (Judgment) [1970] ICJ Rep 3, 32 [33].

1411 See Picone (n 1283) 13, for whom what this thesis calls objective-right-holding-States assume 'functional powers' over attributes of the international community.

1412 Gaja 2005 (I) (n 1284) 126 fn 122; Picone (n 1283) 13–14, 16. See also Sachariew (n 1275) 283; Villalpando (n 1365) 317. On a similar context, but dealing with primary entitlements, see P Weil, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 413, 432; Simma 1994 (n 1274) 244, 310; Villalpando (n 1365) 295, 311. See further Jørgensen (n 1362) 179. This last author supports a different conception of obligations *erga omnes*.

1413 Picone (n 1283) 13.

1414 Sachariew (n 1275) 282. cf Annacker (n 1370) 140; Gaja 2005 (I) (n 1284) 126.

1415 W Riphagen, 'Third Report on the Contents, Forms and Degrees of State Responsibility (Part 2 of the Draft Articles)' (UN Doc No A/CN.4/354, YbILC 1982-II(1)) 45 [139]; Sachariew (n 1275) 283. This is expressed as a possibility, *de lege ferenda*, in Simma 1994 (n 1274) 310. See further Riphagen, 'Responsibility IV' (n 1275) 12 [63]; Crawford, 'Responsibility IV' (n 1298) [37].

individually, [1416] without prejudice to their acting *ut universi* when invoking responsibility for their breach.

Another line of argument is Hutchinson's solidarity 'in the strict sense'.[1417] Hutchinson conceives of two forms of 'solidarity': *stricto sensu* and *lato sensu*. Under the more interesting type of solidarity, *stricto sensu*, Hutchinson would grant 'second-level' rights[1418] to his equivalent of objective-right-holding-States. 'Second-level' rights would allow[1419] objective-right-holders to come in aid of the holders of 'first-level' rights.[1420] The latter may not always be able to enforce their rights unassisted (eg by reason of their relative weakness vis-à-vis the wrongdoer State).[1421] Objective or 'second-level' rights are thus 'auxiliary' to subjective or 'first-level' rights.[1422] The objective-right-holding State would only be granted these rights when the subjective-right-holding State requests it to come to its aid.[1423] In sum,

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1416 Annacker (n 1370) 140, 148; Gaja 2005 (I) (n 1284) 126. See also Stern 2001 (n 1305) 16, stating that obligations *erga omnes* are not owed *erga totum* (ie 'against the whole/all together').

1417 (n 1375) 160 ff.

1418 ie objective rights.

1419 Hutchinson seems to assume, as this thesis does, that only the State due an obligation has standing to claim its breach; hence the need to endow the objective-right-holder with these primary rights. See example at bottom of page in Hutchinson (n 1375) 151.

1420 ie subjective rights. See Hutchinson (n 1375) 160. Where first-level rights are involved, the question is different. See p 161 fn 30.

1421 ie to remedy power asymmetries.Hutchinson (n 1375) 158–59.

1422 Hutchinson (n 1375) 160, 163, 184.

1423 Hutchinson (n 1375) 163.

Hutchinson's objective rights are individual, but auxiliary and dependent on someone else's subjective rights.

Solidarity *lato sensu* is of no interest to this thesis. When acting in solidarity *lato sensu* with other States, the acting States would enjoy all entitlements States acting in solidarity *stricto sensu* possess. But solidarity *lato sensu* would additionally allow these States to invoke responsibility for *every* breach of a multilateral treaty. They would do so in order to prevent that breaches become 'subsequent practice in the application of the treaty' which could shape the way the treaty will be interpreted in the future.[1424] That is, solidarity *lato sensu* justifies actions that preserve the content of treaty obligations.[1425]

(d) Criticisms to this Conception and Preliminary Conclusion

In sum, in different ways, proponents of this first, alternative conception of obligations *erga omnes* (*partes*) believe that the majority of States in the international community hold a primary right *that obligations erga omnes (partes) are upheld*. Under these conceptions, States other than those traditionally injured are not owed obligations *erga omnes* (*partes*) themselves. Rather, these States are owed respect for the law, as it were. But this obligation of respect for legality is a primary obligation nevertheless. Accordingly, the general rule of standing, whereby States owed primary

1424 Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31(3)(b).

1425 Hutchinson (n 1375) 166.

obligations have standing to invoke responsibility for their breach,[1426] would allow for standing even in this situation.[1427]

However, objective rights to the observance of obligations *erga omnes* (*partes*) seem a reflection of a belief that general international law cannot yet create full-fledged, subjective rights outside of the classical pattern referred to throughout this thesis. Ironically, then objective rights project the classical conception of bilateralism onto modern, general international law, a realm that has changed in important respects. A look at the catalogue of subjective-right-holders evidences this.[1428] Objective rights are a diminished form of subjective rights. This is problematic because, as stated before, obligations *erga omnes* (*partes*) are of interest where they allow standing for States which in classic, general international law would have no standing.[1429] That is, where only objective rights can be invoked to support a claim for breach of obligations *erga omnes* (*partes*). For instance, if State A commits genocide against State A's own nationals, none of States B, C … Z could justify impairment of their subjective rights.[1430] In such a case, the full gamut of secondary entitlements ordinarily available after wrongful acts would not be available to them. However, if State A commits genocide against State B's nationals, the full force of the system of international responsibility would come into play, only because State B can justify subjective rights. That the wrongful acts consist in essentially the same

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1426 See ch 1, pp 56–82, above.

1427 Picone (n 1283) 26.

1428 See p 313–14, above.

1429 See introduction, above.

1430 cf pp 310 nn 1390–93 and associated text, 311 ff, above; ch 2, pp 141–51, above.

action is beside the point, despite how the prohibition of genocide intends to protect individuals first and foremost, rather than States.

Even worse, objective rights create a paradox: the more effective State A is at committing, eg, genocide, the less likely it will face the full force of the law of state responsibility. If State A so effectively exterminates a certain group of its nationals that none of the members survives, the full weight of the law of responsibility would not fall on it, on this view. The full application of that regime would depend on the existence of subjective rights, which in turn depend on the nationality of the victims or on the degree to which a breach affects a certain State. As the extermination of these individuals inside State A's territory does not affect any State (eg by influxes of refugees),[1431] only objective rights to the observance of obligations *erga omnes* (*partes*) of States B, C … Z would exist here. Thus objective rights allow State A to escape the full force of the law on state responsibility.

In simpler words, under the conception of objective rights, the more systematic and efficient State A is at carrying out its policy of genocide —ie the graver the breach of the obligation *erga omnes* in question— the less the number of secondary obligations it would bear. This does not seem correct.

3 Obligations *Erga Omnes* as Secondary Legal Relations Only

(a) Introduction

As stated before, some conceive of obligations *erga omnes* (*partes*) as allowing States standing to invoke responsibility —secondary legal relations— irrespective of whether those States are owed primary obligations. The point is made poignantly by

[1431] R Provost, 'Reciprocity in Human Rights and Humanitarian Law' (1994) LXV BYIL 383, 401.

Thirlway, for whom an obligation *erga omnes* '… is perhaps not so much an obligation *erga omnes* as an obligation of which the breach opens responsibility *erga omnes*.'[1432] Many commentators argue that the main implications of obligations *erga omnes* do not lie in the primary obligations, as this thesis has argued, but in secondary entitlements.[1433] Those who consider that States other than those traditionally owed obligations are third States to obligations *erga omnes* (*partes*) but advance no particularly detailed conception of these obligations —aside, eg, of the collective nature of correlative rights, etc— would also belong in this category.[1434] Those who believe that legal interests are secondary entitlements (ie that they only arise with the breach of a primary obligation) also belong in this category.[1435] The same could be said of those who merge obligations *erga omnes* with objective regimes: those that have effects beyond the parties to the rule that contains these obligations.[1436] Others

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1432 H Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989' (1989) LX BYIL 1, 93.

1433 Provost (n 1431) 387; Tams (n 1368) 102; Koskenniemi, 'Fragmentation' (n 1350) [389]. See also K Zemanek, 'New Trends in the Enforcement of Erga Omnes Obligations' [2000] 4 MPUNLY 1, 8, holding that standard-setting conventions regulate conduct unrelated to any specific right; Orakhelashvili (n 1274) 268, for whom standing exists despite the fact that no injury is suffered by invoking States.

1434 Jørgensen (n 1362) 182, 217, 223; Gaja 2005 (I) (n 1284) 161 (Tomuschat). See also E Katselli Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (Routledge, London 2010) 153, on 'third-State' countermeasures and obligations *erga omnes*.

1435 De Hoogh (n 1296) 25–26. cf the legal interests of all States to the observance of obligations *erga omnes* in *Barcelona Traction* (n 1410) 32 [33].

1436 J Juste Ruiz, 'Las Obligaciones "Erga Omnes" en Derecho Internacional Público'*Estudios de Derecho Internacional: Homenaje al Profesor Miaja de la Muela* (Tecnos, Madrid 1979) vol 1, 220–22, passim; J Delbrück, '"Laws in the Public Interest" — Some Observations on the Foundations and Identification of *Erga Omnes* Norms in International Law' in V Götz, P Selmer and R Wolfrum (eds) *Liber Amicorum Günther Jaenicke — Zum 85 Geburtstag* (Beitrage zum ausländischen öffentlichen Recht und Völkerrecht No 135, Springer, Berlin 1998) 18–19, 32. See ch 3, pp 182–84, above.

would make essentially the same point in more subtle ways. They would assert, for instance, that primary obligations, owed *erga omnes*, retain their classical bilateral structure. Such obligations would only bind the territorial State and the State of nationality with regard to respect of human rights of aliens with a nationality,[1437] for instance. Likewise, they would only bind/entitle the State victim of an invasion and the invading State regarding the prohibition of aggression/the use of force.[1438] They would allow standing for all States regardless of this.

This alternative conception is by no means unworkable. Exceptions to the general rule of standing to invoke responsibility are certainly possible. Again, it is the entity owed a primary obligation that has standing to invoke responsibility for breach of that obligation in general international law.[1439] Proponents of indivisibility and of objective rights to the observance of obligations *erga omnes* (*partes*) try to explain how States other than those traditionally owed obligations *inter partes* are actually owed primary obligations. Both of these conceptions would allow standing for all States to invoke responsibility for breach of obligations *erga omnes* (*partes*). And thus, standing under both of these conceptions could conceivably fall within the general rule of standing.

By contrast, the notion that States could invoke responsibility for breach of obligations not owed to them is best thought of as an exception to this general rule of

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1437 Seiderman (n 1371) 128; Tams (n 1368) 134–35, 135 fn 82.

1438 Seiderman (n 1371) 128; Tams (n 1368) 134.

1439 See ch 1, pp 56–82, above.

standing. The rules of standing to invoke responsibility are not part of *jus cogens*.[1440] These rules can be altered (eg through so-called 'self-contained regimes').[1441] And there is no reason to reject the possibility that general customary law, the realm to which obligations *erga omnes* belong, could deal with different types of wrongful acts through different rules and in different ways.

In simpler words, the general regime of responsibility could be displaced through another rule of general international law. The latter rule would deal with the specific situation of breaches of obligations *erga omnes* rather than breaches of obligations in general. Indeed, general customary law does create exceptions to more general rules of general customary law. Thus, diplomatic premises cannot be subjected to countermeasures,[1442] whereas other State assets can be subjected to countermeasures[1443] or could otherwise be seized in certain circumstances (eg *acta jure gestionis* exceptions to immunities).

The Italian and Japanese claims in *SS Wimbledon*[1444] can be regarded as an instance in which States not owed primary obligations invoked responsibility for the breach of those obligations. The SS Wimbledon, a British-flagged vessel, was

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1440 Tams (n 1368) 252. On *jus cogens* see ch 3, pp 205–15, above.

1441 cf Koskenniemi, 'Fragmentation' (n 1350) [151].

1442 The inviolability of diplomatic premises is one of the features of the self-contained regime established by diplomatic law in this regard. See *United States Diplomatic and Consular Staff in Tehran (USA v Iran)* (Judgments) [1980] ICJ Rep 3 (Hostages) 40 [86].

1443 cf the position of Air France, a government carrier, in *Case Concerning the Air Service Agreement of 27 March 1946 between the United States of America and France* (1978) XVIII RIAA 417, 420 [5], 421 [8], 447.

1444 *The Case of the SS Wimbledon* (Judgment) PCIJ Rep Series A No 1.

chartered by a French company to transport weapons to Poland.[1445] The Wimbledon sought passage through the Kiel Canal on 21 July 1921. Germany denied it passage, alleging obligations of neutrality. Poland, where the cargo was destined to, was then at war with the USSR.[1446] Under article 380 of the Treaty of Versailles, Germany had to keep the Kiel Canal open to all the nations at peace with Germany at all times.[1447] Accordingly, the UK, France, Italy, and Japan lodged an application before the PCIJ against Germany, invoking the compromissory clause in article 386 of the Treaty of Versailles.

Three different types of claims could be distinguished as far as the applicants were concerned: **1)** the French claim for injury/damage suffered in the person of its national, the chartering company; **2)** the UK's claim for injury suffered in the person of a ship flying its flag, the Wimbledon, and **3)** the Italian and Japanese claims for breach of article 380. The British claim was not distinguished by the applicants or the defendant[1448] themselves, but it is distinguished by commentators on account of the British flag flown by the vessel.[1449] By contrast, the applicants and the defendant did distinguish the French claim for compensation on behalf of the chartering

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1445 See, eg, *The Case of the SS Wimbledon* PCIJ Rep Series C No 3, 3–4 (Memorial).

1446 This was also in dispute. See, eg, *Wimbledon Pleadings* (n 1445) 4–6, 11–14 (Memorial); 50–52 (Counter-Memorial, Germany).

1447 Treaty of Peace between the Allied and Associated Powers and Germany (opened for signature 28 June 1919, entered into force 10 January 1920) 112 BFSP 1 (Treaty of Versailles).

1448 Germany raised the issue of standing of every applicant but France. See *Wimbledon Pleadings* (n 1445) 42 (Counter-memorial).

1449 Hutchinson (n 1375) 179; Voeffray (n 1383) 48; Tams (n 1368) 78; Katselli Proukaki (n 1434) 40.

company.[1450] Again diplomatic protection of the national State of this sort poses no problem from the point of view of classic, general international law[1451] —in retrospect, at least, since the rules concerning diplomatic protection were objected to in the 1920s.

Turning now to Japan and Italy, their claims consisted only on insistence for respect of freedom of passage as enshrined in article 380.[1452] Stated in modern terms, they sought assurances of non-repetition.[1453] Of course, neither the ship nor the chartering company held Italian or Japanese nationality. Japan's and Italy's 'interest'[1454] was to ensure respect of the law.[1455] The PCIJ agreed. It held that the possession of merchant fleets —rather than being owed a right— by the applicants was sufficient evidence of the 'interest' required by article 386 of the Treaty of Versailles.[1456]

Japanese and Italian entitlements can be seen as secondary/tertiary ones; that is, as entitlements whose sole purpose is redressing the breach of the primary

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1450 *Wimbledon Pleadings* (n 1445) 7, 14–15 (Memorial).

1451 cf ch 2, pp 141 ff, above.

1452 *Wimbledon Pleadings* (n 1445) 7 (Memorial), 65 (Reply).

1453 *Wimbledon Pleadings* (n 1445) 14 (Memorial) ('… en vue de prévenir des abus analogues pour l'avenir').

1454 Treaty of Versailles (n 1447) art 386 ('… any interested Power').

1455 *Wimbledon Pleadings* (n 1445) 65 (Reply).

1456 *SS Wimbledon* (n 1444) 20.

obligation of article 380, on which breach their existence is conditioned.[1457] *And thus, under this point of view, Japan and Italy were given standing —thus secondary and tertiary entitlements— concerning the breach of primary obligations not owed to them*. That Japan and Italy were not owed primary obligation seems to be the correct interpretation. The proposition is supported by Hutchinson, who would deny that article 380 endowed all parties to the Versailles Treaty with primary rights.[1458] It is also supported, indirectly, by those who remark on the 'generosity',[1459] or the 'breadth'[1460] of the compromissory clause, as well as by those for whom *SS Wimbledon* resembles an *actio popularis*.[1461] Terms like these are not used when, say, States exercise diplomatic protection on behalf of their own nationals before courts.[1462] In fact, the applicants' limited standing in *South West Africa 1966*[1463] to

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1457 cf ch 1, pp 56–82, above.

1458 Hutchinson (n 1375) 180. See also C Dominicé, 'The International Responsibility of States for Breach of Multilateral Obligations' (1999) 10 EJIL 353, 356. See further M Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford Monographs in International Law, Clarendon Press, Oxford 1997) 25, contrasting this situation with obligations *erga omnes* cf Perrin (n 1274) 345; Crawford, 'Responsibility III' (n 1283) fn 197 and associated text (in light of the rest of [106(b)]), fn 206.

1459 CD Gray, *Judicial Remedies in International Law* (Oxford Monographs in International Law, Clarendon Press, Oxford 1990) 211 ('generous').

1460 Tams (n 1368) 79 ('remarkably broad'). See also Voeffray (n 1383) 51 ('… conception large').

1461 Voeffray (n 1383) 48–49.

1462 And cf *Ahmadou Sadio Diallo (Guinea v DRC)* (Preliminary Objections) 2007 <http://www.icj-cij.org/docket/files/103/13855.pdf> accessed 13 April 2008, [39], allowing for the traditional, customary notion of diplomatic protection to help protect —more novel— human rights.

1463 *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Second Phase)* (Judgment) [1966].

enforce only primary obligations due to them is deemed as 'restrictive',[1464] rather than 'generous' or 'broad'.

The point advanced here is that it is possible to conceive of obligations *erga omnes* (*partes*) as giving rise to secondary entitlements for all States rather than as being primary obligations of some sort, owed to every State individually. States other than the 'injured' State, or 'directly injured' State, or the 'specially affected' State would only be entitled to invoke responsibility for their breach.[1465] These States would also be entitled to request limited rights of reparation[1466] (eg cessation[1467] and assurances and satisfaction),[1468] as was the case with objective rights to the performance of obligations *erga omnes*.

General standing would attach to obligations *erga omnes* because they are recognised as *erga omnes*: as exceptional, special cases for which the general rule of standing would not apply. This thesis would rather have it that obligations *erga omnes* are different in that they are owed to all States. Standing would simply follow as a <u>*consequence*</u> of the structure of the primary obligation *erga omnes* (*partes*), rather than as the cause for regarding such obligations as owed *erga omnes*

1464 Gray (n 1459) 214; Tams (n 1368) 68. See also J Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 RdC 325, 409 ('… narrow view')

1465 Tams (n 1368) 102; Orakhelashvili (n 1274) 268.

1466 And see Responsibility Comments 1998 (n 1292) 96 (art 40) (Austria); Responsibility Comments 1999 (n 1330) 13 (art 40) (Japan).

1467 Seiderman (n 1371) 139.

1468 Byers (n 1364) 233 fn 86.

(*partes*).[1469] No recourse to any 'liberal'[1470] construction of the rules of standing would be needed, if this thesis is correct.

(b) Qualified Forms of this Conception

However, it must be pointed out that not all supporters of obligations *erga omnes* as secondary legal relations would agree that States other than injured/specially affected States would be 'third' parties to the primary obligation. That is, they recognise some form of entitlement for all States in the international community —or a smaller community— to the observance of obligations *erga omnes* (*partes*).[1471] It is hard not to see this as a contradiction. If it is claimed that some form of primary entitlement is held to the observance of obligations *erga omnes*, these obligations would also concern primary legal relations. Failure to note this is all the more striking since the notion that, say, an obligation concerning the treatment of individuals of a certain nationality could be owed to States other than the State of nationality is quite remarkable, when considered in historical perspective. If it is true that these States are entitled to the observance of obligations *erga omnes* (*partes*), such obligations also raise primary issues. Therefore, the notion most of these commentators defend, that obligations *erga omnes* (*partes*) consist of secondary legal relations only, would at least need further explanation.

Special mention should be made here of Byers's conception of obligations *erga omnes*. Byers's conception closely approximates this thesis's own conception of

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[1469] cf Ragazzi 1997 (n 1458) 202–03 text associated to fn 45 (especially).

[1470] cf Ragazzi 1997 (n 1458) 157 text associated to fns 110–111 analogising from 'liberal' approaches to standing under environmental treaties.

[1471] Seiderman (n 1371) 138 fn 50; Tams (n 1368) 102.

obligations *erga omnes*. He rejects the idea that bilateralism and obligations *erga omnes* are antithetical.[1472] He would have it that obligations *erga omnes* could partly be explained as bilateral legal relations. For Byers, these legal relations are '… multiplied so that similar relations with respect to the same rule exist between all States', thereby becoming general in application,[1473] but bilateralisable[1474] in structure. That is, bilateral legal relations are made general by creating a series of identical legal relationships between every possible pair of States.[1475] This insight is quite similar to this thesis' position on the matter.

But having stated this, without much explanation, Byers then holds that obligations *erga omnes* are 'more than' this.[1476] For Byers, bilateral legal relations cannot sufficiently explain obligations *erga omnes* because the breach of the bilateral obligation between States A and B leaves the —identical— bilateral obligation existing between States A and C intact.[1477] This does not add up well with the rest of his argument. Byers believes that '… each State … [also] has rights with respect to the substantive content of the rule'.[1478] This is taken to mean that State C would also be entitled to the observance by State A of its obligation owed to State B. It has

1472 Byers (n 1364) 231–32.

1473 Byers (n 1364) 232.

1474 cf Byers (n 1364) 232 ('… bilateralized rights and obligations'), 233 fn 87 and associated text.

1475 Byers (n 1364) 232.

1476 Byers (n 1364) 232.

1477 Byers (n 1364) 232.

1478 Byers (n 1364) 232.

already been explained how the legal relations between States A, B and C could be conceived of as bilateral. It has also been argued that standing to invoke responsibility would follow automatically for the entity to which such primary obligations are owed.[1479] The creation of primary obligations, owed —discretely— to every State, would suffice for these purposes.

Byers would disagree. For him, the creation of obligations *erga omnes* does not follow automatically from the creation of the type of primary obligations he supports; it is a two-step process. **First**, primary[1480] obligations —and correlative[1481] rights— are created like obligations *inter partes*.[1482] These are the bilateral primary obligations discussed in this sub-section. **Second**, every State would be granted a —secondary, bilateralisable—[1483] 'corresponding right of protection'.[1484] Only these additional, bilateralised, secondary entitlements allow for standing to invoke responsibility.[1485] They also allow for limited secondary entitlements.[1486] And indeed,

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1479 See, eg, pp 317–18, above; ch 1, pp 56–82, above.

1480 Byers (n 1364) 232–33 ('substantive').

1481 Byers (n 1364) 232 ('corresponding').

1482 ie 'ordinary rules'. Byers (n 1364) 232. These are the bilateral relations mentioned in the previous paragraph.

1483 cf ch 2, pp 118–22, above.

1484 Byers (n 1364) 232. cf *Barcelona Traction* (n 1410) 32 [34]. This is a 'right' that the right-holder itself protect these obligations; thus it can only be either a liberty or a power. See ch 1, pp 43–44,52–53, above.

1485 Byers (n 1364) 232–33.

1486 viz 'declarations of responsibility' (ie satisfaction). See Byers (n 1364) 233 fn 86.

like other commentators, Byers believes that '[g]enerality of standing … is the essence of *erga omnes* rules.'[1487]

In any case, Byers would have it that States other than the primary-right-holder have standing to invoke responsibility for breach of obligations not owed to them.

(c) The Different Regimes of Standing under the ASR

Arangio-Ruiz's conception of obligations *erga omnes* (*partes*), favoured by this thesis, was criticised by many States.[1488] The new Special Rapporteur on State Responsibility, Professor James Crawford, set about modifying old article 40 DASR 1996[1489] in a way more acceptable to States. The final result of that process was what eventually became articles 42 and 48 ASR,[1490] concerning the legal position of '… injured States' and '… States other than an injured State' (hereinafter '**non-injured States**'), respectively. Obligations *erga omnes* (*partes*) are involved in at least three ways in the ASR.

First, there is invocation by the **injured State**. The injured State can invoke the breach of obligations owed to a group of States including itself (obligations *erga omnes partes*),[1491] up to and including the international community as a whole

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1487 Byers (n 1364) 230.

1488 See p 288 n 1292 and associated text, above.

1489 (n 1289).

1490 (n 1297).

1491 ASR (n 1297) art 42(b).

(obligations *erga omnes*).[1492] The injured State can do so in two situations: **1)** when it is 'specially affected' by the breach,[1493] or **2)** where the breach of the obligation radically alters the position of all parties with respect to further performance of the obligation.[1494] These two provisions are closely modelled on equivalent provisions in the VCLT.[1495] This indiscriminate transposition of VCLT provisions into the ASR has already been criticised in this thesis.[1496]

Both types of injured State hint at the injured State being the exclusive primary-right-holder to obligations *erga omnes* (*partes*).[1497] As stated before, the 'specially affected State'[1498] may be the State owed a bilateral obligation —*inter partes*— contained in a multilateral rule/source (eg treaty, custom).[1499] And as stated before, a breach that radically alters the position of parties with respect to further compliance[1500] concerns interdependent obligations.[1501] 'Interdependent obligations',

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1492 ASR (n 1297) art 42(b).

1493 ASR (n 1297) art 42(b)(i).

1494 ASR (n 1297) art 42(b)(ii).

1495 VCLT (n 1424) art 60(2)(b), 60(2)(c). See Crawford, 'Responsibility III' (n 1283) [91], on the possibility of extrapolating these VCLT issues into the ASR. See also Crawford, *Commentaries* (n 1307) 259–60 [12]–[14] (art 42), evidencing the influence of these two provisions of the VCLT in the ASR. cf criticism of such an approach at ch 4, pp 222–26, above.

1496 See ch 4, pp 253–57, above.

1497 And see use of ILC definitions of injury in p 292, above.

1498 cf VCLT (n 1424) art 60(2)(b).

1499 See ch 4, pp 242 ff, above.

1500 cf VCLT (n 1424) art 60(2)(c).

owed *erga omnes partes*, are considered to create individual rights for States on account of —misguided conceptions of— reciprocity.[1502] It bears remembering that some commentators do not extend this trait to 'absolute obligations', which are also owed *erga omnes* (*partes*), but are deemed to be non-reciprocal.[1503] Furthermore, Prof Crawford considered that invocation of responsibility by the injured State is the 'ordinary' type of invocation of state responsibility.[1504] And thus injured States are considered to be in the same position as States traditionally injured. The different ways in which their status is described reminisce of reciprocity, bilateralism, the pursuit of individual State interests [1505] and traditional conceptions of primary rights.[1506]

Second, there is invocation of responsibility for breach of obligations *erga omnes* (*partes*) by **non-injured States**.[1507] This regime is the more important for this thesis. It encompasses all cases of standing to invoke responsibility by States other than those traditionally injured or 'specially affected' (eg invocation of responsibility

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1501 And see Responsibility Comments 1998 (n 1292) 97 (art 40) (UK); Responsibility Comments 2001 (n 1292) 72 (art 49) (Japan), on injury arising from breach of disarmament obligations. See also ch 4, pp 232–33, above.

1502 On which see J Crawford, 'Second Report on State Responsibility' (UN Doc No A/CN.4/498, YbILC 1999) [327] reasoning *a contrario*, in light of [326].

1503 See ch 4, pp 253–57, above. And see Crawford, 'Responsibility II' (n 1502) [327].

1504 Crawford, 'Responsibility III' (n 1283) [111].

1505 See ch 4, generally.

1506 See ch 2, generally.

1507 See p 330, above.

for wrongful acts committed on another State's nationals).[1508] As will be discussed below, the ASR allow non-injured States standing to invoke responsibility for breach of obligations *erga omnes* (*partes*). However, article 48 ASR conveys that non-injured States hold no correlative primary rights to obligations *erga omnes* (*partes*).

Like article 42 ASR, article 48 ASR allows non-injured States standing to invoke responsibility for breaches of: **1)** obligations owed to a group of States to which they belong, established for the protection of a collective interest (obligations *erga omnes partes*),[1509] and **2)** '… obligation[s] … owed to the international community as a whole' (obligations *erga omnes*).[1510] Reference to obligations owed to 'the international community as a whole', rather than obligations *erga omnes*, was deliberate. Among other reasons,[1511] the 'international community' would include entities other than States as primary-right-holders.[1512] This is highly significant. It implies that individuals and peoples, rather than States, are the true primary-right-holders in general international law. In turn, this implies that States are not primary-right-holders to obligations *erga omnes* (*partes*) that protect individuals.

1508 See, eg, Crawford, *Commentaries* (n 1307) 279 [12] text associated to fn 774 (art 48).

1509 ASR (n 1297) art 48(1)(a).

1510 ASR (n 1297) art 48(1)(b).

1511 These words were also chosen on grounds of convenience. '*Erga omnes*' is also used as, eg, opposable to the world at large. Crawford, 'Responsibility IV' (n 1298) [49], fn 64. This is the reason why the *erga omnes* effects of certain regimes were distinguished from obligations *erga omnes* in ch 3 (pp 182–84, above).

1512 Crawford 2006 (n 1464) 446. See also Crawford, *Commentaries* (n 1307) 184 [18] (art 25), 278 [8]–[10] (art 48).

Additionally, unlike article 42 ASR, article 48 ASR makes no mention of the 'specially affected State'. The omission is deliberate, as it was considered that non-injured States are never 'specially affected' by the breach of an obligation *erga omnes*.[1513] Again, the notion of the 'specially affected State' is wrongly linked with the notion of injury, and thus of primary rights, rather than with the notion of damage. To assert that a certain State is not 'specially affected' is to assert that such a State is owed no primary obligation. Therefore, asserting that non-injured States are not specially affected by breaches of obligations *erga omnes* (*partes*) implies that such States are not owed these obligations. The omission of so-called 'interdependent' obligations from article 48 ASR points to the same conclusion. That is, of obligations whose 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.'[1514] States are injured when interdependent obligations[1515] are breached (eg disarmament obligations). Reference in article 48 ASR to 'collective'[1516] interests is significant. As stated before, collective obligations are often presented as the antithesis of obligations owed to States individually; and thus, they are presented as the antithesis of individual rights.[1517] And, indeed, article 48 ASR has no equivalent provision to article 42(a)'s obligations '… owed to … [a] State individually'.[1518] This implies that

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1513 Crawford, *Commentaries* (n 1307) 254 [2] (Part III ch I).

1514 ASR (n 1297) art 42(b)(ii) (emphasis added). cf VCLT (n 1424) art 60(2)(c).

1515 Crawford, 'Responsibility III' (n 1283) [168], fn 195, [280]. And see p 332 n 1501, above.

1516 ASR (n 1297) art 48(1)(a).

1517 See ch 4, generally.

non-injured States hold no individual primary right that obligations *erga omnes* (*partes*) are observed.

Finally, some '… special legal obligations'[1519] follow from serious[1520] breaches of obligations which have attained *jus cogens* status. That is, these obligations exist additionally[1521] to those that ordinarily follow from wrongful acts.[1522] Only when obligations *erga omnes* and *jus cogens* and obligations *erga omnes* overlap are these obligations relevant to non-injured States.[1523] But these obligations are independent from article 48 ASR,[1524] the more interesting provision for this thesis. In any case, article 41(1) codifies[1525] the obligation for States to cooperate in bringing about the end of such breaches. Article 41(2) actually codifies two distinct[1526] obligations on States: **1)** the obligation not to recognise the legality of

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1518 ASR (n 1297) art 42(a).

1519 Crawford, *Commentaries* (n 1307) 249 [1] (art 41). See also at p 192 [2] (art 28) ('…further consequences').

1520 ie '… gross and systematic'. ASR (n 1297) art 40(2). The 'seriousness' of the breach refers to its magnitude, the 'grossness' of the breach refers to its intensity, and its 'systematic' character refers to whether the breach forms part of a deliberate plan of the wrongdoing State. Crawford, *Commentaries* (n 1307) 247–48 [7]–[8] (art 40).

1521 Crawford, *Commentaries* (n 1307) 245 [7] (part II, ch III) ('…additional consequences').

1522 ASR (n 1297) art 41(3).

1523 For the ILC, both notions have a different focus. See Crawford, *Commentaries* (n 1307) 244–45 [7] (part II, ch III). This instinct is close to this thesis's own position on the matter, on which see ch 3, pp 205–16, above. However, they were deemed 'virtually coextensive'. See Crawford, 'Responsibility III' (n 1283) [106(a)], [373]–[374].

1524 Crawford, *Commentaries* (n 1307) 245 [7] (part II, ch III).

1525 The commentary hints at this obligation being a matter of progressive development of international law. See Crawford, *Commentaries* (n 1307) 249 [3] (art 41).

a situation created by a breach of an obligation benefiting from *jus cogens* status, and **2)** the obligation not to assist the wrongdoing State in maintaining that situation.

Since these obligations originate with *jus cogens* and each of them can be the object of theses of their own, they will not be pursued any further. As stated above, the more interesting provision is invocation under article 48 ASR for non-injured States. The legal position of the non-injured State will be the focus of the next sub-section.

(d) Injury for Breach of 'Multilateral Obligations' under the ASR

Non-injured States are holders of secondary entitlements only under the ASR. This can be ascertained from the ILC's conception of injury. The concept of 'injury' is 'central' to the ASR,[1527] but it was not defined. It was felt that no concept of injury applied across the board in international law.[1528] However, injury was *described* many times.

For instance, it is clear that injury concerns primary rights. Under the ASR, States other than those traditionally owed obligations only acquire secondary entitlements when obligations *erga omnes* (*partes*) are involved. Indeed, the 'paradigm'[1529] to which article 48 ASR aspired was the '… adjectival or procedural

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1526 Crawford, *Commentaries* (n 1307) 252 [12] (art 41).

1527 Crawford, *Commentaries* (n 1307) 254 [2] (Part III ch I); J Crawford, 'Overview of Part Three of the Articles of State Responsibility' in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 932. See also Crawford, 'Responsibility I' (n 1296) [126] ('pivotal').

1528 Crawford, 'Responsibility IV' (n 1298) [31].

1529 Crawford, 'Responsibility IV' (n 1297) fn 52, [40], cross-referring to Crawford, 'Responsibility III' (n 1283) [85], [92].

right'[1530] of Ethiopia's and Liberia's in *South West Africa 1966*.[1531] Whether the applicants' entitlement to seise the ICJ was procedural or otherwise is beside the point;[1532] suffice it to state that the Special Rapporteur had a purely procedural entitlement in mind when crafting the position of non-injured States under article 48 ASR. '[P]ublic interest standing, not the exercise of a subjective right' is what lies behind article 48 ASR.[1533] It has been discussed before that 'legal interests' may denote primary rights.[1534] Prof Crawford would disagree. For him, a State's having legal interests over a —primary— obligation and its being considered primary-right-holder[1535] are not equivalent notions.[1536] It seems that 'legal interests' were considered as lesser entitlements than primary rights.[1537]

This aspect of Prof Crawford's work is rather confusing. He believed that both injured States and non-injured States had legal interests that obligations *erga omnes*

1530 Crawford, 'Responsibility III' (n 1283) [85].

1531 *South West Africa 1966* (n 1463).

1532 cf pp 322–26, above.

1533 Crawford 2010b (n 1527) 934

1534 See ch 3, p 176 n 755, above.

1535 ie 'obligee'; Prof Crawford denoted the obligation-bearer with the term 'obligor'. Crawford, 'Responsibility III' (n 1283) [99] ('… dealing with all obligations of States … detailed treatment of States as obligors').

1536 Crawford 2006 (n 1464) 438. See also Crawford, 'Responsibility III' (n 1283) [109] ('legitimate concern').

1537 Crawford, 'Responsibility III' (n 1283) [104] ('… a right or even a legally protected interest') (emphasis added). See also Sicilianos (n 1300) 1132 ('… states with only a legal interest'), 1138.

are respected.[1538] Non-injured States also have legal interests in such a case.[1539] However, at one point, Prof Crawford treated the notions of injury and of impairment of legal interests as equivalent notions.[1540] All States share legal interests in the observance of obligations *erga omnes* (*partes*). The impairment of these interests constitutes injury. Therefore, every State would be injured when an obligation *erga omnes* (*partes*) is impaired, under this view.

In any case, it is clear that the true 'victims' of a breach of obligations *erga omnes* (*partes*) are the injured State[1541] and individuals/peoples, where obligations about their treatment are concerned.[1542] Non-injured States merely 'represent' the victims.[1543] But, again, confusingly, non-injured States are not complete strangers to primary obligations *erga omnes* (*partes*), although they are not considered true primary-right-holders. Non-injured States do participate to some degree from the primary aspects of obligations *erga omnes* (*partes*). But their legal positions are more 'abstract' or 'general'[1544] than that of injured States, participants to 'individual'[1545] or

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1538 *Barcelona Traction* (n 1410) 32 [33].

1539 Crawford, 'Responsibility III' (n 1283) [78] text associated to fn 145, [87], [97], [108], [109], [118(a)]; Crawford, *Commentaries* (n 1283) 276–77 [2] (art 48).

1540 Crawford, 'Responsibility III' (n 1283) [106(c)] ('…it is possible for a State to be "injured" — for its legal interests to be affected— in a number of different ways') (emphasis added).

1541 Crawford, 'Responsibility III' (n 1283) [400].

1542 Crawford, *Commentaries* (n 1307) 192–93 [3] (art 28), 209 [3] (art 33).

1543 Crawford 2006 (n 1464) 438. See also Crawford, *Commentaries* (n 1307) 279 [12] (art 48).

1544 Crawford, *Commentaries* (n 1307) 202 [5] (art 31) ('… merely abstract concerns or general interests').

'concrete' legal positions. The key is that obligations *erga omnes* (*partes*) are considered 'collective'[1546] or 'communitarian'[1547] or 'community'[1548] obligations. Article 48 ASR conceives of obligations *erga omnes* (*partes*) as owed to groups,[1549] of which non-injured States are members. That is, these obligations are owed collectively,[1550] rather than individually.

This scheme is problematic. It has been explained before that the false dichotomy between **1)** obligations owed individually to one State or **2)** obligations owed collectively, to a group, fails to distinguish obligations individually to all members of a group.[1551] The scheme is also contradictory. That non-injured States hold some form of primary entitlements obligations *erga omnes* (*partes*) is hard to square with the notion that non-injured States are merely '… "interested" third

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1545 Crawford, *Commentaries* (n 1307) 169 [6] (art 22).

1546 Crawford, 'Responsibility III' (n 1283) [84]

1547 Crawford, 'Responsibility III' (n 1283) [84]

1548 Crawford, 'Responsibility III' (n 1283) [403], [405].

1549 ASR (n 1297) art 48(1)(a).

1550 Crawford, 'Responsibility III' (n 1283) [9], [106]. The implications of this concept have been rejected. cf, eg, ch 2, 93–122; ch 4, pp 258–69, above.

1551 See ch 4, pp 244–68, above.

States'[1552] to those obligations. As stated before, if a State holds primary entitlements, that State is not a 'third' State to obligations *erga omnes* (*partes*).[1553]

It is here that the concept of damage takes on the paramount role. On this, the ASR are consistent. Whatever the legal position of States vis-à-vis the primary aspects of obligations *erga omnes* (*partes*), they can only justify injury *by equivalence* when they have suffered damage: *when the effects of the wrongful act are graver on them than on other States*. In order for a State to be considered injured, it is not enough that such a State is owed an obligation *as a member of a group*.[1554] Holding a *collective* primary right and having that primary right breached is not enough to configure injury.[1555] An 'additional requirement'[1556] must be met, viz that the State in question is '…affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed.'[1557] *Thus in the ASR, injury concerns not only primary obligations, but also the effects that the wrongful act may have on a particular State*.[1558] Article 31(2), ASR clarifies as much. The

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1552 Crawford, 'Responsibility III' (n 1283) [400]. See also at [116], [251], [279] (emphasis added). See further Crawford 2006 (n 1464) 435, 438.

1553 See pp 327, above.

1554 See, eg, Crawford, *Commentaries* (n 1307) 276 [1] (art 48). cf debate on standing *ut singuli* or *ut universi* when enforcing objective rights to the observance of obligations *erga omnes* (*partes*), pp 314–17, above.

1555 cf definition of injury by the ASR itself at p 294 n 1292 and associated text, above.

1556 Crawford, *Commentaries* (n 1307) 259 [11] (art 42).

1557 Crawford, *Commentaries* (n 1307) 259 [12] (art 42).

1558 Crawford, *Commentaries* (n 1307) 259 [12] (art 42) ('… the wrongful act may have particular adverse effects on one State or on a number of States').

'abstract' and 'general' concerns of non-injured States that obligations *erga omnes* (*partes*) are respected would never be considered part of the concept of injury.[1559]

In any case, when a collective obligation is breached, a State must sustain 'special impact'[1560] beyond that suffered by other States in order to be considered as an equivalent to an injured State. The legal position of the injured State owed an obligation individually (article 42(a) ASR) is equivalent[1561] to —rather than identical with— the legal position of States injured by reason of 'special impact' for breaches of obligations *erga omnes* (*partes*).[1562] Thus the position of the 'specially affected' State is equivalent to that of the State owed an obligation individually.[1563] And among the category of States owed an obligation individually, there are right-holders to obligations arising from bilateral treaties or from obligations *inter partes* arising from multilateral treaties.[1564]

In simpler words, the legal position of non-injured States concerning obligations *erga omnes* (*partes*) are 'abstract' and 'general'. Harm to these 'abstract' and 'general' concerns cannot constitute damage. And damage is a requirement of

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1559 Crawford, *Commentaries* (n 1307) 202 [5] fn 483 and associated text (art 31). cf ascriptions of rights —and thus of injury— under the treaty regimes described in ch 2, pp 154–60, above.

1560 Crawford, *Commentaries* (n 1307) 259 [12] (art 42); Crawford, 'Responsibility III' (n 1283) [108]. See also Tams (n 1368) 46 ('… special effects').

1561 Crawford, 'Responsibility III' (n 1283) [111] ('… its position is assimilated to that of the injured State in a bilateral context (the State holding a subjective right)') (emphasis added).

1562 See further Crawford, 'Responsibility III' (n 1283) fn 205.

1563 ASR (n 1297) art 42(a).

1564 Crawford, *Commentaries* (n 1307) 256–58 [4], [7]–[8] (art 42).

injury, for the ILC. Therefore, even if non-injured States are owed primary obligations as part of a group, the breach of these primary obligations could never be considered as injury.

This reliance on damage, together with the 'adjectival' or 'procedural' right of right-holders to obligations *erga omnes* (*partes*) completes the picture. As stated before, reliance on damage as an indicator of injury tends to project classic, general international law onto modern, general international law. Since damage can only be justified by States with links to the individual/things affected by wrongful acts (eg nationality, property, title to territory, etc), only traditional primary-right-holders would be 'injured' (ie owed primary obligations) under this view.[1565]

Indeed, like supporters of objective rights, supporters of obligations *erga omnes* (*partes*) as secondary legal relations also project classic international law onto modern international law. But they do so more fully. If the general rule of standing must be displaced or relaxed so that a State other than traditional primary-right-holders invokes responsibility for the breach of an obligation *erga omnes* (*partes*), the implication is that these States still hold no right to the observance of these obligations.[1566] Supporters of this conception do not fully accept that obligations forbidding, say, the commission of genocide against non-nationals or pollution of the high seas could be owed to a State as any other obligation. Otherwise, the need to override the rule of standing —ie by granting secondary entitlements to States for whom no primary entitlements existed— is hard to understand. Prof Tams's reliance

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[1565] cf pp 317–19, above, for the position of objective–right-holders.

[1566] The State due an obligation has standing to invoke responsibility for its breach, it should be remembered. cf ch 1, pp 56–82, above.

on 'sovereign rights' as a sure-fire trigger of secondary legal relations bears highlighting here.[1567] Therefore, conceiving of obligations *erga omnes* (*partes*) only as secondary relations takes the effects of classic bilateralism, reciprocity, and community interests to the extreme.[1568]

Contrary to what was the case for supporters of objective rights, however, supporters of this conception would not necessarily withhold the full force of the law of state responsibility in the face of grave breaches of obligations *erga omnes* (*partes*).[1569] However, there are problems with their conception of secondary rights in some instances. Under the ASR, for instance, it is impossible to clean up pollution of the high seas or a State's internal lakes or waters. Let State A pollute an internal lake or the high seas and let pollution remain confined to those areas. Again, the interest in studying obligations *erga omnes* (*partes*) lies in examples like this. Under the ASR, restitution is deemed a form of reparation.[1570] Under article 48(2)(b) ASR, reparation can only be requested '… in the interest of the injured State'. And thus, the cleaning up of the polluted lake can only be requested in the interest of State A. Under the ASR, when State A's intenal waters or the high seas are polluted, neither of States B, C … Z could justify standing under article 42 ASR. They have no title over State A's internal waters or the high seas and suffer no 'special impact' if pollution remains

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1567 See, eg, Tams (n 1368) 46, 62 text associated to fn 71 (emphasis added).

1568 J Ferrer Lloret, 'El Derecho de la Responsabilidad del Estado ante la Celebración de una Conferencia Codificadora' (2004) LVI REDI 705, 708, 713, stating that the ASR has favoured 'the relational structure' ('…la estructura relacional…') (ie bilateralism) over community-interest-based structures.

1569 cf p 319, above.

1570 ASR (n 1297) part II, ch II; art 34.

confined there. Under article 48 ASR, States B, C … Z can ask, on their own behalf, for cessation (eg shutting down the valves spilling pollutants) and for assurances of non-repetition (ie a stated readiness not to repeat the same conduct) and other forms of satisfaction.[1571]

However, cleaning polluted areas, the '… re-establish[ment of] the situation which existed before the wrongful act was committed',[1572] the 'undoing' of pollution,[1573] is effected through restitution. But, again, in the example considered above, State A would be both the injured State and the State committing the wrongful act. *Restitution would have to be procured in spite of State A*, rather than 'in the interest of' that State, as article 48(2)(b) would have it. Therefore, this would be a case in which article 48(2)(b) ASR would not apply.

By contrast, this thesis would allow for restitution in such a case. Restitution is the form of reparation that applies by default.[1574] It is one of the few secondary obligations that undoes the consequences of the wrongful act rather than making good the wrongful act through an equivalent (eg money, in the case of compensation; apologies, in the case of satisfaction). Not all forms of restitution enrich States (eg affording medical treatment to victims of human rights abuses).[1575] Ordering State A

1571 ASR (n 1297) art 48(2)(a).

1572 ASR (n 1297) art 35.

1573 Riphagen, 'Responsibility VI' (n 1275) 9 [8] (art 6).

1574 cf, eg, ASR (n 1297) art 36(1) ('…insofar') (reasoning *a contrario*) .

1575 Annacker (n 1370) 154 ('… medical treatment').

to clean up a lake over which State A has title would not 'unjustly enrich'[1576] State B in any way.

Again, the scheme adopted in the ASR is indeed workable. But adopting a top-down approach to the question of redress, by ruling out certain types of reparation, may risk creating an imbalance elsewhere. The clean up of pollution in areas over which no State has title or the wrongdoer State has title cannot be ordered through the ASR without doing some violence to article 48 ASR.

(e) Entitlement to make Claims and Individuals under the ASR

It has been discussed in this thesis that in general international law one of the consequences of holding a primary right (ie being owed a primary obligation) is the entitlement to make claims if that right/obligation is breached. When a wrongful act occurs, the primary-right-holder acquires secondary entitlements. It has been argued that where the rules of standing to invoke responsibility of general international law apply, the identity of the primary-right-holder can be determined surely —but indirectly— by looking to the entities that hold these secondary entitlements.[1577] The identity of the primary-right-holder(s) to obligations *erga omnes* (*partes*) has been a central question to this thesis. It has been argued that obligations *erga omnes* (*partes*) are owed to States in general international law.

In contrast to this position, the ILC would have it that obligations *erga omnes* (*partes*) concerning the treatment of individuals are owed to these individuals in the

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[1576] Annacker (n 1370) 154.

[1577] See ch 1, pp 56–82, above; ch 2, pp 118–22, above.

first instance, rather than to States. Although the content of state responsibility[1578] and the invocation of responsibility (eg articles 42 and 48 ASR)[1579] by entities other than States was not regulated by the ASR,[1580] entities other than States (eg individuals) are regarded as primary-right-holders under the ASR. For instance, the principle whereby all wrongful acts of a State entail its responsibility, codified in article 1, was meant to include obligations owed to both States and to any other entities (eg the 'primary beneficiaries' of, say, human rights obligations,[1581] which are individuals).[1582] Thus, in cases where States take on the cause of these 'beneficiaries', it is the beneficiaries themselves who are injured, rather than the State.[1583] States only have a general interest in compliance with these obligations and merely 'represent' these individuals.[1584]

In line with this position, the ASR only allow non-injured States to request cessation and assurances of non-repetition from the wrongdoing State in their own

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1578 ASR (n 1297) part II.

1579 ASR (n 1297) part III, ch I.

1580 Crawford, *Commentaries* (n 1307) 193 [3] (art 28). See also J Crawford and S Olleson, 'The Nature and Forms of International Responsibility' in MD Evans (ed) *International Law* (2nd edn OUP, Oxford 2006) 473.

1581 Crawford, *Commentaries* (n 1307) 193 [3] (art 28); Crawford, 'Responsibility III' (n 1307) [17].

1582 Identifying beneficiaries of an obligation/right with right-holders is a mistake. In order for an entity to hold a right, it is neither necessary nor sufficient that this entity is the intended beneficiary of that right. HLA Hart, 'Bentham on Legal Rights' in AWB Simpson (ed) *Oxford Essays in Jurisprudence* (Clarendon Press, Oxford 1973) 195–96. cf Stern 2010 (n 1310) 196.

1583 Crawford, 'Responsibility III' (n 1283) [86]. This is supported by Sicilianos (n 1300) 1132.

1584 See p 338–39, above.

capacity, when obligations *erga omnes* (*partes*) are breached.[1585] Non-injured States can request any form of 'reparation'[1586] only in the interest of **1)** the injured State or, significantly, **2)** of beneficiaries of the obligation breached.[1587] These 'beneficiaries' are individuals, when obligations allegedly owed to individuals are at issue in a claim (eg human rights obligations). Prof Crawford considered individuals and peoples the true victims of human rights abuses.[1588] Again, by 'victims' he meant that they were primary right-holders or 'primary obligees'; Prof Crawford considered it improper to treat their 'rights' as State rights. [1589] This idea is central to what finally emerged — and did not emerge— as the ASR.

The picture that emerges is that individuals are owed primary rights in general international law, or at least those correlative to obligations *erga omnes* [1590] (*partes*)[1591] of which they are 'primary beneficiaries'. The ILC is not alone in this. Many believe that, say, human rights obligations are owed to individuals.[1592] Others

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1585 ASR (n 1297) art 48(2)(a).

1586 cf ASR (n 1297) arts 31, 34–38.

1587 ASR (n 1297) art 48(2)(b).

1588 See pp 338–39, above.

1589 Crawford, 'Responsibility III' (n 1283) [85], [108]. See also at [88].

1590 ASR (n 1297) arts 48(1)(b), 48(2).

1591 ASR (n 1297) arts 48(1)(a), 48(2).

1592 Byers (n 1364) 235; Sicilianos 2002 (n 1300) 1132; Katselli Proukaki (n 1434) 28 text associated to fn 95. See further Gaja 2005 (I) (n 1284) 135 (but cf p 127). This idea may also lie behind remarks on inter-State relations and human rights norms in De Hoogh (n 1296) 157, 160; Seiderman (n 1371) 127; Dupuy 2002 (n 1287) 1070. See, finally, Koskenniemi, 'Fragmentation' (n 1350) [392]–[393].

would see in procedures available to these individuals under human rights treaties or similar treaties as a sign of the existence of individuals' rights in international law.[1593]

These positions contradict those advanced in this thesis. They all imply that individuals are owed obligations *erga omnes* (*partes*) concerning their protection. In this thesis, it has been argued that States are primary-right-holders to obligations *erga omnes* (*partes*). This is maintained here.

First, the ILC's arguments are internally inconsistent. If non-injured States are not owed human rights obligations because individuals are the 'ultimate beneficiaries' of those obligations,[1594] the same logic should apply to the violations of the human rights of aliens with a nationality. All individuals benefit from human rights in equal measure. Therefore, no State should ever be injured by breaches of human rights obligations under the ILC's logic. This is why it is contradictory to recognise the State of nationality as an injured State[1595] or as a subjective-right-holder,[1596] as occurred in classic, general international law. Aliens with a nationality are individuals. They benefit from human rights obligations to the same extent as other kinds of individuals. That individuals are 'ultimate beneficiaries' of the norms about their treatment seems beside the point.

1593 JR Dugard, 'First Report on Diplomatic Protection' (UN Doc No A/CN.4/586, YbILC 2000-II(1)) [24]. See also Crawford, *Commentaries* (n 1307) 210 [4] (art 33).

1594 See p 348, above.

1595 cf Crawford, *Commentaries* (n 1307) 264 [2] (art 44) and citations to *Mavrommatis*.

1596 cf, again, pp 310 nn 1390–93 and associated text, 311 ff, above; ch 2, pp 141–51, above.

Second, it is unlikely that general international law has evolved to the point where individuals can be regarded as primary-right-holders. A definitive and complete answer to the question of whether individuals are owed primary obligations in general international law would require a full study of the personality of individuals. This would exceed the scope of this thesis. However, obligations *erga omnes* exist in general international law, it should be remembered. Furthermore, some *erga omnes partes* regimes do not derogate from general international law in this respect. Therefore, the idea that individuals are owed primary obligations *erga omnes* or all obligations *erga omnes partes* should not go unchallenged, as it has been argued that obligations *erga omnes* (*partes*) are owed to States in the first instance.

As explained before, holding secondary entitlements mirrors holding primary rights in general international law.[1597] Individuals do not yet hold secondary rights in general international law, which makes it unlikely[1598] that they also hold primary rights. It is still the case that States, rather than individuals, are secondary-entitlement-holders in general international law (eg they retain the proceeds of compensation obtained on individuals' behalf).[1599] Thus municipal courts have

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1597 See ch 1, pp 59 fn 248 and associated text, above.

1598 Although this eventuality is 'unlikely', it is not impossible. As discussed in chapter 1, a primary right is a different legal relation from secondary entitlements. A primary right can be sufficiently explained without making reference to secondary legal relations. Therefore, the fact that an entity holds secondary entitlements does not by itself determine the same entity does or should hold primary rights. This is why it has been insisted in this thesis that holding secondary entitlements is good but *indirect* evidence of the identity of the primary-right-holder. This does not result from logical necessity, but from the rules of standing to invoke responsibility in general international law.

1599 Bollecker-Stern (n 1310) 107–08; JR Dugard, 'Seventh Report on Diplomatic Protection' (UN Doc No A/CN.4/567, YbILC 2006) [93]–[103], [102] (especially). See also *Lornho Exports Ltd v Export Credits Guarantee Department* [1999] Ch 158, 178, 180; [1998] 3 WLR 394, 409–10, 411 (F)–412 (Ch D). cf analysis of case cited at Dugard, 'Diplomatic VII' (n 1599) fn 196 and associated text with *STS 4617/2004, del 30 de junio* (RJ 2004, 5665) (Tribunal Supremo) (Spain) Fundamentos 1°–2°.

refused to recognise individuals as right-holders of obligations to compensate for breaches of international humanitarian law.[1600] This remains true even for human rights obligations. In a recent case,[1601] the ICJ held that the manner in which the DRC expelled a Guinean national, Mr Diallo, violated many of his 'rights'. Concretely, at paragraph 160, the Court recounted that the following violations to Mr Diallo's 'rights' had taken place: **1)** his right not to be arbitrarily deprived of liberty,[1602] **2)** his right not to be arbitrarily expelled from the DRC,[1603] and **3)** his right that the Guinean Consulate was informed of his arrest.[1604] In deciding that compensation was the appropriate remedy for this case, the Court held that reparation for violation of these rights was actually owed to Guinea.[1605] Other cases have recognised the existence of

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1600 *X et al v Japan* (1998) 42 Jap Ann Int L 143 (Tokyo District Ct) 145 [2(1)], 149–50 [3(iii)]–[5]; *35 Citizens of the Former Federal Republic of Yugoslavia v Germany* Appeal Judgment, BGHZ 166, 384; III ZR 190/05; ILDC 887 (DE 2006) (Federal High Ct of Justice) (Germany) [6.1.a)], [8.b)], [10]. The provision at issue was Convention respecting the Laws and Customs of War on Land (opened for signature 18 October 1907, entered into force 26 January 1910) 205 CTS 277 (Hague IV) art 3 ('A belligerent party which violates the provisions of the said Regulations shall … be liable to pay compensation.').

1601 *Diallo Merits* (n 1313).

1602 International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 9; African Charter on Human and Peoples' Rights (opened for signature 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (Banjul Charter) art 6. See also *Diallo Merits* (n 1313) [78]–[85].

1603 ICCPR (n 1602) art 13; Banjul Charter (n 1602) art 6. See also *Diallo Merits* (n 1313) [72]–[74].

1604 Vienna Convention on Consular Relations (opened for signature 24 April 1963, entered into force 19 March 1967) 596 UNTS 261 (VCCR) art 36(1)(b). See also *Diallo Merits* (n 1313) [95]–[97].

1605 *Diallo Merits* (n 1313) [161] ('la réparation due à la Guinée à raison des dommages subis par M. Diallo doit prendre la forme d'une indemnisation'). See also [195](2)–(4), (7).

'rights' for individuals, but have still held that reparation is due to their States of nationality.[1606]

Of course, the situation may not be the same in all regimes of conventional international law. It is indeed the case that under certain treaty regimes, individuals hold secondary entitlements and primary rights. But these treaty regimes are exactly that: they spring from treaties. They comprehensively derogate from positive, general international law; eg by granting secondary rights directly to individuals.[1607] But as exceptions to general international law, they do not, by themselves, influence the development of general international law (eg obligations *erga omnes*) or the development of other treaty regimes.[1608]

4 Preliminary Conclusion

In this section, two major groups of alternative conceptions of obligations *erga omnes* (*partes*) have been sketched out. One conceives of obligations *erga omnes* (*partes*) as composed of two types of legal relations: **1)** subjective rights —ie ordinary, traditional rights— for the same States owed obligations in general international law and **2)** objective rights to the observance of the law itself: to respect for legality. Under the second major conception, obligations *erga omnes* (*partes*) are also

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1606 *LaGrand (Germany v USA)* (Judgment) [2001] ICJ Rep 466, 494 [77], 497 [89]. cf *Avena and Other Mexican Nationals (Mexico v USA)* (Judgment) [2004] ICJ Rep 12, 36 [40].

1607 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (opened for signature 4 November 1950) (ECHR) art 41; American Convention of Human Rights (opened for signature 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143 (ACHR) art 63(1).

1608 See, eg, the relevance of the rule of exhaustion of local remedies in ECHR (n 1607) art 35(1); ACHR (n 1607) art 46(1)(a). cf Convention on the Settlement of Investment Disputes between States and Nationals of other States (opened for signature 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention) art 26.

composed of two types of legal relations: **1)** primary rights for States traditionally owed obligations, individuals, and peoples —and secondary entitlements for them in case of breach— and **2)** secondary entitlements for all other States in cases of breach of primary obligations owed to all the States, individuals, and peoples mentioned before.

Neither of these conceptions is unworkable or fatally incorrect. But they both make unwarranted assumptions about the state of general international law that warrant some criticism. Furthermore, by failing properly to distinguish between injury and damage, they create some practical problems. Some of these are easily fixable,[1609] but others are more fundamental[1610] or do not conform to positive international law.[1611]

[1609] See pp 343–45, above.

[1610] See p 319, above.

[1611] See pp 345 ff, above.

GENERAL CONCLUSION

In this thesis, the nature and origin of obligations *erga omnes* has been considered in some detail.

What makes obligations *erga omnes* unique is not their essence or nature. As explained in **chapter 3**, the ICJ's essential distinction is incorrect. The idea that obligations owed *erga omnes* are so owed because of the importance of the rights they protects is belied by the fact that obligations owed *inter partes* protected identical rights and values. As explained in **chapter 4**, obligations of either type are created in similar ways and influenced by similar factors; that reciprocity or community interests influence the creation of obligations *erga omnes* (*partes*) is neither here nor there. The better view is that, as explained in **chapter 2**, obligations *erga omnes* are an exception to the manner in which obligations *inter partes* were created in classic, general international law.

It was explained in **chapter 1** that owing an obligation to an entity gave that entity control over the individuals/things about whose treatment the obligation consists and about the State agents which may potentially breach this obligation. Therefore, keeping the number of States owed an obligation to a minimum ensured that the State with supremacy **1)** over the individuals/things protected by the obligation in question and **2)** over the agents which who may potentially break that obligation would both retain control of all situations concerning respect, enforcement, modification, or extinction of the obligation in question. As such, keeping the number of States owed the obligation to the minimum possible —ie one— furthered the freedom of action of the States involved. Since the consent of every primary-right-holder must be obtained to modify or extinguish the correlative obligation or to

ensure that secondary rights will not be claimed upon its breach, increasing the number of States owed an obligation decreases control by the two States concerned of all situations described before. Therefore, when all States are primary-right-holders to an obligation, as is the case with obligations *erga omnes*, control by the two States with supremacy reaches its nadir.

This explains why obligations *inter partes* came to be as prevalent as they are in general international law and obligations *erga omnes*, as scarce as they are. The main culprit is the way in which 'supremacy' and 'independence' were conceived in classic, general international law. It was discussed that State liberties were granted or curbed following a set pattern:

> **(1)** States were at liberty to act in relation to individuals/things over which they alone (eg their own nationals, ships flying their flags) —or no other State (eg stateless individuals or vessels)— had supremacy;
>
> **(2)** States were under obligation to act or not to act in certain ways over individuals/things over which other States had supremacy (eg another State's nationals or a vessel flying the flag of another State); and
>
> **(3)** Only the acting State (obligation-bearer) and the State(s) with supremacy (right-holders) were parties to the relevant legal relationships.

In simpler words, the more supremacy States had, the freer —thus, the more independent— they were to act. These freedoms tended to be curbed when States were confronted with individuals/things over which other States had supremacy. In this way, sovereignty influenced the creation of obligations *inter partes*. And, again, the less States were owed these obligations, the freer the States concerned were to enforce, alter, or extinguish the relevant obligations or to abstain from doing so. It is State freedom, and thus sovereignty, that is furthered here. In this way, this thesis tentatively answered the question, raised in the introduction, of **how it is possible to determine that a State is owed an obligation, *erga omnes* or otherwise**.

This pattern applied throughout general international law. As such, it could have been done away with through conventional international law or any other form of *lex specialis*. When it was done away with, for instance, by creating obligations with respect to the human rights of the obligation-bearer's own nationals or agents, obligations *erga omnes* (*partes*) resulted. The same pattern could also be broken by creating obligations with respect to the treatment of unique objects (eg the original text of a treaty, kept by its depositary). Likewise, the pattern could also be broken by creating obligations for States over individuals or things irrespective of any consideration of supremacy or sovereignty (eg obligations not to detonate nuclear weapons 'underwater' or to respect the human rights of individuals without regard to their nationality or status).

It also bears noting if the pattern above is broken in any which way, obligations *erga omnes* (*partes*) would arise. *An obligation to respect the life of the obligation-bearer's own nationals would be owed erga omnes (partes) as much as an obligation to kill the same individuals*. This last obligation would probably fall foul of *jus cogens*, of course, but it would break the pattern in the same way.

Finally, aside from breaking the pattern mentioned above, a further development in this respect has been that state responsibility can now be invoked even in circumstances in which no damage has occurred. This development has allowed this thesis to defend its preferred conception of obligations *erga omnes*, previously advanced by Gaetano Arangio-Ruiz as Special Rapporteur on State Responsibility: of obligations *erga omnes* as primary obligations, owed to all States alike and in the same measure. This was discussed in **chapter 5**, in which different

conceptions of obligations *erga omnes* (*partes*) were confronted with this thesis' conception of the same.

Throughout this thesis, it has been argued that obligations *erga omnes* (*partes*) create primary, individual rights for all States in the international community. These obligations/rights are of the same nature as any other obligation in international law. Furthermore, their breach entails the same consequences as the breach of any obligation would, although the extent to which States suffer loss —or not— might determine that their secondary entitlements might differ from State to State. Alternative conceptions would have it either that obligations *erga omnes* (*partes*) consisted of different kinds of primary rights for different kinds of primary right-holders or that they only consist of secondary entitlements —ie no primary rights— for most States. Neither of these alternative conceptions is unworkable. But they make unjustified assumptions. And, furthermore, the practical result of alternative conceptions is either a system in need of fine-tuning (eg the ASR) or of re-consideration altogether.

That said, faulty or incoherent reasoning may lead to norms which find general acceptance of States and become part of positive international law. Thus, it may well be the case that alternative conceptions give a better depiction of what is acceptable to —certain— States at this point. However, there are many reasons why the conception defended in this thesis is better. The most important reason by far is that obligations *erga omnes* (*partes*) are conceived of as ordinary obligations. Obligations *erga omnes* (*partes*) could well be seen as primary obligations, like any other. Redress for their breach could be dealt with by traditional rules of standing to invoke responsibility, like all others. *Inter se* agreements derogating from these

obligations could be regulated by the traditional rules on the law of treaties; and so on.

This is one of the more important theoretical contributions this thesis seeks to add to the subject. By conceiving of obligations *erga omnes* (*partes*) as primary obligations, like all others, there is no need to justify a radical break with classic international law. This ensures that a wealth of norms applied to the solution of issues raised by international obligations throughout the development of international law could be brought to bear on the solution of similar problems raised by obligations *erga omnes* (*partes*).

Conversely, by insisting that obligations *erga omnes* (*partes*) are different in essence from other obligations, proponents of rival conceptions and commentators in general sever modern and classic general international law. This is not wholly unjustified. By explaining obligations *erga omnes* (*partes*) as not conforming to bilateralism, reciprocity, etc, proponents of rival conceptions intend precisely to explain why classic, general international law did not create obligations *erga omnes* (*partes*) and how modern, general international law allows for their existence. In turn, this produces a break with classic, general international law and with the many norms created at that time. Obligations *erga omnes* (*partes*) have indeed been created through a certain break with classic, general international law. But this break consists in the creation of *obligations where none existed*, as opposed to a change in *the manner in which obligations were created or enforced through the law of responsibility*.

Bluntly put, if an obligation not to mistreat a stateless individual or a State's own national did not exist, the question of whether the non-existent obligation was bilateral or reciprocal is beside the point.

Finally, as with all projects, it is impossible to cover all possible angles and implications of its main topic. These topics could be covered in a future expansion of this project. Thus, obligations *erga omnes* are indeed multilateral obligations, as the title to this thesis suggests. However, it is arguably the case that obligations *erga omnes* do not exhaust the concept of multilateral obligations. The prohibition of the use of force may be a multilateral obligation, but is not owed to all States *erga omnes*.[1612] Multilateral obligations were defined as those *whose breach* entailed legal effects for more than one State.[1613] Thus a primary obligation whose breach would result in secondary entitlements for States not owed that obligation would fall within this definition of 'multilateral obligation'. But if more States had standing than were owed the primary obligation, such an obligation would not be owed *erga omnes*, to all States.

Indeed, many have noted that the prohibition of the use of force or of aggression are structurally similar to obligations *inter partes*.[1614] This is correct. The

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1612 cf J Crawford, 'Third Report on State Responsibility' (UN Doc No A/CN.4/507, YbILC 2000) [109]. cf also, on the prohibition of aggression, *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (New Application: 1962)* (Judgment) [1970] ICJ Rep 3 32 [34]; R Ago, 'Cinquième Rapport sur la Responsabilité des États' (UN Doc No A/CN.4/291, YbILC 1976-II(1)) 30 [89]; ID Seiderman, *Hierarchy in International Law: the Human Rights Dimension* (School of Human Rights Research Series No 9, Intersentia-Hart, Antwerpen 2001) 128; LA Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002) 13 EJIL 1127, 1139.

1613 See ch 3, pp 174–75, above.

1614 ie they are 'bilateralisable'. See Seiderman (n 1612) 128; A De Hoogh, *Obligations Erga Omnes and International Crimes: a Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (Kluwer Law International, The

State to which the obligation is owed has supremacy over its own territory. Uses of force affect the '…territorial integrity … [and] political independence'[1615] of the victim State only. It has been stated that obligations *erga omnes* (*partes*) arise when States owed obligations have no supremacy at all over the individuals or things protected by the obligation owed to it. Consequently, the prohibition on the use of force would not qualify as an obligation *erga omnes* in this thesis.

This does not detract from the arguments advanced in this thesis. Their aim is more modest. All obligations owed to States concerning individuals and things over which they have no supremacy are owed *erga omnes* (*partes*). It may be the case that more types of obligations *erga omnes* (*partes*) exist than were contemplated in this thesis. However, it has not been claimed that alternative conceptions of these obligations are unworkable. It has been admitted, for instance, that the rules of standing can be relaxed —or tightened— to fit whatever regime is being created. And there is no reason why different types of multilateral obligations with different types of rationales could not coexist with one another. This thesis does not go so far as to deny this.

Hague 1996) 54–55; CJ Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge Studies in International and Comparative Law, CUP, Cambridge 2005) 134.

[1615] Charter of the United Nations (opened for signature 26 June 1945, entered into force 24 October 1945) 3 Bevans 1153 (UNCh) art 2(4).

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