OVERLAPPING INDIVIDUAL AND INTERSTATE CLAIMS IN INTERNATIONAL LAW

DPHIL THESIS

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Disclaimer

The views expressed herein are those of the author and do not necessarily reflect the views of any institution with which the author is or has been affiliated, including the United Nations.

Abstract

This DPhil is concerned with overlapping claims, in which both States and individuals are able to claim against the same respondent State for violations of international law. More particularly, it considers whether and how the conduct of either States or individuals may preclude, under the law of State responsibility, overlapping claims brought by the other.

It begins by outlining that such overlapping claims have been, and will likely continue to be, so brought. It then considers whether the conduct of one of those entities might enliven rules that would preclude the other's claims.

First, Part B (Chapters III-VII) considers a number of rules of preclusion that have the potential to operate to preclude one of such overlapping claims: the local remedies rule; treaty provisions governing overlapping claims; waiver; *res judicata* and treaty provisions with similar effect; and double recovery. It highlights that there are many circumstances in which the actions of States or individuals may, under these rules, preclude the overlapping claims of the other.

Second, Part C (Chapter VIII) addresses circumstances precluding wrongfulness. Focusing on countermeasures and self-defence, it considers whether the conduct of either a State or an individual may, due to the operation of such circumstances, have the effect of precluding not only the claim of that entity, but also an overlapping claim belonging to the other. It concludes that, particularly as understood in light of recent practice, there is significant scope for these rules to so operate.

In highlighting when the actions of either States or individuals might preclude, under the law of State responsibility, overlapping claims brought by the other, this thesis aims to narrow the gap left, in this respect, by the ILC's recent codification of the law of State responsibility, and place both States and individuals in a more certain position going forward.

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Arbitral Cases

ICJ/PCIJ Cases

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ECommHR/ECtHR

Treaty Body Decisions

Inter-American Commission/IACtHR

African Commission on Human and Peoples' Rights

Table of Abbreviations

ILC Articles

ARSIWA	ILC, *Articles on Responsibility of States for Internationally Wrongful Acts (with commentaries)*, as reproduced in James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) (footnote references to *ARSIWA* refer to this version of the *Articles*)
DADP	ILC, *Draft Articles on Diplomatic Protection, with commentaries* [2006] 2(2) ILCYB 22
DAEAC	ILC, *Draft Articles on the Effects of Armed Conflicts on Treaties, with commentaries* [2011] 2(2) ILCYB 108
DARIO	ILC, *Draft Articles on the Responsibility of International Organizations, with commentaries* [2011] 2(2) ILCYB 46

Treaties and related instruments

Access Agreement	Memorandum of Understanding with Canada on Access to Medicines (US-Canada) (16 July 2004) <http://www.ustr.gov/archive/assets/Trade_Sectors/Intellectual_Property/asset_upload_file426_6319.pdf>
ACHPR	African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217
ACHPR.Prot.	Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 9 June 1998, entered into force 25 January 2004) OAU Doc OAU/LEG/EXP/AFCHPR/PROT(III)
AmCHR	American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123
Anglo-Austrian (1920)	Agreement concerning the Settlement of Enemy Debts Referred to in Section 3 and the Annex Thereto of Part X of the Peace Treaty of Saint-Germain (signed 27 August and 2 October 1920) (1922) 12 LNTS 414

Anglo-Austrian (1930)	Agreement between Austria and Great Britain, and New Zealand and India in regard to the Liquidation of Austrian Properties and Exchange of Notes (signed 15 March 1930) (1931) 113 LNTS 395
Anglo-Austrian (1931)	Agreement between Great Britain and Austria relating to the Provisional Dissolution of the Anglo-Austrian Mixed Arbitral Tribunal (signed 14 July 1931) (1931) 123 LNTS 383
Anglo-Bulgaria	Agreement between the United Kingdom and Bulgaria relating to the Provisional Dissolution of the Anglo-Bulgarian Mixed Arbitral Tribunal (signed 17 June 1927) (1927) 67 LNTS 239
Anglo-German (1929)	Agreement regarding the Liquidation of German Properties and Exchange of Notes (signed 28 December 1929) (1929) 102 LNTS 49
Anglo-German (1932)	Agreement regarding the Dissolution of the Anglo-German Mixed Arbitral Tribunal and Exchange of Notes (26 July 1932) (1932) 133 LNTS 99
Anglo-Turkish	Exchange of Notes regarding the settlement of claims against the Turkish Government in respect of outstanding judgments pronounced by the Anglo-Turkish Mixed Arbitral Tribunal constituted in virtue of Part 3, Section 5 of the Treaty of Lausanne, together with notes exchanged (signed 23 March 1944) (1945) 2 UNTS 227
Australia-Germany	Agreement regarding the release of Property Rights and Interests of German Nationals subject to the Charge created in pursuance of the Treaty of Versailles and Exchange of Notes (signed 17 January 1930) (1930) 107 LNTS 325
Austria PT	State Treaty for the re-establishment of an independent and democratic Austria (adopted 15 May 1955, entered into force 27 July 1955) (1955) 217 UNTS 223
Austria-US	Agreement between the Austrian Federal Government and the Government of the United States of America concerning the Austrian Fund “Reconciliation, Peace and Cooperation” (Reconciliation Fund) (with annexes) (signed 24 October 2000, entered into force 1 December 2000) (2004) 2162 UNTS 3
Belgium-Austria	Convention between Belgium and Austria for the Final Settlement of the Questions resulting from Sections III

	and IV of Part X of the Treaty of Saint-Germain (signed 16 January 1930) (1930) 104 LNTS 231
Belgium-Germany	Agreement for the Final Settlement of the Questions resulting from Sections III to VII of Part X of the Treaty of Versailles (signed 18 January 1930) (1930) 104 LNTS 223
Bulgaria PT	Treaty of Peace with Bulgaria (adopted 10 February 1947, entered into force 15 September 1947) (1949) 41 UNTS 21
Bulgarian Settlement	Agreement between Belgium, Great Britain and Northern Ireland, Canada, Australia, New Zealand, Union of South Africa, India, France, Greece, Italy, Japan, Poland, Portugal, Roumania, Czechoslovakia, Yugoslavia and Bulgaria regarding the Settlement of Bulgarian Reparations, with Final Clause and Declarations annexed thereto (signed 20 January 1930) (1930) 112 LNTS 361
Burma PT	Treaty of Peace with Burma (adopted 5 November 1954) (1956) 251 UNTS 202
CACJ Statute	Statute of the Central American Court of Justice (adopted 10 December 1992, entered into force 2 February 1994) (1995) 34 ILM 921
CAFTA	Central America-Dominican Republic-United States Free Trade Agreement (5 August 2004) <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>
Canada-France	Exchange of notes constituting an agreement for the settlement of Canada's claim in respect of military relief and the claim of France in respect of French vessels requisitioned by Canada during the war (Ottawa, 26 June and 4 July 1951) (1956) 233 UNTS 101
Canada-Japan	Arrangement regarding the settlement of certain Canadian claims (signed 5 September 1961) (1963) 451 UNTS 47
Cartagena Agreement	The Andean Subregional Integration Agreement (Cartagena Agreement) (1969) 8 ILM 910 (as amended), updated codified text available: <https://wits.worldbank.org/GPTAD/PDF/archive/Cartagena.pdf>

Cartagena Protocol	Protocol Amending the Treaty Creating the Court of Justice of the Cartagena Agreement (adopted 28 May 1996, entered into force 25 August 1999), available in English: <https://wits.worldbank.org/GPTAD/PDF/annexes/Cartagena%20justicetreaty.pdf>
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) (1990) 1249 UNTS 13
CEDAW.Prot.	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 6 October 1999, entered into force 22 December 2000) (2003) 2131 UNTS 83
CERD	International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) (1971) 660 UNTS 195
Chaguaramas Treaty	The Revised Treaty of Chaguaramas Establishing the Caribbean Community, including the CARICOM Single Market and Economy (adopted 5 July 2001, entered into force 1 January 2006) (2006) 2259 UNTS 293
Chicago Convention	Convention on International Civil Aviation (adopted 7 December 1944, entered into force 4 April 1947) (1948) 15 UNTS 295
COMESA Treaty	Treaty establishing the Common Market for Eastern and Southern Africa (adopted 11 May 1993, entered into force 8 December 1994) (1993) 33 ILM 1067
Corruption Convention	United Nations Convention against Corruption (signed 31 October 2003, entered into force 14 December 2005) (2007) 2349 UNTS 41
CPED	International Covention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) (2010) 2716 UNTS 3
CRC.Prot.	Optional Protocol to the Convention on the Rights of the Child on a communications procedure (adopted 19 December 2011, entered into force 14 April 2014) <https://treaties.un.org/doc/source/docs/A_RES_66_138-Eng.pdf>

CRPD.Prot.	Optional Protocol to the Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) (2011) 2518 UNTS 283
CSD	Claims Settlement Declaration (Declaration of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran), included in the Algiers Accords (19 January 1981) (1981) 20 ILM 223, also available: <http://www.iusct.net/General%20Documents/2-Claims%20Settlement%20Declaration.pdf>
EAC Treaty	Treaty for the Establishment of the East African Community (adopted 30 November 1999, entered into force 7 July 2000) (2003) 2144 UNTS 255
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended) (adopted 4 November 1951, entered into force 3 September 1953) (1955) 213 UNTS 221
ECHR.Prot.1	Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (signed 20 March 1952, entered into force 18 May 1954) ETS 9
EECC Agreement	Agreement between Ethiopia and Eritrea (12 December 2000) (Ethiopia - Eritrea Claims Commission) <https://pcacases.com/web/sendAttach/786>
ECOWAS Treaty	Revised Treaty of the Economic Community of West African States (ECOWAS) (adopted 24 July 1993, entered into force 23 August 1995) (2010) 2373 UNTS 233
ECOWAS Protocol	Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice and Article 4 paragraph 1 of the English Version of the Said Protocol (19 January 2005) <http://www.courtecowas.org/site2012/pdf_files/supplementary_protocol.pdf>
ECT	Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) (2002) 2080 UNTS 95
EU-Russia PA	Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part (signed 24 June 1994)

	<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:21997A1128(01)>
Finland PT	Treaty of Peace with Finland (adopted 10 February 1947, entered into force 15 September 1947) (1950) 48 UNTS 203
Gen.Dec.	Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration) (19 January 1981) (1981) 20 ILM 223, also available: <http://www.iusct.net/General%20Documents/1-General%20Declaration%E2%80%8E.pdf>
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) (1957) 278 UNTS 1950
Germany-France	Agreement regarding the Discontinuance of the Liquidation of German Property (signed 31 December 1929) (1929) 106 LNTS 93
Germany-Poland (1929)	Agreement regarding the Settlement of Claims, with Final Protocol (signed 31 October 1929) (1931) 124 LNTS 345
Germany-Poland (1931)	Agreement between the German and Polish Governments, concerning the Termination of the Functions of the German-Polish Mixed Arbitral Tribunal (1 December 1931) (1933) 141 LNTS 315
Germany-Romania	Convention for the purpose of terminating the existing Financial Disputes between the two countries with Final Protocol and Exchange of Notes (signed 10 November 1928 and 6 December 1928) (1929) 91 LNTS 101
Germany-US	Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America concerning the establishment of the Foundation 'Remembrance, Responsibility and the Future' (with annexes and joint statement) (signed 17 July 2000, entered into force 19 October 2000) (2003) 2130 UNTS 249
Greece-Japan	Arrangement regarding settlement of certain Greek claims (signed 20 September 1966) (1967) 609 UNTS 103
Gut Dam Agreement	Agreement concerning the establishment of an International Arbitral Tribunal to dispose of United States claims relating to Gut Dam (signed 25 March 1965) (1967) 607 UNTS 141

Hague Agreement	Final discharge of financial obligations of Austria (signed 20 January 1930) (1930) 104 LNTS 413
Hungary-Italy (1927)	Agreement between Hungary and Italy for the Friendly Settlement of Certain Claims from Italian Nationals Submitted to the Italio-Hungarian Mixed Arbitral Tribunal (signed 21 May 1927) (1928) 74 LNTS 47
Hungary-Italy (1932)	Convention between Hungary and Italy on the Mixed Arbitral Tribunal set up in Application of Article 239 of the Treaty of Peace of Trianon (signed 12 November 1932) (1933) 142 LNTS 95
Hungary PT	Treaty of Peace with Hungary (adopted 10 February 1947, entered into force 15 September 1947) (1949) 41 UNTS 135
ICCPR	International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) (1983) 999 UNTS 171
ICCPR.Prot.	Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) (1983) 999 UNTS 171
ICESCR.Prot.	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013), available: <https://treaties.un.org/doc/source/docs/A_63_435-E.pdf>
ICPMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) (2004) 2220 UNTS 3
ICSFT	International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) (2004) 2178 UNTS 197
ICSID	Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) (1968) 575 UNTS 159
Italy-Germany	Agreements between Germany and Italy regarding questions connected with Articles 296 and 297 of the

	Treaty of Versailles (signed 1 September 1927) (1927) 67 LNTS 425
Italy PT	Treaty of Peace with Italy (adopted 10 February 1947, entered into force 15 September 1947) (1950) 49 UNTS 3
ITLOS Rules	ITLOS: Rules of the Tribunal (17 March 2009), available: <https://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf>
IUSCT, RoP	Iran-US Claims Tribunal Rules of Procedure (3 May 1983), available: <http://www.iusct.net/General%20Documents/5-TRIBUNAL%20RULES%20OF%20PROCEDURE.pdf>
Japan-Czechoslovakia	Protocol relating to the restoration of normal relations (signed 13 February 1957) (1958) 300 UNTS 119
Japan PT	Treaty of Peace with Japan (adopted 8 September 1951, entered into force 28 April 1952) 136 UNTS 45
MTA	Agreement on Maritime Transport (France-Algeria) (adopted 24 July 1967, entered into force 25 September 1967) (1975) 821 UNTS 393
Mauritius Convention	United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (adopted 10 December 2014, entered into force 18 October 2017) (2015) 54 ILM 747
NAAEC	North American Agreement on Environmental Cooperation, available: <https://www.canada.ca/content/dam/eccc/documents/pdf/international-affairs/compendium/2018/batch-11/north-american-agreement-environmental-cooperation.pdf>
NAFTA	North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) (1993) 32 ILM 296, 612
Netherlands-Germany	Treaty between the Kingdom of the Netherlands and the Federal Republic of Germany concerning the Settlement of Financial Questions and concerning Payments for the Benefit of Netherlands Victims of National Socialist Persecution (Financial Treaty) (signed 8 April 1960) (1966) 509 UNTS 194

NY.Conv.	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) (1959) 330 UNTS 3
OAS Charter	Charter of the Organization of American States (signed 30 April 1948, entered into force 13 December 1951) (1952) 119 UNTS 3
Olivos.Prot.	The Olivos Protocol for the Settlement of Disputes in MERCOSUR (adopted 18 February 2002, entered into force 1 January 2004) (2003) 42 ILM 2
Prize Court Convention	Convention (XII) Relative to the Creation of an International Prize Court (adopted 18 October 1907, not in force) 205 CTS 381
Rapallo Agreement	German - Russian Agreement (signed at Rapallo, 16 April 1922) (1923) 19 LNTS 248
Romania PT	Treaty of Peace with Roumania (adopted 10 February 1947, entered into force 15 September 1947) (1949) 42 UNTS 3
SADC Treaty	Treaty of the Southern African Development Community (adopted 17 August 1992, entered into force 5 October 1993) (1993) 32 ILM 116, as amended; consolidated text available: <http://www.sadc.int/files/5314/4559/5701/Consolidated_Text_of_the_SADC_Treaty_-_scanned_21_October_2015.pdf>
SADC.Prot.	Protocol on Tribunal in the Southern African Development Community (adopted 7 August 2000, entered into force 14 August 2011) <http://www.sadc.int/documents-publications/show/814>
SADCT Rules	Rules of Procedure of the Southern African Development Community Tribunal (2000), <http://www.sadc.int/files/1413/5292/8369/Protocol_on_the_Tribunal_and_Rules_thereof2000.pdf>
Sequestration Removal Agreement	Removal of sequestration over proceeds from the liquidation of German property in Japan (adopted 12 September 1924) (1926) 59 LNTS 17
SLA	Softwood Lumber Agreement (US-Canada) (12 September 2006) <http://www.international.gc.ca/controls-controles/assets/pdfs/softwood/SLA-en.pdf>

Tegucigalpa Protocol	Tegucigalpa Protocol to the Charter of the Organization of Central American States (signed 13 December 1991, entered into force 23 July 1992) (1992) 1695 UNTS 382
TEU	Consolidated version of the Treaty on European Union (2016) 59 Official Journal C 202, p. 13 <http://eur-lex.europa.eu/collection/eu-law/treaties.html>
TFEU	Consolidated version of the Treaty on the Functioning of the European Union (2016) 59 Official Journal C 202, p. 47 <http://eur-lex.europa.eu/collection/eu-law/treaties.html>
Thailand-Japan Settlement	Agreement concerning settlement of "Special Yen Problem" (signed 9 July 1955) (1956) 230 UNTS 13
Treaty of Neuilly-sur-Seine	Treaty of Peace between the British Empire, France, Italy, Japan and the United States (the Principal Applied and Associated Powers), and Belgium, China, Cuba, Czechoslovakia, Greece, the Hedjaz, Poland, Portugal, Roumania, the Serb-Croat-Slovene State, Siam, and Bulgaria (signed 27 November 1919) 226 CTS 332
Treaty of Paris	Treaty of Paris between the United States and Spain (signed 10 December 1898), 30 Stat. 1754, reproduced Coleman Phillipson, *Termination of War and Treaties of Peace* (Unwin 1916), 418-422.
Treaty of St-Germain-en-Laye	Treaty of Peace between the British Empire, France, Italy, Japan and the United States (the Principal Applied and Associated Powers), and Belgium, China, Cuba, Czechoslovakia, Greece, Nicaragua, Panama, Poland, Portugal, Roumania, the Serb-Croat-Slovene State, Siam, and Austria (signed 10 September 1919) 226 CTS 8
Treaty of Trianon	Treaty of Peace between the Allied and Associated Powers and Hungary (signed 4 June 1920) (1921) 6 UNTS 187
Treaty of Versailles	Treaty of Peace between the British Empire, France, Italy, Japan and the United States (the Principal Applied and Associated Powers), and Belgium, Bolivia, Brazil, China, Cuba, Czechoslovakia, Ecuador, Guatemala, Haiti, the Hedjaz, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Roumania, the Serb-Croat-Slovene State, Siam, and Uruguay and Germany (signed 28 June 1919) 225 CTS 188
Trianon Settlement Treaty (TST)	Agreements relating to the obligations resulting from the Treaty of Trianon, including Agreement I

	(Concerning the arrangements between Hungary and the Creditor Powers) and Agreement II (Concerning the settlement of questions relating to the agrarian reforms and Mixed Arbitral Tribunals) (signed 28 April 1930) (1931) 121 LNTS 69
UK-Austria	Money and Property Agreement (with exchange of notes) (signed 30 June 1952) (1952) 138 UNTS 152
UK/France/US/Italy/Germany	Agreement relating to certain libraries and properties in Italy (signed 30 April 1953) (1953) 175 UNTS 89
UK-Germany	Agreement between Germany and Great Britain concerning the Liquidation of Germany's Restitution Obligations and Protocol (signed 5 January 1924 and 19 March 1924) (1924) 36 LNTS 366
UNCAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) (1996) 1465 UNTS 85
UNC	Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) <https://www.un.org/en/charter-united-nations/>
UNCLOS	United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) (1982) 1833 UNTS 397
US-Austria	Agreement (with appendix) concerning the disposition of certain United States property in Austria (signed 26 September 1955) (1957) 272 UNTS 31
US-France	Agreement respecting maritime claims and litigation (signed 14 March 1949) (1951) 84 UNTS 225
US-Germany Settlement	Agreement regarding the settlement of the claim of the United States of America for post-war economic assistance (other than surplus property) to Germany (signed 27 February 1953) (1955) 224 UNTS 13
US-Iceland Settlement	Agreement regarding the settlement of claims of Icelandic insurance companies (adopted 23 November 1956) (1957) 281 UNTS 361
US-Iraq	Claims Settlement Agreement between the Government of the United States of America and the Republic of Iraq (signed 2 September 2010) <https://www.state.gov/documents/organization/166949.pdf>

US-Japan (Awa.Maru)	Agreement for settlement of the Awa Maru claim (signed 14 April 1949) (1951) 89 UNTS 141
US-Japan (Amami.Islands)	Agreement (with annex, exchange of notes and agreed official minutes) concerning the Amami Islands (signed 24 December 1953) (1955) 222 UNTS 193
US-Libya	Claims Settlement Agreement between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya (signed 14 August 2008) <https://www.state.gov/documents/organization/109771.pdf>
US-Norway	Agreement regarding settlement for lend-lease, military relief, and claims (with exchange of notes) (signed 24 February 1948) (1949) 34 UNTS 155
US-UK Interpretation	Exchange of Notes constituting an Agreement Interpreting the Agreement (II) on Settlement of Intergovernmental Claims, annexed to Memorandum of the Governments of the US and the UK pursuant to Joint Statement of December 6, 1945, regarding Settlement for Lend-lease, Reciprocal Aid, Surplus War Property, and Claims (Washington, 19 and 28 February 1947) (1951) 89 UNTS 368
US-UK Settlement	Exchange of Notes (with annex) constituting an agreement relating to claims for damages relating to acts of armed forces personnel (London, 29 February and 28 March 1944) (1948) 15 UNTS 413
VCCR	Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) (1969) 596 UNTS 261
VCDR	Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) (1965) 500 UNTS 95
VCLT	Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) (1987) 1155 UNTS 331

Statutes and administrative measures

ASR (Australia)	Autonomous Sanctions Regulations (2011)
ATPA	Andean Trade Preference Act 19 USC §3201
ATS	Alien Tort Statute 28 USC §1350

E.O.	Executive Order (US)
EUCP.2002/145/CFSP	EU Council Common Position 2002/145/CFSP (18 February 2002)
EUCP.2004/161/CFSP	EU Council Common Position 2004/161/CFSP (19 February 2004)
EUCP.2006/318/CFSP	EU Council Common Position 2006/318/CFSP (27 April 2006)
EU.Dec.2010/232/CFSP	EU Council Decision 2010/232/CFSP (26 April 2010)
EU.Dec.2010/800/CFSP	EU Council Decision 2010/800/CFSP (22 December 2010)
EU.Dec.2011/101/CFSP	EU Council Decision 2011/101/CFSP (15 February 2011)
EU.Dec.2011/137/CFSP	EU Council Decision 2011/137/CFSP (28 February 2011)
EU.Dec.2011/273/CFSP	EU Council Decision 2011/273/CFSP (9 May 2011)
EU.Dec.2011/782/CFSP	EU Council Decision 2011/782/CFSP (1 December 2011)
EU.Dec.2012/739/CFSP	EU Council Decision 2012/739/CFSP (29 November 2012)
EU.Dec.2013/255/CFSP	EU Council Decision 2013/255/CFSP (31 May 2013)
EU.Dec.2014/145/CFSP	EU Council Decision 2014/145/CFSP (17 March 2014)
EU.Dec.2014/265/CFSP	EU Council Decision 2014/265/CFSP (12 May 2014)
EU.Dec.2014/475/CFSP	EU Council Decision 2014/475/CFSP (18 July 2014)
EU.Dec.2014/499/CFSP	EU Council Decision 2014/499/CFSP (25 July 2014)
EU.Dec.2015/1333/CFSP	EU Council Decision CFSP/2015/1333 (31 July 2015)
EU.Dec.2017/667/CFSP	EU Council Decision 2017/667(CFSP) (6 April 2017)
EU.Dec.2018/655/CFSP	EU Council Decision 2018/655(CFSP) (26 April 2018)
EU.Dec.2018/900/CFSP	EU Council Decision 2018/900(CFSP) (25 June 2018)
EU.Reg.1294/1999	EU Council Regulation 1294/1999 (15 June 1999)
EU.Reg.2488/2000	EU Council Regulation 2488/2000 (10 November 2000)
EU.Reg.1283/2009	EU Council Regulation 1283/2009 (22 December 2009)

EU.Reg.2011/235/CFSP	EU Council Regulation 2011/235/CFSP (12 April 2011)
EU.Reg.267/2012	EU Council Regulation 267/2012 (23 March 2012)
EU.Reg.2015/1861	EU Council Regulation 2015/1861 (18 October 2015)
EU.Reg.2017/2063	EU Council Regulation 2017/2063 (13 November 2017)
E.O.12283	Executive Order 12283 (19 January 1981)
E.O.13219	Executive Order 13219 (26 June 2001)
E.O.13288	Executive Order 13288 (6 March 2003)
E.O.13304	Executive Order 13304 (28 May 2003)
E.O.13310	Executive Order 13310 (28 July 2003)
E.O.13448	Executive Order 13448 (18 October 2007)
E.O.13464	Executive Order 13464 (30 April 2008)
E.O.13469	Executive Order 13469 (25 July 2008)
E.O.13477	Executive Order 13477 (Libyan Claims Settlement) (31 October 2008)
E.O.13551	Executive Order 13551 (1 September 2010)
E.O.13553	Executive Order 13553 (28 September 2010)
E.O.13566	Executive Order 13566 (25 February 2011)
E.O.13572	Executive Order 13572 (29 April 2011)
E.O.13573	Executive Order 13573 (18 May 2011)
E.O.13606	Executive Order 13606 (22 April 2012)
E.O.13619	Executive Order 13619 (11 July 2012)
E.O.13660	Executive Order 13660 (6 March 2014)
E.O.13661	Executive Order 13661 (16 March 2014)
E.O.13662	Executive Order 13662 (20 March 2014)
E.O.13685	Executive Order 13685 (19 December 2014)
E.O.13687	Executive Order 13687 (2 January 2015)
E.O.13692	Executive Order 13692 (8 March 2015)

E.O.13722	Executive Order 13722 (15 March 2016)
E.O.13810	Executive Order 13810 (20 September 2017)
E.O.13818	Executive Order 13818 (21 December 2017)
E.O.13846	Executive Order 13846 (6 August 2018)
JVCFOA	Justice for Victims of Corrupt Foreign Officials Act (2017) (Canada)
Magnitsky Act	Global Magnitsky Human Rights Accountability Act (2016) 22 USC §2656 (US)
SEMBR (Canada)	Special Economic Measures (Burma) Regulations (2007)
SEMIR (Canada)	Special Economic Measures (Iran) Regulations (2010)
SEMRR (Canada)	Special Economic Measures (Russia) Regulations (2014)
SEMSR (Canada)	Special Economic Measures (Syria) Regulations (2011)
SEMVR (Canada)	Special Economic Measures (Venezuela) Regulations (2017)
SEMZR (Canada)	Special Economic Measures (Zimbabwe) Regulations (2008)
USIFCPA	Iran Freedom and Counter-Proliferation Act (2012) 22 USC §8801 (US)

Journal and case citations

AC	Appeal Cases (UK)
AHRLJ	African Human Rights Law Journal
AfJICL	African Journal of International and Comparative Law
AHRLR	African Human Rights Law Reports
AIAJ	Asian International Arbitration Journal
AJIL	American Journal of International Law
Arb.Int.	Arbitration International

Ariz.JICL	Arizona Journal of International and Comparative Law
AUILR	American University International Law Review
Aust.Rev.I&EL	Austrian Review of International and European Law
BCDRIAR	BCDR International Arbitration Review
BerkJIL	Berkley Journal of International Law
BYBIL	British Yearbook of International Law
BFSP	British and Foreign State Papers
Camb.JI&CL	Cambridge Journal of International and Comparative Law
Ch	Law Reports, Chancery Division (UK)
CLR	Commonwealth Law Reports (Australia)
Colum.J.L&Soc.Probs	Columbia Journal of Law and Social Problems
Colum.LR	Columbia Law Review
Corn.ILJ	Cornell International Law Journal
CYBP&PIL	Czech Yearbook of Public & Private International Law
Denv.J.Int.L&Pol.	Denver Journal of International Law & Policy
DR	Decisions and Reports of the European Commission on Human Rights
ECHR	Reports of Judgments and Decisions of the European Court of Human Rights
ECR	European Court Reports
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
EWCA	Court of Appeal of England and Wales
EWHC	High Court of England and Wales
FCR	Federal Court Reports (Australia)
Geo.Wash.ILR	George Washington International Law Review
Hast.I&CLR	Hastings International & Comparative Law Review

Hornsby's	Edmund Hornsby, *Report of the Mixed Commission on Private Claims, established under the convention between Great Britain and the United States of America of the 8th February 1853: with the judgments of the commissioners and umpire* (Harrison & Sons, 1856)
Harv.ILJ	Harvard International Law Journal
Harv.LJ	Harvard Law Journal
IA.Rep.	International Arbitration Reporter
IAYBkHR	Inter-American Yearbook on Human Rights
ICSID Rep.	ICSID Reports
ICSID Rev.-FILJ	ICSID Review – Foreign Investment Law Journal
ICLQ	International & Comparative Law Quarterly
IDIA	Annuaire de l'institut de droit international
Ind.JGLS	Indiana Journal of Global Legal Studies
Int.L.Forum	International Law FORUM du droit international
ILA.Conf.Rep.	ILA Reports of Conferences
ILCYB	Yearbook of the International Law Commission
ILDC	Oxford Reports on International Law in Domestic Courts
ILM	International Legal Materials
ILPr	International Litigation Procedure
ILR	International Law Reports
Iran-USCTR	Iran-US Claims Tribunal Reports
JC&SL	Journal of Conflict and Security Law
JIDS	Journal of International Dispute Settlement
JIEL	Journal of International Economic Law
JWIT	Journal of World Investment and Trade
KB	Law Reports, King's Bench Division (UK)
LPICT	Law and Practice of International Courts and Tribunals

Loy.LAI&CLR	Loyola of Los Angeles International & Comparative Law Review
Martens	*Nouveau Recueil Général de Traités et Autres Actes Relatifs aux Rapports de Droit International, Continuation du Grand Recueil de G. FR. Martens* par Heinrich Triepel, Troisième Série (Librarie Theodor Weicher, 1927)
Moore's	John Bassett Moore, *History and Digest of the International Arbitrations to which the US has been a Party* (GPO, 1898)
MULR	Melbourne University Law Review
NDLR	Notre Dame Law Review
NDWP	Notre Dame Working Paper
Nord.JIL	Nordic Journal of International Law
NwULRColl.	Northwestern University Law Review Colloquy
NYT	New York Times
Op.Juris	Opinio Juris Blog <http://opiniojuris.org/>
ÖZ	Österreische Zeitschrift für öffentliches Recht und Völkerrecht
RDIP&P	Rivista di Diritto Internazionale Privato e Processuale
Rdc	Recueil des Cours (Collected Courses of the Hague Academy of International Law)
Rep.	Report
RPUNO	Repertory of Practice of United Nations Organs
SAYIL	South African Yearbook of International Law
SDILJ	San Diego International Law Journal
Sel.Dec.HRC	Selected Decisions of the Human Rights Committee
SMULR	Southern Methodist University Law Review
TAM	Recueil des Décisions des Tribunaux Arbitraux Mixtes
Tul.LR	Tulane Law Review
UCLAJILFA	UCLA Journal of International Law & Foreign Affairs

UNRIAA	United Nations Reports of International Arbitral Awards
UNSWLJ	University of New South Wales Law Journal
UNYB	United Nations Yearbook
VJIL	Vanderbilt Journal of International Law
WLR	Weekly Law Reports (UK)
WWR	Western Weekly Reports (Canada)
YBkECHR	Yearbook of the European Convention on Human Rights
YLJ	Yale Law Journal
ZfaöVR	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

Book and publisher abbreviations

CUP	Cambridge University Press
Man.UP	Manchester University Press
MPEPIL	Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law (Online)* (OUP) <www.mpepil.com>
OUP	Oxford University Press
Stan.UP	Stanford University Press
YUP	Yale University Press

Other abbreviations

ACommHR	African Commission on Human Rights
AfCtHR	African Court on Human and Peoples' Rights
ALI	American Law Institute
Andean Court	Court of the Andean Subregional Integration Community
BCCA	British Columbia Court of Appeal

BCJ	Benelux Court of Justice
BGH	Bundesgerichtshof (Federal Supreme Court, Germany)
BIICL	British Institute of International and Comparative Law
BIT	Bilateral Investment Treaty
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court of Germany)
CARICOM	Carribean Community
CA	Court of Appeal
CAT	Committee Against Torture
CACJ	Central American Court of Justice
CC or Cl.Comm.	Claims Commission
CCJ	Caribbean Court of Justice
CFI	Court of First Instance
CJ	Court of Justice
Civ.Ct.	Civil Court
COMESA	Common Market for Eastern and Southern Africa
Cons.d'Etat	Conseil d'Etat
Counter-Mem.	Counter-Memorial
Cour.Cass.	Cour de Cassation
CPW	Circumstance precluding wrongfulness
CTS	Consolidated Treaty Series
DC	District Court
DoS	Department of State (US)
DPRK	Democratic People's Republic of Korea (North Korea)
EAC	East African Community
EC	European Commission
ECFR	European Council on Foreign Relations

ECJ	European Court of Justice
ECommHR	European Commission on Human Rights
ECOWAS	Economic Community of West African States
ECSC	Eastern Caribbean Supreme Court
ECtHR	European Court of Human Rights
EEA	European Economic Area
EECC	Ethiopia-Eritrea Claims Commission
EFTA	European Free Trade Area
EGC	European General Court
EU	European Union
Exch.Lett.	Exchange of Letters
FCN	Freedom, Commerce and Navigation
FET	Fair and Equitable Treatment
FRG	Federal Republic of Germany
FTA	Free Trade Agreement
GC	Grand Chamber (ECtHR)
GC	General Court (ECJ)
GDP	Gross Domestic Product
HC	High Court
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
IDI	Institut de droit international
IDP	Internally displaced person
IHL	International humanitarian law (*jus in bello*)
ILA	International Law Association

ILC	International Law Commission
ILEP	Institute for Law and Economic Policy
ILO	International Labour Organization
ILOFOAC	ILO Freedom of Association Committee
ITLOS	International Tribunal for the Law of the Sea
IUSCT	Iran-US Claims Tribunal
LAS	League of Arab States
LoN	League of Nations
LNTS	League of Nations Treaty Series
MAT	Mixed Arbitral Tribunal
Mem.	Memorial
MERCOSUR	Mercado Común del Sur, established under the Treaty establishing a Common Market (Asunción Treaty) between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (adopted 26 March 1991, entered into force 29 November 1991) (2003) 2140 UNTS 257
NAM	Non-Aligned Movement
OECD	Organisation for Economic Co-operation and Development, established under the Convention on the Organisation for Economic Co-operation and Development (adopted 14 December 1960, entered into force 30 September 1961) (1980) 888 UNTS 179
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PLO	Palestine Liberation Organisation
POW	Prisoner of war
Rej.	Rejoinder
Rep.	Reply (in the context of pleadings)
RoP	Rules of Procedure

SADC	Southern African Development Community, established under the SADC Treaty
SADCT	Tribunal of the SADC
SC	Supreme Court
SGCA	Singapore Court of Appeal
SCSA	Supreme Court of South Africa
TGI	Tribunal de grande instance (France)
UAR	United Arab Republic
UK	United Kingdom of Great Britain and Northern Ireland
UKHL	UK House of Lords
UKSC	UK Supreme Court
UN	United Nations
UNCC	United Nations Compensation Commission
UNLS	UN Legislative Series
UNSC	United Nations Security Council
UNSG	Secretary-General of the United Nations
UNTS	United Nations Treaty Series
US	United States
USCA	United States Court of Appeals
USCADC	United States Court of Appeals, D.C. Circuit
US CtCl	United States Court of Claims
USSC	United States Supreme Court
WGAD	Working Group on Arbitrary Detention
WTO	World Trade Organization, established under the Marrakesh Agreement establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) (1998) 1867 UNTS 154
WWI	First World War
WWII	Second World War

A note on lump sum settlement agreements

A number of treaties referred to in this thesis are reproduced in one of three volumes:

> Richard B. Lillich and Burns H. Weston, *International Claims: Their Settlement By Lump Sum Agreements*, vol 1 and 2 (Virginia UP 1975); and
>
> Burns H. Weston, Richard B. Lillich and David J. Bederman, *International Claims: Their Settlement By Lump Sum Agreements, 1975-1995* (Transnational Publishers 1999).

In such cases, the relevant treaty is noted by way of referring, in parentheses, to its number in the relevant volume, or in the appendix in which it is located, together with the parties to the agreement.

A note on other treaties

Unless otherwise noted, Bilateral Investment Treaties are available on the UNCTAD website: http://investmentpolicyhub.unctad.org/IIA. All BITs are described in the text by reference to the States parties and year of signature.

Unless otherwise noted, other treaties are available in the LNTS or UNTS databases.

A note on titles and abbreviations

Treaties, statutes and administrative measures, and ILC articles are referred to in the footnotes by way of their abbreviated titles, contained in the table of abbreviations. Lengthy titles for certain cases, books and journal articles have been shortened in the footnotes. Full titles, together with the details of the publisher, may be found in the bibliography.

PART A

INTRODUCTION

Modern public international law was traditionally the domain of States.[1] Individuals' interests were represented by their States of nationality, and claims for violations of international law concerning individuals were made and settled between States.[2] In the last century, however, individuals have increasingly gained recognition under international law as entities separate from the State, been accorded rights and obligations,[3] and been granted the ability in certain circumstances to make claims against States for violations of international law before international tribunals.[4]

The law of State responsibility, as reflected in the ILC's *Articles on State Responsibility* ('ARSIWA'), is nonetheless designed to operate primarily between States.[5] The ARSIWA do not address the invocation of responsibility by individuals, nor do they govern 'the tricky terrain of the relations between claims of responsibility asserted by

[1] Generally, e.g., Parlett, *The Individual in the International Legal System* (2011) 3;10-17;343-344; Peters, *Beyond Human Rights* (Huston tr, 2016) 13-14; ILC 'Draft Articles on Diplomatic Protection, with commentaries' [2006] 2(2) ILCYB 22, 25 ('DADP'); McCorquodale, 'The Individual and the International Legal System' in Evans (ed), *International Law* (4th edn, 2014) 281-282; Weiss, 'Invoking State Responsibility in the Twenty-First Century' (2002) 96 AJIL 798, 798; authorities *infra*.nn231;670.

[2] E.g., DADP, 25; Crawford, *State Responsibility: The General Part* (2013) 584; Chinkin, *Third Parties in International Law* (1993) 14; Garcia-Amador, 'International Responsibility' [1956] 2 ILCYB 173, 192; McCorquodale (n1) 280;288-289; Jessup, *A Modern Law of Nations* (1968) 8-9; Mugerwa, 'Subjects of International Law' in Sørensen (ed), *Manual of Public International Law* (1968) 249;266; Schreuer, *Decisions of International Institutions Before Domestic Courts* (1981) 329; Parlett (n1) 15-16;50;64-65; *infra*.n313.

[3] E.g., Garcia-Amador, 'Report' (n2) 192; DADP, 25; Parlett (n1) 3;27-29;37-38;349-351; Peters (n1) 25-34; McCorquodale (n1) 284-288; *infra*.nn197;675.

[4] *Infra*.Ch.II(I); Crawford, *The International Law Commission's Articles on State Responsibility* (2002) 210 ('*ARSIWA*'); Crawford, *GP* (n2) 584-585; Shany, *Regulating Jurisdictional Relations Between National and International Courts* (2007) 10; Weiss (n1) 809ff; Parlett (n1) Chs.2;5.4;349-350; McCorquodale (n1) 284;288-294; also Roucounas, 'Non-State Actors' in Ragazzi (ed), *International Responsibility Today* (2005) 399.

[5] Tams, 'All's Well That Ends Well' (2002) 62 ZfaöRV 759,760-761; Weiss (n1) 798;815-816; cf.Crawford, 'Retrospect' (2002) 96 AJIL 874, 886-888; also Roucounas (n4) 392;399; Roberts, 'Triangular Treaties' (2015) 56 Harv.ILJ 353, 364; Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 79 BYBIL 264, 333; Parlett, 'The Application of the Rules on Countermeasures in Investment Claims' in Chinkin and Baetens (eds), *Sovereignty, Statehood and State Responsibility* (2015) 405.

States and those, arising from the same conduct, asserted by the actual victims.'[6] This thesis endeavours to narrow that gap by examining the relationship between interstate and individual invocations of responsibility for violations of international law.[7] In particular, it examines how far, under the law of State responsibility, the conduct of States and individuals can lead to the preclusion of the other's claims.[8] It generally regards as 'individuals' any 'non-State actor'[9] whose actions are not attributable to a State, and therefore 'maintain[s] an identity and existence independent of [it]'.[10]

I. Overlapping claims

This thesis begins from the premise that the existence and utilisation of individual claims mechanisms, combined with more traditional routes for the invocation of responsibility by States,[11] gives rise to actual and potential 'overlap' between individual

[6] Crawford, 'Overview of Part Three' in Crawford and others (eds), *The Law of International Responsibility* (2010) 932, referencing *ARSIWA*, Art.33(2); similarly Crawford, *GP* (n2) 549; also Nollkaemper, *National Courts and the International Rule of Law* (2011) 98; *infra*.nn232-233.

[7] Similarly: Crawford, *GP* (n2) 585-593; Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory' (2014) 55 Harv.ILJ 1, 3ff; authorities *infra*.n8. On 'need[ing] to regulate...multiple proceedings': Shany (n4) 17, generally 17-20;131-132;155-156; similarly Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003) 79-80;81-82;110-115;117-121;124-125;154ff; Schreuer, *Decisions* (n2) 328; Hess, 'The Private-Public Divide in International Dispute Resolution' (2018) 388 Rdc 49, 237-238;245; Roberts, 'Hybrid' (n7) 41.

[8] Considering similar situations, particularly Roberts, 'Triangular' (n5) 355;363;383-386; Vermeer-Künzli, 'Unfinished Business: Concurrence of Claims' (2010) 10 HRLR 269, 270ff; Paparinskis, 'Countermeasures' (n5), particularly Pts.(III)-(V); Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility' (2013) 24 EJIL 617, 629-635;640-641;643-646; generally *infra*.nn41-43;460-465. On terminology: *infra*.nn45;64.

[9] As does McCorquodale (n1) 281; similarly Jessup (n2) 19-20; cf.Parlett (n1) 4-5 (criticising; preferring natural persons); Peters (n1) 9-10.

[10] Lubell, *Extraterritorial Use of Force Against Non-State Actors* (2010) 15; also Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 Virg.JIL 483, 494; *infra*.Ch.I(I); cf.Chinkin, 'Monism and Dualism' in Nijman and Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (2007) 139-142.

[11] See Parlett (n1) 366; generally *infra*.Ch.II.

and interstate claims,[12] in the sense that both individuals and States may claim for violations of international law arising from the same factual circumstances and against the same respondent State.[13]

While individual claims mechanisms are often celebrated as liberating States from involvement in disputes concerning their nationals,[14] those States may nonetheless wish to invoke responsibility, for various reasons:[15] to claim for their own additional injury resulting from the violation of international law;[16] to add their weight to an individual's claim;[17] to assist individuals facing difficulties;[18] to resolve a question of principle arising from a given dispute that has wider ramifications;[19] and/or to consolidate numerous

[12] Using 'overlap' or 'overlapping' in this context: authorities *infra*.nn348;358;391;412; Nollkaemper, 'Conversations among Courts' in Romano, Alter and Shany (eds), *The Oxford Handbook of International Adjudication* (2014) 529; Juratowich, 'The Relationship between Diplomatic Protection and Investment Treaties' (2008) 23 ICSID.Rev.-FILJ 10, 34; also Crawford, 'The ILC's Articles on Diplomatic Protection' (2006) 31 SAYIL 19, 23; authorities *infra*.nn13;348;380.

[13] Similarly *supra*.n6; Roberts, 'Triangular' (n5) 383 ('same underlying conduct'); cf.Shany (n7) 21 ('overlap…means...dispute can be addressed by more than one available forum'); 22 ('proceedings...share…sufficient degree of similarity'); Shany (n4) 2 ('disputes between…same parties…or, closely related…over essentially identical issues'); 23; Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (2013) [1.20] ('multiple proceedings'); Hobér, 'Res Judicata and Lis Pendens in International Arbitration' (2014) 366 Rdc 99, 118; Schreuer, *Decisions* (n2) 329; generally *infra*.Chs.II,VI(II).

[14] Roberts, 'Triangular' (n5) 389-391; Roberts, 'Hybrid' (n7) 15; also Paparinskis, 'Countermeasures' (n5) 266;273; Paparinskis, 'Analogies and Other Regimes of International Law' in Douglas, Pauwelyn and Vinuales (eds), *The Foundations of International Investment Law* (2014) 84; *Corn Products v Mexico (Responsibility)* ICSID Case-ARB(AF)/04/01 (15.Jan.2008) [1] (Sep.Op.Lowenfeld); also Amerasinghe, *Local Remedies in International Law* (2nd edn, 2004) 57;61.

[15] Similarly Roberts, 'Hybrid' (n7) 14-15.

[16] Particularly *infra*.nn332ff ('mixed' claims); Fitzmaurice, 'Fourth Report on the Law of Treaties' [1959] 2 ILCYB 37 [161].

[17] Juratowich (n12) 33. Cf.Crawford, *GP* (n2) 586.

[18] See Berman, 'The Relevance of the Law on Diplomatic Protection in Investment Arbitration' in Ortino and others (eds), *Investment Treaty Law, Current Issues II* (2007) 71-72; Paparinskis, 'Countermeasures' (n5) 291; Roberts, 'Hybrid' (n7) 14-15.

[19] See Berman (n18) 72; Roberts, 'Triangular' (n5) 395-397; Roberts, 'Hybrid' (n7) 4;9-10;14;49-50; Fitzmaurice, 'FourthRep' (n16) [160]; Paparinskis, 'New' (n8) 630; Paparinskis, 'Countermeasures' (n5) 291; also Kaufmann-Kohler, 'Non-Disputing State Submissions in Investment Arbitration' in de

claims where the injury is significant or affects numerous nationals.[20] In addition, overlap may exist with non-nationals' claims.[21]

As Chapter II details, overlapping individual-interstate claims, concerning the same or similar alleged violations of international law, have arisen frequently in recent years.[22] In the human rights field, for instance, the interstate *Georgia/Russia* cases, before the ICJ and ECtHR,[23] were brought simultaneously with numerous individual ECtHR claims;[24] the pending ICJ *Ukraine/Russia* case overlaps with individual ECtHR applications;[25] the ECtHR's compensation award in the interstate *Cyprus/Turkey* case expressly acknowledged 'overlapping' individual claims;[26] and, when the Netherlands claimed against Russia for violations of UNCLOS vis-à-vis a vessel, it recognised potential 'overlap' with human rights claims instituted by individuals on board.[27]

Chazournes, Kohen and Vinuales (eds), *Diplomatic and Judicial Means of Dispute Settlement* (2013) 317; *North American Dredging v Mexico* (1926) IV UNRIAA 26 [11]; authorities *infra*.n378 (*Ecuador/US*); generally *infra*.Chs.IV(III)(B)(ii);VI(V)(B).

[20] Roberts, 'Hybrid' (n7) 4;9-10;14-15;29;67; Roberts, 'Triangular' (n5) 395-397; Berman (n18) 72; Juratowich (n12) 32-33; also Jessup (n2) 116-117; *infra*.nn950-954;1058-1061;1734;1757.

[21] See *infra*.n358.

[22] Cf.Gaja, 'The Protection of General Interests in the International Community' (2012) 364 Rdc 9, 170 ('unlikely'). On overlap before international courts generally: Shany (n7), particularly Ch.2. On domestic/international courts: Shany (n4), particularly Chs.1;4.

[23] *Infra*.nn386-387.

[24] *Infra*.n388.

[25] *Infra*.nn392-394.

[26] *Infra*.n391.

[27] *Infra*.n412.

The same is apparent vis-à-vis international investment law.[28] A tobacco company challenged Australian legislation requiring particular product packaging, while multiple WTO cases were launched on the interstate level.[29] The US likewise challenged a Mexican tax before the WTO in circumstances in which the same tax was claimed, by US investors, to have violated NAFTA.[30] Mexico defended the tax, both in the interstate and investor-State claims, as a legitimate countermeasure against the US.[31] And in a long-running softwood lumber saga, investor-State claims were brought against the US under NAFTA, as well as by Canada before the WTO, with the two States ultimately settling the whole dispute.[32]

The overlap is not, however, limited to international fora.[33] National courts have become increasingly concerned with questions of international law.[34] 'Jurisdictional interactions between national and international courts' have followed,[35] including 'overlap' between individual and interstate claims for violations of international law before domestic and international tribunals.[36] The interstate *Legality of Use of Force* cases concerned, for example, conduct also challenged by individuals before domestic

[28] Generally *infra*.Ch.II(III)(A).

[29] *Infra*.n358.

[30] *Infra*.n359.

[31] *Infra*.nn1931;2005-2006.

[32] *Infra*.nn360;1327ff.

[33] Nollkaemper (n12) 529; generally authorities *infra*.Ch.II(III)(C).

[34] Shany (n4) 8-11;197; Nollkaemper (n12) 525; Nollkaemper (n6) 7-10;12;26;213; Tzanakopoulos, 'Domestic Courts in International Law' (2011) 34 Loy.LAI&CLR 133, 133;136-137.

[35] Shany (n4) 1; generally Chs.1;4. Similarly Nollkaemper (n12) 525-526.

[36] Nollkaemper (n12) 529; generally Nollkaemper (n6) 27ff; authorities *infra*.nn448-453; generally *infra*.Chs.II(I)(C);(III)(C).

courts.[37] The ICJ *Immunities Case*, for its part, concerned agreements made between Germany and Italy purporting to settle WWII claims,[38] yet Italian nationals nonetheless brought war-related claims against Germany domestically.[39]

II. Overlapping claims and State responsibility

Given the silence of the ARSIWA regarding the relationship between individual and interstate claims,[40] this thesis addresses whether and how States and individuals may invoke State responsibility in such circumstances of overlap. It is fundamentally concerned with two main issues. First, it examines whether rules relevant to the law of State responsibility might operate to prevent one or the other entity invoking responsibility and claiming reparation in circumstances of overlap,[41] and particularly whether individuals can prevent States exercising their traditional role of settling disputes concerning their nationals, or, to the contrary, whether States can override individual claims and continue to exercise that role.[42] Second, it examines how far actions by a State or individual, that would enable a respondent State to invoke a circumstance precluding wrongfulness ('CPW'), might operate to preclude not only that entity's claims but also an

[37] And the ECtHR: *infra*.nn409;449.

[38] *Infra*.nn1119-1121.

[39] *Jurisdictional Immunities (Germany v Italy: Greece Intervening) (Judgment)* [2012] ICJ.Rep 99 [27]-[36]; also *Sechremelis v Greece*, Doc.CCPR/C/100/D/1507/2006/Rev1 (25.Oct.2010); Nollkaemper (n6) 95-96.

[40] *Supra*.n6; similarly Nollkaemper (n6) 170.

[41] Cf.authorities *infra*.nn460-465; Shany (n7) 17.

[42] Similarly: Roberts, 'Triangular' (n5) 363-364;383-385;392-393;395-399;403-414; Roberts, 'Hybrid' (n7) 2;5-6;7-8;49-52;69-70; Peters (n1) 169;175;212-213;317; Paparinskis, 'Analogies' (n14) 104-105; Paparinskis, 'New' (n8) 643-646; Vermeer-Künzli, 'Concurrence' (n8) 270-272. Cf.*supra*.nn2;11.

overlapping individual or interstate claim.[43] In both cases, the concern is with whether rules under the law of State responsibility exist that might operate to 'preclude' individual or interstate claims,[44] rules not dependent for their application on the conduct of that individual or State, but on the conduct of the other entity possessing an overlapping claim.[45]

The thesis considers seven categories of rules fitting this description, and their potential operation in the context of overlapping individual-interstate claims:

(1) the rule on the exhaustion of local remedies, which renders certain interstate claims inadmissible when individuals have failed to bring an overlapping claim before domestic courts;[46]

(2) certain provisions under ICSID and CARICOM, which are enlivened by the actions of one or the other entity in claiming, consenting to claim, or not doing so, and which render the other's claims inadmissible;[47]

(3) waiver by individuals and States of the claims of the other, querying whether such waivers operate to render those other claims inadmissible;[48]

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[43] Similarly: Roberts, 'Triangular' (n5) 364;384-386;399-402; Paparinskis, 'Countermeasures' (n5), particularly Pt.(V); Paparinskis, 'New' (n8), particularly 629-635;639-640;642-643; Paparinskis, 'Analogies' (n14) 100-102; Parlett (n5) 394-405; *infra*.n226; Ch.VIII, particularly *infra*.nn2003-2012;2198-2203.

[44] See *infra*.n64.

[45] Using the term 'conduct' in this sense: *infra*.nn1916-1917.

[46] *Infra*.Chs.III(II)(C);IV, particularly *infra*.n464.

[47] *Infra*.Chs.III(II)(B);IV.

(4) *res judicata*, a general principle of international law that operates to render inadmissible a claim brought subsequently to another that is, pursuant to criteria to be explained, similar;[49]

(5) certain treaty-based provisions that restrict the bringing of a claim already decided, commonly interpreted as reflecting similar elements to *res judicata*;[50]

(6) the rule precluding double recovery, which prevents a claimant from recovering again where damage has already been repaired;[51] and

(7) countermeasures and self-defence as CPWs enlivened by State conduct, and potentially that of individuals.[52]

The common features of the rules considered in this thesis are threefold. First, they relate to secondary rules of State responsibility, rather than primary rules.[53] Second, they have the potential to preclude claim(s) for violation of international law from being successfully brought in circumstances of overlapping individual-interstate claims.[54]

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[48] *Infra*.Chs.III(I);V, particularly *infra*.n462.

[49] *Infra*.Chs.III(II)(A);VI, particularly *infra*.n463.

[50] *Infra*.Chs.III(II)(B);VI. Similarly *infra*.nn463;487.

[51] *Infra*.Chs.III(III);VII, particularly *infra*.n465.

[52] *Infra*.Ch.VIII and see *supra*.n43. Consent is excluded for reasons explained *infra*.nn1917-1918.

[53] For the distinction: *ARSIWA*, 74; also Tams, 'Well' (n5) 764-765; cf.Paddeu, *Justification and Excuse in International Law* (2018) 53-57. Taking a similar approach: ibid.18. Exceptionally, Chs.V and VIII discuss conduct relating to primary norms, but in the secondary rules context.

[54] *Infra*.n64.

Finally, their application vis-à-vis a particular entity's claim is dependent not on that entity's conduct, but on the conduct of an entity possessing an overlapping claim.

Not all of the rules depend, for their operation, on overlapping claims *actually* being brought. Some do: *res judicata*, for instance, is only potentially applicable where an earlier claim has been judicially decided,[55] while the rule precluding double recovery operates where reparation has been paid vis-à-vis an earlier claim.[56] However, other rules, such as that requiring exhaustion of local remedies, as well as certain treaty provisions, are enlivened by overlapping individual-interstate claims being *available*.[57] Moreover, a given claim could be waived without State responsibility being invoked.[58] Nonetheless, questions concerning the impact of interstate waivers on individual claims, and *vice versa*, commonly arise where both States and individuals have endeavoured to claim.[59] Likewise, a CPW might conceivably be invoked vis-à-vis circumstances that could otherwise give rise to overlapping claims where only one entity, or indeed neither, has actually claimed.[60] However, as the case concerning Mexico noted above demonstrates, CPWs may also be invoked where overlapping individual-interstate claims are actually brought.[61]

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[55] *Infra*.n511.

[56] *Infra*.Ch.III(III).

[57] *Infra*.nn533-540;559. Cf.Criddle, 'Humanitarian Financial Intervention' (2013) 24 EJIL 583, 597 (fn.68) (vis-à-vis countermeasures).

[58] See Sohn/Baxter (eds), *Convention on the International Responsibility of States for Injuries to Aliens* (HLS 1961) Art.25 ('potential claim'); Spiermann, 'Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties' (2004) 20 Arb.Int. 179, 186; *infra*.n469.

[59] See *infra*.Ch.V.

[60] Cf.*infra*.n63. E.g. if a CPW were accepted to apply: cf.*infra*.nn2330-2333.

[61] *Supra*.n31.

The unifying feature of the situations with which this thesis is concerned is, accordingly, that, *but for* the alleged operation of the rules under consideration, overlapping individual and interstate claims *could* be brought.[62] Thus, 'overlapping claims' is taken to mean that both States and individuals would, *prima facie*, and in the absence of rules of preclusion, be able to invoke the responsibility of the same respondent State for violations of international law arising from the same factual circumstances, whether or not they actually claim.[63]

The terms 'preclusion' or 'preclude' are taken simply to mean that an entity *prima facie* possessing an overlapping claim is unable to invoke responsibility successfully.[64] Certain of the rules under consideration, including the local remedies rule, *res judicata* and related provisions and principles, and waiver, might operate to allow one entity's conduct to render the other's claim *inadmissible*.[65] Other rules, if applicable, relate to *breach*, with an entity's conduct precluding the other from establishing that international law was violated: as will be seen, this explains certain situations subsumed under the notion of waiver,[66] as well as how CPWs, invoked in response to the conduct of one entity, may preclude another's claim.[67] Certain other rules, including that precluding double recovery, relate to *reparation*. If such rules apply to overlapping individual-

[62] For 'but for' language, e.g.: ILC, 'Draft Articles on the Responsibility of International Organizations, with commentaries' [2011] 2(2) ILCYB 46, 72.

[63] Cf.Paddeu, *Justification* (n53) 102;109-110;227 (countermeasures only '*prima facie*…breach'); *supra*.nn12-13; *infra*.n218.

[64] Cf.*infra*.nn218-220 (CPWs) and discussion Crawford, *GP* (n2) 275 ('true of…armoury of other defensive arguments'); also *ARSIWA*, 266 ('preclude…claim for reparation'); Roberts, 'Hybrid' (n7) 4;7;9;11;15;67; Paparinskis, 'Countermeasures' (n5) 267; Sohn/Baxter (n58) 201.

[65] See authorities *infra*.Ch.III(I)-(II).

[66] *Infra*.nn1078ff.

[67] *Infra*.Ch.I(III), particularly *infra*.nn218-220.

interstate claims, then one entity's conduct curtails the other's ability to claim reparation, even if the claim might still be brought.[68]

III. Overview

The thesis consists of four Parts, divided into eight Chapters.

Part A consists, in addition to this Introduction, of two Chapters. Chapter I introduces the concepts of State responsibility relevant to the remainder of the thesis. Chapter II outlines the mechanisms available for individuals to invoke State responsibility for violations of international law, and the potential for resulting overlap with interstate claims.

Part B (Chapters III-VII) addresses rules of preclusion related to admissibility and reparation. Chapter III introduces the rules with which the Part is concerned, explaining common features that justify grouping certain of them together. Chapter IV considers the local remedies rule, and provisions contained in ICSID and CARICOM; Chapter V examines waiver; Chapter VI addresses the principle of *res judicata* and related treaty provisions; and Chapter VII considers the principle precluding double recovery. In each Chapter, consideration is given to whether and to what extent the conduct of an individual or State can, given the operation of those rules, render the other's overlapping claim inadmissible or affect their capacity to recover reparation.

[68] See discussion *infra*.nn567-569;602-604.

Part C (Chapter VIII) addresses countermeasures and self-defence, considering how far State or individual conduct may result in these CPW being invocable by a third (respondent) State to preclude the overlapping claims that might otherwise result. Like Part B, Part C is concerned with overlapping individual and interstate claims, and the possible preclusion of an entity's claims through the operation of rules the application of which depends on the conduct of the other. However, where Part B is largely concerned with rules endeavouring to determine which of two overlapping claims may be brought, Part C is concerned with whether the CPW under consideration may operate to preclude *both* claims.

The Conclusion in Part D affirms that overlapping individual and interstate claims may indeed be curtailed by actions of the other entity possessing an overlapping claim that enliven rules relating to breach, admissibility, or reparation. In particular, it highlights that how far claims may be thus precluded depends heavily on how far States and individuals, and their rights and claims, are "identified" with one another.[69]

[69] Cf. on "identification": Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986) 24, referencing *Reparation for injuries (Adv.Op.)* [1949] ICJ.Rep. 174, 207;214 (Sep.Op.Badawi Pasha); similarly de Aréchaga, 'International Responsibility' in Sørensen (n2) 573; Bowett, *Self-Defence in International Law* (1958) 92-93; also *Barcelona Traction (Belgium v Spain)* [1970] ICJ.Rep. 3 [41] (corporation/shareholder); *infra*.nn297;617-621;1448;1789;2415.

CHAPTER ONE: STATE RESPONSIBILITY

I. Introduction to State responsibility

The international framework regarding State responsibility is reflected in the ARSIWA, which in most important respects codify customary international law.[70] This section provides a brief overview, focusing on four key points. First, as to the *existence* of State responsibility, an 'internationally wrongful act' results from a State's breaching its primary international obligations, and 'entails [its] international responsibility'.[71] Breach results from the State's acting in a manner 'not in conformity with what is required of it by [an] obligation'.[72] Second, as to *who* is responsible, "the State" must operate through individual persons.[73] Nonetheless, States are entities distinct from the members of their population,[74] and not responsible for those individuals' actions as such.[75] Rather, rules of attribution set out when a given individual's acts are treated as the State's.[76] As

[70] Crawford, *GP* (n2) 43 ('in whole or…large part an accurate codification'); generally *ARSIWA*, 74 ('codification and progressive development'). Doubt regarding an article's customary status will be noted.

[71] *ARSIWA*, Arts.1-2; also Barboza, 'Legal Injury' in Ragazzi, *Responsibility* (n4) 8–9; Pellet, 'The Definition of Responsibility in International Law' in Crawford/others, *Responsibility* (n6) 9; Stern, 'The Elements of an Internationally Wrongful Act' in Crawford/others *Responsibility* (n6) 194. On primary/secondary obligations: *supra*.n53.

[72] *ARSIWA*, Art.12.

[73] See Cheng, *General Principles of Law* (1953) 183–184; Jennings and Watts, *Oppenheim's International Law*, (9th edn, 1992) 505-506;540; Condorelli and Kress, 'The Rules of Attribution: General Considerations' in Crawford/others, *Responsibility* (n6) 221; Crawford, *GP* (n2) 113; also Portmann, *Legal Personality in International Law* (2010) 130; Momtaz, 'Attribution of Conduct to the State' in Crawford/others, *Responsibility* (n6) 237; McCorquodale (n1) 283; Jackson, *Complicity in International Law* (2015) 177; *ARSIWA*, 94; Stern (n71) 202; Wittich, 'Direct Injury and the Incidence of the Local Remedies Rule' (2000) 5 Aust.Rev.I&EL 121, 127.

[74] Cheng (n73) 181;184; *ARSIWA*, 91; Aréchaga (n69) 558-559; Portmann (n73) 35-36;cf.32; Morss, *International Law as the Law of Collectives* (2013) 131; Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 Rdc 325, 459-460.

[75] *ARSIWA*, 91; Stern (n71) 202; *infra*.n1979.

[76] *ARSIWA*, 91; generally Arts.4-11, 91-123; Condorelli/Kress (n73) 221; Stern (n71) 202; Cheng (n73) 180-181; cf.Brownlie, *System of the Law of Nations* (1983) 36-37.

Chapter VIII discusses further, those rules identify individuals or groups acting as agents of the State.[77]

Third, as to the *consequences* of State responsibility, Article 28 of the ARSIWA sets out that a State's 'international responsibility' 'involves [certain] legal consequences' in the form of secondary obligations.[78] These are, relevantly,[79] obligations to:

(1) 'cease [the] act, if it is continuing', and 'offer appropriate assurances and guarantees of non-repetition' (Article 30); and
(2) 'make full reparation for the injury caused by the internationally wrongful act' (Article 31).[80]

Finally, while these consequences arise 'automatically' from a State's 'internationally wrongful act',[81] practically-speaking, the State's responsibility must be *invoked*.[82] Invocation consists of making a claim,[83] i.e., asserting, through 'measures of a relatively

[77] Momtaz (n73) 237; *ARSIWA*, 91; Crawford, *Brownlie's Principles of Public International Law* (8th edn, 2012) 542-543 ('organs or agents'; ARSIWA 'eschew…terminology of agency'); also Crawford, *GP* (n2) 125-126; Cheng (n73) 184; Jackson (n73) 178; cf.Crawford, 'First Report on State Responsibility' [1997] 2(1) ILCYB 1 [158],[162]; *infra*.nn1976-1979.

[78] *ARSIWA*, Art.28, 191. Generally Crawford, *GP* (n2) 459ff;480ff; Roucounas (n4) 398-399; Amerasinghe (n14) 103.

[79] Similarly: *ARSIWA*, 192; Barboza (n71) 11. Cf.Stern, 'A Plea for "Reconstruction" of International Responsibility Based on the Notion of Legal Injury' in Ragazzi, *Responsibility* (n4) 97-98;104 (*i.a.* Art.29 continuing performance duty not consequence).

[80] *ARSIWA*, Arts.30-31(1), also 201, referencing *Factory at Chórzow (Merits)* [1928] PCIJ.Rep. SerA.No17, 47.

[81] *Infra*.n120.

[82] Crawford, *GP* (n2) 553; *ARSIWA*, 254.

[83] See *ARSIWA*, 256; Crawford, *GP* (n2) 541; further Nollkaemper (n6) 9.

formal character',[84] that, owing to breach of an international obligation, the secondary obligations of responsibility just discussed (cessation, assurances, and reparation) must be fulfilled.[85] Invocation may be undertaken through 'all forms of lawful dispute settlement',[86] including both judicial and non-judicial claims.[87] The reaching of a settlement is taken herein to attest that responsibility has been invoked.[88]

As to who may invoke a State's responsibility, unless *lex specialis* rules provide otherwise,[89] 'injured' States may, under Article 42 of the ARSIWA, invoke responsibility when they are owed obligations 'individually'.[90] This reflects a bilateral assumption of obligations by one State towards another,[91] akin to under domestic private law.[92] The latter State thus has a 'right' in the Hohfeldian sense.[93]

[84] *ARSIWA*, 256; also Crawford, *GP* (n2) 541; Weiss (n1) 800.

[85] See *ARSIWA*, 254; also Crawford, *GP* (n2) 554-555. Cf. on 'dispute': Tomuschat, 'Article 36' in Zimmerman and others (eds), *The Statute of the International Court of Justice: A Commentary* (2012) 641-643 and authorities; *Ecuador v US (Award)* PCA.Case-2012-5 (29.Sept.2012) [212]-[224]; Roberts, 'Hybrid' (n7) 56.

[86] DADP, 27; also *ARSIWA*, 256; Crawford, *GP* (n2) 541;554.

[87] DADP, 27; similarly *ARSIWA*, 256.

[88] Particularly *infra*.Chs.V;VII.

[89] *ARSIWA*, Art.55 and 255;256 (fn.703).

[90] ibid. Art.42, see 257-260. Generally Crawford, *GP* (n2) 542-546.

[91] Pauwelyn, 'A Typology of Multilateral Treaty Obligations' (2003) 14 EJIL 907, 916.

[92] *Brownlie's* (n77) 16; Roberts, 'Triangular' (n5) 374; Pauwelyn (n91) 909.

[93] I.e., A owes B an obligation; B has corresponding right that A's duty be performed: Hohfeld, *Fundamental Legal Conceptions* (1923) 38; authorities *infra*.nn203;1455. Similarly Nollkaemper (n6) 98-99; Tams, 'Well' (n5) 776; Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 Rdc 217, 231-232 ('bilateralism').

States are also entitled to invoke responsibility vis-à-vis group obligations, in three situations.[94] Pursuant to the rule reflected in Article 48 of the ARSIWA, a 'State other than an injured State' may invoke responsibility for breach of obligations 'owed to a group', including it, in the 'collective interest' (*erga omnes partes* obligations), or owed to 'the international community as a whole' (*erga omnes* obligations).[95] Article 48 provides 'public interest' rules of standing,[96] vis-à-vis obligations more akin to domestic public law rules.[97] States may also claim as 'injured' under Article 42, even where such obligations are concerned, either where breach of an obligation owed to a group 'specially affects' them, or where breach 'radically ... change[s] the position' of a group of State obligees.[98]

In addition to States, other subjects of international law may invoke responsibility in certain circumstances,[99] including, as Chapter II elucidates, individuals.[100]

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[94] See Crawford, *GP* (n2) 546; Pauwelyn (n91) 917-922 ('collective' obligations); also Ruys, 'Sanctions, Retorsions and Countermeasures' (8.Apr.2016) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2760853, 14.

[95] *ARSIWA*, Art.48, see 277-278. Generally Crawford, *GP* (n2) 545-553. While Art.48(2)(b) was 'progressive development' (*ARSIWA*, 279; Crawford, *GP* (n2) 555), *erga omnes (partes)* standing is well-established*:* see ibid.549;551, referencing *Barcelona Traction* (n69) [33]-[34] and see *infra*.Ch.II(III)(B); Weiss (n1) 803-804. Apparently recognising Art.48(2)(b): *Cyprus v Turkey (Just Satisfaction)* ECHR 2014-II 245 [45]-[46], discussed *infra*.nn1801;1904-1907.

[96] Crawford, *GP* (n2) 551; also Crawford, 'Chance, Order, Change' (2013) 365 Rdc 9, 199; Delbrück, '"Laws in the Public Interest"' in Götz, Selmer and Wolfrum (eds), *Liber amicorum Günther Jaenicke* (1998) 17ff; Pauwelyn (n91) 918-919. Generally Nollkaemper (n6) 92-93.

[97] See Pauwelyn (n91) 909 (criminal/constitutional law); Crawford, *GP* (n2) 551 (domestic analogy); Weiss (n1) 808-809; Jessup (n2) 10-12; *Brownlie's* (n77) 17; generally Elliott and Varuhas, *Administrative Law* (5th edn, 2017) 545-568; Endicott, *Administrative Law* (4th edn, 2018) Ch.11; Craig, *Administrative Law* (8th edn, 2016) [25-009],[25-034]-[25-049]; Hessick, 'Standing, Injury in Fact and Private Rights' (2008) 93 Corn.LR 275, 293ff; Brown and Bell, *French Administrative Law* (5th edn, 1998) 166-169;181; Singh, *German Administrative Law in Comparative Perspective* (2001) 216-218 (UK/India/US);cf.214-216;218 (Germany).

[98] *ARSIWA*, Arts.42(b)(i)-(ii), see 257;259-260; Pauwelyn (n91) 919.

[99] See *ARSIWA*, Art.33, 209-210.

[100] *Infra*.Ch.II(I).

II. 'Injury' and the invocation and consequences of responsibility

This Chapter now moves to examine in greater detail the nature of international claims. The analysis is conducted through the prism of 'injury' in the law of State responsibility. The terminology of 'injury' is employed in the ARSIWA vis-à-vis both the consequences of responsibility – with States obliged to make reparation for 'injury' caused by breach[101] – and also invocation, with both 'injured' and not 'injured' States entitled to invoke responsibility under Articles 42 and 48 respectively.[102] However, despite employing the same terminology, as will be shown, the notion of 'injury' in relation to the two is distinct.[103] These different conceptions are significant in examining how far interstate and individual claims may overlap (Chapter II) and whether rules of preclusion might apply (Parts B–C). Consideration is therefore given here to the injury which gives rise to responsibility, which enables States to invoke responsibility, and to which obligations of reparation relate.[104]

A. Legal and factual injury

Beginning with the notion of "injury" generally, the term can, in international law, describe two different concepts.[105] Crawford suggests, first, that 'its natural meaning' is 'harm, material or moral, suffered by the victim as obligee or beneficiary of the obligation

[101] *Supra*.n80.

[102] *Supra*.nn90;95. Also Ruys (n94) 14.

[103] *Infra*.Pts.II(A)-(D) and authorities, particularly Stern (n79) 102-105; Stern (n71) 196-200.

[104] *Infra*.Pts.II(A)-(D) and authorities, particularly Stern *infra*.n115.

[105] For the legal/factual distinction made herein, see, e.g., Tomuschat, 'Individuals' in Crawford/others, *Responsibility* (n6) 985 (distinguishing 'harm in fact' and someone 'injured...in the legal sense'); Paparinskis, 'New' (n8) 640 (entities '(factually) injured' in diplomatic protection); *infra*.n649; Hessick (n97) 280; Garcia-Amador, 'Sixth Report on State Responsibility' [1961] 2 ILCYB 1 [27]-[28]ff,[176]; also *infra*.nn106-107;111. Generally Crawford, *GP* (n2) 55;486-490; Stern (n79); Stern (n71) 194-200.

breached',[106] but acknowledges, second, that '"injury" involves the concept of *iniuria* – that is, infringement of rights or legally protected interests – whereas the term "damage" refers to material or other loss suffered'.[107]

The first meaning of "injury", which might be described as 'factual injury',[108] thus refers to *damage*, or the *loss* caused by particular actions.[109] Such damage can be of different kinds in international law:

> Material damage refers to damage to property or other substantive interests of a state and its nationals which is assessable in financial terms. Moral damage encompasses two distinct concepts … Moral damage to individuals includes such things as individual pain and suffering, loss of loved ones or the personal affront associated with an intrusion into one's home or private life. Moral damage to a state refers to injury which is not financially assessable but amounts to an affront to the state, for example, a violation of its sovereignty or territorial integrity.[110]

In this thesis, the terms "damage" or "loss" are used to refer to such injury of a "factual" nature. The identifiers "material" and "moral" are employed where necessary to distinguish types of damage.

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[106] Crawford, *GP* (n2) 490.

[107] ibid.55. Similarly Brownlie, *System* (n76) 199; also Graefrath, 'Responsibility and Damages Caused' (1984) 185 Rdc 9, 20;35;46-47; ALI, *Restatement of the Law: The Foreign Relations Law of the United States* (3rd edn, 1987) §711, 185 ('"injury"…any loss, detriment, or damage to liberty, property, or other interest...includ[ing]...resulting from violation of customary law or...international agreement protecting [individual] rights or interests'); *Lusitania Cases (US/Germany)* (1923) VII UNRIAA 32, 35; discussion *Aerial Incident of July 27th, 1955 (Israel/US/UK v Bulgaria)* ICJ Pleadings ('*Incident Pleadings*'), 533 (Israel).

[108] Hessick (n97) 280-281; also Tomuschat and Paparinskis, *supra*.n105; Craig (n97) [25-045].

[109] Crawford, *GP* (n2) 55; *ARSIWA*, Art.31(2), 202 and discussion *infra*.nn125-126;170; *Lusitania* (n107) 39, referenced *ARSIWA*, 219; also Brown, *A Common Law of International Adjudication* (2007) 191.

[110] Crawford, *GP* (n2) 486-487; also *ARSIWA*, 202; *Oppenheim's* (n73) 528 (fn.2).

The second kind of "injury" identified above is commonly termed 'legal injury'[111] and is that 'inherent in the violation of [a] right';[112] i.e., 'injury arising from the mere fact of the breach of an international obligation'.[113] As Stern suggests, the ARSIWA's structure is both consistent with, and well explained by, recognising legal injury,[114] which assists in understanding both the consequences of international responsibility and its invocation.[115] The relevance of the distinction between the types of injury to these two aspects of State responsibility is explained in the following three Parts (B)-(D).

B. Existence of responsibility

Responsibility under the ARSIWA arises independently of damage having been caused.[116] As Stern observes, the ILC 'eliminated injury [i.e. factual injury, or damage] as a condition for responsibility, precisely so as to take account of mere breaches of the law'.[117] Unless the primary rule incorporates a damage requirement,[118] it therefore suffices that a State has acted inconsistently with its obligations – causing *legal* injury – for it to have committed an 'internationally wrongful act'.[119]

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[111] E.g., Stern (n71) 199-200; sources *infra*.n113, Barboza (n71) 11; Stern (n79).

[112] Stern (n71) 199 (emphasis removed); generally Crawford, *GP* (n2) 489-490 (discussing, *i.a.*, Stern); Graefrath (n107) 35.

[113] Crawford, *GP* (n2) 487; also Stern (n79) 93 ('immaterial injury inherent in breaches of…law'). Similarly Nollkaemper (n6) 93;95.

[114] See Stern (n79) 98-99;101 ('more coherent way of achieving...same objective'); 105-106; Stern (n71) 197-200.

[115] See discussion Stern (n79) 95-98;100-105; Stern (n71) 198-200.

[116] *ARSIWA*, 84; Crawford, *GP* (n2) 49;57-59; similarly Pellet (n71) 9; Stern (n79) 94;100; Stern (n71) 194; Barboza (n71) 7-9; Graefrath (n107) 35-36; Tams, 'Well' (n5) 766. Cf.*infra*.n851 and authorities.

[117] Stern (n79) 100; also Stern (n71) 194 ('legal injury' the 'natural conclusion' of 'responsibility...aris[ing] as soon as...international obligation...breached');197.

[118] *ARSIWA*, 84; Pellet (n71) 9; see *infra*.n851.

[119] *Supra*.nn71-72;117.

C. Consequences of responsibility

The consequences of responsibility noted above – cessation, assurances and reparation – flow 'automatically' from 'an internationally wrongful act'.[120] As responsibility does not depend on damage,[121] these consequences should also flow from breach alone, and for the Article 30 consequences – cessation and assurances – this is undoubtedly true.[122]

For obligations of *reparation*, Article 31 provides that these arise where 'injury' is present,[123] but whether this means in a legal and/or factual sense is perhaps more complicated than *prima facie* appears.[124] Article 31 outlines that 'injury', in the reparation context, 'includes any damage, whether material or moral, caused by the internationally wrongful act'.[125] With the word 'includes' purposefully used, instead of 'consists of', to denote that 'legal wrong[s]' may occur without damage,[126] one might deduce that 'injury' in this context could mean either.[127] Nonetheless, this thesis contends that while the existence of responsibility depends on breach (i.e. *legal* injury),[128] reparation is rightly

[120] Crawford, *GP* (n2) 553; *ARSIWA*, 202; also 191-192;254; Aréchaga (n69) 533.

[121] *Supra*.nn116-119.

[122] See Stern (n79) 98;102;104-105; Stern (n71) 199-200; Crawford, *GP* (n2) 489; *ARSIWA*, 196 (Art.30 concerns 'restoration and repair of…legal relationship'); Crawford, 'Fourth Report on State Responsibility' [2001] 2(1) ILCYB 1 [32]; Paparinskis, 'New' (n8) 636-637; also Corten, 'The Obligation of Cessation' in Crawford/others, *Responsibility* (n6) 545-546; *infra*.n150.

[123] *Supra*.n80.

[124] See discussion *infra*.nn125-127;148;160ff; also *infra*.Pt.II(D) (vis-à-vis invocation).

[125] *ARSIWA*, Art.31(2). See *infra*.nn126;170.

[126] Crawford, *GP* (n2) 485, citing Crawford, 'FourthRep' (n122) 9 (see [33]).

[127] Cf.Crawford, *GP* (n2) 485-486.

[128] *Supra*.nn116-119.

regarded as responding to damage (i.e. *factual* injury),[129] even if, as noted below, it may simultaneously remedy both.[130]

Article 34 of the ARSIWA explains that '[f]ull reparation for … injury ... shall take the form of restitution, compensation and satisfaction, either singly or in combination'.[131] Restitution requires 're-establish[ing] the situation which existed before the wrongful act';[132] compensation must be paid 'insofar as such damage is not made good by restitution';[133] and satisfaction repairs 'injury ... [that] cannot be made good by restitution or compensation.'[134] As Crawford suggests, these 'forms of reparation' are for 'material and moral damage',[135] namely types of *factual* injury.

Compensation is for 'financially assessable damage',[136] the ARSIWA commentary explaining that this 'exclude[s] compensation for ... "moral damage" to a State, i.e., the affront or injury caused by a violation of rights not associated with actual damage to property or persons'.[137] It covers a State's material damage,[138] as well as

[129] *Infra*.nn131ff; Graefrath (n107) 47.

[130] *Infra*.nn150;159;173-175.

[131] *ARSIWA*, Art.34; Crawford, *GP* (n2) 507.

[132] *ARSIWA*, Art.35.

[133] ibid. Art.36.

[134] ibid. Art.37. The ARSIWA order types of reparation (see Crawford, *GP* (n2) 507-508;509-510; Brown (n109) 191). Different ordering here helps appreciate their relevance to different injury.

[135] Crawford, *GP* (n2) 487; also Barboza (n71) 9; Stern (n71) 199.

[136] *ARSIWA*, Art.36(2); also 219 ('actual losses incurred').

[137] ibid.218; also Brown (n109) 191.

[138] *ARSIWA*, 221; also Barker, 'Compensation' in Crawford/others, *Responsibility* (n6) 604.

material damage to individuals,[139] including to their property and person,[140] the latter also encompassing 'non-material losses' like 'pain and suffering'.[141] Compensation is therefore for *material* damage, which is taken to include individuals' moral damage.[142]

Restitution is also primarily for material damage,[143] as evidenced by compensation usually being an alternative.[144] Restitution can be legal or material,[145] concerning respectively changing 'a legal situation',[146] and acts like returning property or persons.[147] Admittedly, '[t]he result of cessation may be indistinguishable from restitution' in certain cases,[148] notwithstanding the suggestion above that cessation responds to *legal* injury,[149] with restitution 'necessarily including a return to legality'.[150] However, while restitution

[139] See *ARSIWA*, 220.

[140] ibid.223;225ff; Barker (n138) 606-608; generally Brown (n109) 199-208.

[141] Crawford, *GP* (n2) 517; also *ARSIWA*, 223; Barker (n138) 604-605.

[142] See Arangio-Ruiz, 'Second Report on State Responsibility' [1989] 2(1) ILCYB 1 [4],[7]; Barboza (n71) 9; Garcia-Amador, 'State Responsibility: Some New Problems' (1958) 94 Rdc 365, 475-476; Kerbrat, 'Interaction Between the Forms of Reparation' in Crawford/others, *Responsibility* (n6) 580.

[143] See Garcia-Amador, 'Problems' (n142) 475; Barboza (n71) 9; Kerbrat (n142) 580; Barker (n138) 601. Cf.*infra*.nn148ff.

[144] Crawford, 'Third Report on State Responsibility' [2000] 2(1) ILCYB 3 [130]; *ARSIWA*, 219, quoting *Chórzow (Merits)* (n80) 47; Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (1984) 65.

[145] Gray, 'Restitution' in Crawford/others, *Responsibility* (n6) 590; Crawford, *GP* (n2) 511; Graefrath (n107) 77.

[146] Crawford, *GP* (n2) 512; *ARSIWA*, 214-215; Gray, 'Restitution' (n145) 591.

[147] Crawford, *GP* (n2) 465;511; *ARSIWA*, 214-215; also Gray, 'Restitution' (n145) 590.

[148] *ARSIWA*, 197; also Crawford, *GP* (n2) 465; Gray, 'Restitution' (n145) 590; Stern (n79) 104; Barboza (n71) 13-14; Graefrath (n107) 84.

[149] *Supra*.n122.

[150] Stern (n79) 104, referencing Crawford, 'ThirdRep' (n144) [131]; *ARSIWA*, Art.35, *supra*.n132. Similarly Barboza (n71) 13-15.

may thus encompass cessation, the two are not the same.[151] Cessation only applies to continuing breaches,[152] while restitution operates even vis-à-vis terminated obligations,[153] and, where 'wrongful conduct produces broader effects, the reversal of those effects falls within the obligation of restitution'.[154] Cessation therefore responds to breach (i.e. *legal* injury), while restitution is for material damage (i.e. *factual* injury).[155]

Finally, satisfaction:

> is the remedy for those injuries, not financially assessable, which amount to an affront to the State. These injuries are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences.[156]

It therefore remedies a State's *moral* damage (i.e. *factual* injury);[157] examples include acknowledgement, apology, and 'symbolic damages'.[158] Declarations may provide satisfaction, but 'are not intrinsically associated with the remedy'.[159]

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[151] See Crawford, *GP* (n2) 468; cf.Barboza (n71) 13-16; Gray, 'Remedies' in Romano/Alter/Shany, *Adjudication* (n12) 879; Tzanakopoulos, *Disobeying the Security Council* (2011) 143.

[152] Corten, 'Cessation' (n122) 547; *Avena (Mexico v US) (Judgment)* [2004] ICJ.Rep. 12 [148], discussed Crawford, *GP* (n2) 464; also Graefrath (n107) 73-74.

[153] Crawford, 'ThirdRep' (n144) [132].

[154] Crawford, *GP* (n2) 468, citing *Immunities* (n39) [137]; also 465, citing Corten, 'Cessation' (n122) 548; Ruedin, *Exécution Des Arrêts* (2009) [404]; Graefrath (n107) 77; cf.discussion Barboza (n71) 13-15.

[155] See *supra*.nn122;143; also *infra*.nn172;209-212.

[156] *ARSIWA*, 231; also Aréchaga (n69) 572.

[157] *ARSIWA*, 218; also Crawford, *GP* (n2) 527; Garcia-Amador, 'Problems' (n142) 476; Aréchaga (n69) 572; Brown (n109) 192.

[158] *ARSIWA*, 232-233; also Crawford, *GP* (n2) 527-528; Garcia-Amador, 'Problems' (n142) 476; Wyler and Papaux, 'Satisfaction' in Crawford/others, *Responsibility* (n6) 630-633.

[159] *ARSIWA*, 233; also Crawford, *GP* (n2) 529-530; Paddeu, *Justification* (n53) 65. They may repair legal injury: Barboza (n71) 18-19; discussion Garcia-Amador, 'SixthRep' (n105) [57]-[61].

It is sometimes suggested that satisfaction responds to breach, and can thus repair a State's legal injury.[160] However, as Crawford observes, 'the position taken in the ARSIWA is clearly that satisfaction is available to make good moral damage and not to remedy the mere breach of an international obligation.'[161] As he notes, satisfaction is described as 'rather exceptional',[162] awarded consequent on, *inter alia*, violating sovereignty, attacking vessels or aircraft, and mistreating officials or embassies.[163] If moral damage resulted from every breach, satisfaction would not be reserved for such violations, nor be "exceptional".[164] Rather, moral injury to the State, even if 'arising from the very fact of ... breach', must 'amount to an affront';[165] i.e., cause 'offence to [the State's] dignity, honour or prestige'.[166] A State's moral injury is therefore factual in nature.[167]

Factual injury (damage) may thus be material or moral, whether suffered by States or individuals. Reparation – restitution, compensation and satisfaction – is for these kinds

[160] See Crawford, *GP* (n2) 487, citing, *i.a.*, *Rainbow Warrior Affair* (1990) XX UNRIAA 215 [122], also quoted *ARSIWA*, 232 ('moral or legal damage'); discussion Arangio-Ruiz (n142) [14],[106],[111], with authorities; Barboza (n71) 17; Wyler/Papaux (n158) 626;627-628, quoting (627 (fn.18)) Crawford, 'ThirdRep' (n144) [181] ('"moral damage"...the fact of...breach'); also Garcia-Amador, 'SixthRep' (n105) [16]-[17],[42]. Cf.Graefrath (n107) 43;46.

[161] Crawford, *GP* (n2) 487-488; also 58.

[162] ibid.488;527; *ARSIWA*, 231.

[163] *ARSIWA*, 232; also Wyler/Papaux (n158) 625; Garcia-Amador, 'SixthRep' (n105) [45]ff; Wittich (n73) 156-157.

[164] Similarly Barboza (n71) 17-18; cf.Wittich (n73) 155-157.

[165] *Supra*.n156; also Crawford, *GP* (n2) 488.

[166] Arangio-Ruiz (n142) [14] (though apparently considering offence flows from legal injury; report discussed *RW.Affair* (n160) [122]); also Barboza (n71) 17-18; Wittich (n73) 155-156; Wyler/Papaux (n158) 625 ('classic approach');cf.626-628.

[167] Cf.*supra*.nn108-110.

of damage.[168] Crawford has suggested that legal injury thus has no place in the ARSIWA,[169] *inter alia* because '[i]t would not be logical [under Article 31] to require "full reparation for ... injury" including "legal injury" where none of the available forms of reparation can address that type of damage.'[170] Nonetheless, as noted above, Article 31 uses the word 'includes', suggesting that legal injury is implicitly acknowledged.[171] As Stern suggests, it is cessation and assurances of non-repetition that respond to such injury.[172] Moreover, even if reparation is strictly for factual injury (damage), such injury presupposes legal injury (breach),[173] and, as already noted vis-à-vis restitution,[174] reparation may simultaneously repair both.[175] Thus, obligations of reparation arise vis-à-vis damage (i.e., *factual* injury), even if the ARSIWA recognise breach (or *legal* injury) as enlivening responsibility.[176] Later Chapters elucidate the importance of these conceptions of breach, damage, and reparation to the potential operation of rules of preclusion vis-à-vis overlapping individual-interstate claims.

[168] *Supra*.nn110;135; also Rivier, 'Inter-American Mechanisms' in Crawford/others, *Responsibility* (n6) 747-748.

[169] See Crawford, *GP* (n2) 487-491; cf.Nollkaemper (n6) 93.

[170] Crawford, *GP* (n2) 488. Further *infra*.n180. Cf.Barboza (n71) 9.

[171] *Supra*.nn125-127.

[172] Stern (n79) 104-105; Stern (n71) 199-200. Similarly Graefrath (n107) 47;72-73; also Crawford, *GP* (n2) 489.

[173] Stern (n71) 199; *supra*.nn80;106-107.

[174] *Supra*.nn148-150.

[175] *Supra*.n150; Barboza (n71) 18 (reparation also remedies legal injury); similarly Stern (n71) 199-200.

[176] *Supra*.Pt.II(B)-(C).

D. Invocation of responsibility

As foreshadowed above, States may invoke responsibility when they are 'injured' (under Article 42) and, in certain circumstances, when they are not 'injured' (under Article 48).[177] Again, the ARSIWA make no distinction here between legal and factual injury.[178] However, unlike vis-à-vis reparation, and importantly for later Chapters, this section suggests that States invoking responsibility are responding to breach of an obligation owed to them (i.e. *legal* injury).[179]

Admittedly, as Crawford suggests, 'if injury [under the ARSIWA] did include "legal injury" due to the mere fact of breach, then what the ARSIWA define as a "State other than an injured State" [i.e. under Article 48] would suffer "injury", a terminological inconsistency.'[180] However, a focus on terminology is misplaced since, if damage (factual injury) is not required for international responsibility to arise,[181] it is seemingly possible for both "injured" States (under Article 42) and States other than injured States (under Article 48) not to be "injured" in this factual sense.[182] A State is, for instance, "injured" under Article 42(a) if a bilateral treaty obligation owed to it is breached, regardless of

[177] *Supra*.nn90;95.

[178] Cf.*supra*.Pt.II(A); *infra*.nn179;180ff. Cf.Wittich (n73) 127-128.

[179] *Infra*.nn181ff; particularly Stern, *infra*.nn185;187;189; also Nollkaemper (n6) 93 (States 'invoke responsibility if...legally injured'). Cf., vis-à-vis individuals, *infra*.nn1463;2007-2009.

[180] Crawford, *GP* (n2) 488.

[181] *Supra*.n116.

[182] Gaja, 'The Concept of an Injured State' in Crawford/others, *Responsibility* (n6) 942; also *infra*.n188; Crawford, *GP* (n2) 547 (on Art.42(b)(ii)); discussion Arangio-Ruiz, 'Fourth Report on State Responsibility' [1992] 2(1) ILCYB 1 [129]. Stern (n71) 194 makes a related point (*supra*.n117), but apparently considers Art.42 States must be *factually* injured: ibid.200; similarly Stern (n79), quoted *infra*.n185.

material damage[183] (with moral damage not, as noted, presumed).[184] Thus, even if Article 42 "injured" States generally suffer legal injury together with material or moral damage,[185] damage is not essential: they need not necessarily be *factually* injured.[186] And for Article 48 States, as Stern suggests, it is 'legal injury' that explains why they may invoke responsibility at all.[187]

There is, undoubtedly, a distinction in the *kinds* of obligations with which Articles 42 and 48 are concerned.[188] However, in both cases, the invocation of responsibility responds to breach of an international obligation.[189] Under Article 42, the obligation is bilateral, or the injured State is treated as being in that position.[190] Under Article 48, some suggest that States have only a 'performance interest' in the relevant obligation,[191] which

[183] See Gaja, 'Concept' (n182) 942; also *infra*.n188. E.g., *Oil Platforms (Iran v USA) (Judgment)* [2003] ICJ.Rep. 161 [108]-[109],[120] (third-State vessel attacks allegedly violating bilateral treaty obligations), discussed Vermeer-Künzli, 'A Matter of Interest' (2007) 56 ICLQ 553, 572; *Air Services Case (USA v France)* (1978) XVIII UNRIAA 417 [39] ('vacated' orders '*would* inflict...injury'). Generally on bilateral treaties: *ARSIWA*, 257; on domestic law: Hessick (n97) 279. Cf.Stern (n71) 196;200.

[184] *Supra*.nn160-166; Barboza (n71) 17-18.

[185] Stern (n79) 102 (Art.42 States 'injured both from…legal perspective (legal injury) and in other ways (material and/or moral injury)'; Art.48 States 'only suffer legal injury'); similarly Stern (n71) 200; Crawford quoted *infra*.n206; also Gaja, 'Concept' (n182) 942; Wyler/Papaux (n158) 627.

[186] *Supra*.nn182-184.

[187] Stern (n71) 196-198; cf.Crawford, *GP* (n2) 490; Stern (n79) 96;102; also Barboza (n71) 21; *infra*.Pt.II(E).

[188] Gaja, 'Concept' (n182) 942; Wyler/Papaux (n158) 626 ('Instead of being identified by the nature and…characteristics of…damage suffered, the concept of the "injured" State derives from…characteristics of the obligation breached'); also Tams, 'Well' (n5) 773. Generally *supra*.nn90ff; *infra*.nn190ff. On public/private rights distinction: Thomas, *Public Rights, Private Relations* (2015). 114ff; Hessick (n97) 279-281.

[189] See Stern (n79) 96;102; Stern (n71) 196-197;198-199; also Wittich (n73) 128-129; Gaja, 'Concept' (n182) 942; similarly Weiss (n1) 803. While disagreeing with Stern's use of "legal injury", Crawford accepts Art.48 States 'are legally affected by...breaches of obligations *erga omnes*': Crawford, *GP* (n2) 489.

[190] Gaja, 'States Having an Interest in Compliance with the Obligation Breached' in Crawford/others, *Responsibility* (n6) 958; Crawford, *International Law as an Open System* (2002) 337-340, also 317-318; Crawford, 'Multilateral' (n74) 445-446.

[191] Crawford, 'Multilateral' (n74) 434; also 446.

is owed not to them but to the 'collective'.[192] Accordingly, States would have a purely 'procedural right' to invoke responsibility.[193] By definition, however, obligations *erga omnes (partes)* are owed *to* someone: either the international community or a group of States.[194] As there is no 'legal person, the international community',[195] such obligations are better considered owed to the States *within* the relevant group or community,[196] as well as, sometimes, to other entities.[197] For instance, while human rights treaties embody obligations *erga omnes partes*,[198] they are nonetheless still treaties, 'creat[ing] rights and obligations between their parties to the effect that any State party is obliged as against any other State party to perform its obligations'.[199] Such treaties may 'not give rise *only* to a set of bilateral obligations',[200] and may even create individual rights.[201] However, as

[192] Crawford, 'Chance' (n96) 202; also Crawford, 'Multilateral' (n74) 432-439;442-446; Peters (n1) 475. Cf.Crawford, *System* (n190) 172;327-329.

[193] Crawford, 'Multilateral' (n74) 437; Crawford, 'ThirdRep' (n144) [85].

[194] See *ARSIWA*, Art.48(1); Gaja, 'Compliance' (n190) 957; also Crawford, 'Multilateral' (n74) 436; Crawford, 'FirstRep' (n77) [123],[125]; Crawford, *System* (n190) 331;cf.349. State obligations to citizens are sometimes conceptualised as 'owed to the public as a whole': Elliott/Varuhas (n97) 547; also Peters (n1) 423-424. However, States have domestic 'power…to create unilateral rights and obligations…bind[ing] third parties without their consent' (Brown/Bell (n97) 182), while interstate obligations are largely consensual: e.g., White and Abass, 'Countermeasures and Sanctions' in Evans, *IL* (n1) 537; Brunnée, 'Consent' in *MPEPIL* (2010) [1],[5],cf.[16]-[18],[20]; cf.Peters (n1) 427. Highlighting relevance of public law's nature to individuals' international rights: Roberts, 'Triangular' (n5) 367;373-375; also Peters (n1) 168; further *infra*.n1393;Ch.VI(V)(B).

[195] Crawford, 'Multilateral' (n74) 447; also Crawford, *System* (n190) 344-345; *Brownlie's* (n77) 17; Dawidowicz, 'Public Law Enforcement without Public Law Safeguards?' (2007) 77 BYBIL 333, 342; Gaja, 'General' (n22) 25-31; Gaja, 'Compliance' (n190) 958. Indeed 'there may be no primary obligee': Crawford, 'Multilateral' (n74) 443; also Crawford, *System* (n190) 338.

[196] Gaja, 'Compliance' (n190) 957-958; *infra*.n202; similarly Simma (n93) 310;314-315;370; Vermeer-Künzli, 'Interest' (n183) 579; Wittich (n73) 128; also Crawford, 'FirstRep' (n77) [117]; Crawford, *System* (n190) 338 ('privy'); 349-350; cf.Gaja, 'General' (n22) 25.

[197] See Crawford, *System* (n190) 349-352 (cf.352);358;410-411; Gaja, 'General' (n22) 24-25; Simma (n93) 234; Weiss (n1) 804; Crawford, 'Multilateral' (n74) 446-447; e.g, individuals vis-à-vis human rights: Crawford, *System* (n190) 333; Gaja, 'General' (n22) 25; Borelli and Olleson, 'Obligations Relating to Human Rights and Humanitarian Law' in Crawford/others, *Responsibility* (n6) 1195; *infra*.n675.

[198] *Infra*.n420.

[199] Simma (n93) 370, discussion 364-375; similarly Borelli/Olleson (n197) 1184-1185; also Paddeu, *Justification* (n53) 279 (fn.301); Roucounas (n4) 398-399; Roberts, 'Hybrid' (n7) 34.

[200] Gaja, 'Compliance' (n190) 959 (emphasis added).

Judge Weeramantry has suggested, '[a]n *erga omnes* right is ... a series of separate rights *erga singulum* ... With the violation by any State of the obligation so lying upon it, the rights enjoyed *erga omnes* become opposable *erga singulum* to the State so acting.'[202] In Hohfeldian terms, a State's right has still been violated by breach of an obligation owed *erga omnes (partes)*.[203]

Rather than considering Article 48 States as not injured but nonetheless able to invoke responsibility, they are therefore better considered 'merely States which are injured differently'.[204] Whenever a State invokes responsibility, under either Article 42 or Article 48, it does so because it has suffered *legal* injury: an obligation owed to it has been breached.[205] Thus used, "legal injury" is simply a 'convenient shorthand' describing breach entitling invocation of responsibility.[206] Which entity suffers such injury turns on who holds the "right" breached.[207]

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[201] *Supra*.n197; *infra*.nn675;2189.

[202] *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ.Rep 90, 172 (Diss.Op.Weeramantry), quoted Crawford, *System* (n190) 325; criticised Crawford, 'The Relationship between Sanctions and Countermeasures' in Gowlland-Debbas (ed), *United Nations Sanctions and International Law* (2001) 63-64.

[203] *Supra*.n93; cf.Crawford, 'ThirdRep' (n144) [84].

[204] Stern (n71) 197; also 196. See Crawford, *GP* (n2) 489-490 (discussing Stern's approach). Cf.Sicilianos, 'Countermeasures in Response to Grave Violations' in Crawford/others, *Responsibility* (n6) 1138-1139.

[205] *Supra*.n189 and authorities; cf.Nollkaemper (n6) 172-173.

[206] Crawford, *GP* (n2) 489, see 489-490 ('Although a convenient shorthand...what is at issue [under Art.48] is...breach of an obligation...not caus[ing] material or moral damage'). Crawford's concern about revisiting 'the outdated bilateral conception of relations between States' (ibid.490) is overstated: see Stern (n71) 197-198; Stern (n79) 100-101. Crawford also objects that using "injury" legally 'conflicts with its natural meaning' (Crawford, *GP* (n2) 490; see *supra*.n106), but see *supra*.n107.

[207] Nollkaemper (n6) 93;98-99; also Peters (n1) 167-169;172-173, discussing *ARSIWA*, 209-210;192-193; Graefrath (n107) 47; Crawford, *GP* (n2) 548-549.

E. Conclusion

In sum, recognising legal injury helpfully[208] shows that States 'can be injured in different ways, material, moral or legal', and that different remedial consequences follow.[209] Article 42 and 48 States may claim cessation and assurances in response to breach of obligations owed to them (legal injury).[210] An 'injured' Article 42 State may, *if* it has suffered damage (factual injury),[211] additionally claim restitution, compensation and/or satisfaction, as appropriate.[212] However, as becomes important when considering rules of preclusion in later Chapters, Article 48 States never suffer material or moral damage and cannot claim reparation for themselves,[213] but only 'in the interest of the injured State or of the beneficiaries of the obligation breached'.[214] And even if individuals might also incur 'legal injury' through breach of their rights,[215] obligations are owed on

[208] See Stern (n79) 105 ('useful'). Ultimately, the outcome under the ARSIWA is unaffected: Stern (n71) 197-198; also Crawford, *GP* (n2) 489-490; *supra*.n114.

[209] Stern (n71) 198-199; also Stern (n79) 101-102;103-105; Arangio-Ruiz (n182) 6-7 (cessation/non-repetition protect 'primary legal relationship', other remedies 'erase...injurious consequences…material or moral'). Cf.Nollkaemper (n6) 172-173.

[210] Stern (n71) 198-200; similarly Stern (n79) 102; Crawford, *GP* (n2) 489-490.

[211] *Supra*.nn182-186.

[212] Stern (n71) 199;200; Stern (n79) 102. See *supra*.nn131-135.

[213] See *supra*.nn185-187;206; *infra*.n873; Wittich (n73) 128-129; Nollkaemper (n6) 94; also Amerasinghe (n14) 418-419; cf.Gaja, 'Compliance' (n190) 961.

[214] *ARSIWA*, Art.48(2)(b); also Stern (n79) 105; Gaja, 'Concept' (n182) 942; Crawford, *GP* (n2) 67; Tams, 'Well' (n5) 781; *infra*.nn874;1654-1655;1907.

[215] Nollkaemper (n6) 98-99; also Peters (n1) 167;172-173;338;388; Crawford, *GP* (n2) 548-549; *infra*.n675.

the interstate level.[216] One or more States must, therefore, also be entitled to invoke responsibility for that breach.[217]

III. Circumstances precluding wrongfulness

The six CPW contained in the ARSIWA, where applicable to a given situation, allow States to raise 'a shield against an otherwise well-founded claim for the breach of an international obligation'.[218] While relying on such circumstances, States are viewed as not in breach of their obligations at all.[219] Consequently, the secondary obligations of responsibility, including to make reparation, do not arise, and no invocation can be possible.[220]

This simplistic explanation unduly discounts scholarly discussion regarding how different CPWs operate,[221] particularly whether certain CPW are better conceptualised as 'justifications', where the relevant conduct is legal, and others as 'excuses', vis-à-vis

[216] See Amerasinghe (n14) 47;152;164;308-309; Paparinskis, 'Countermeasures' (n5) 288-291; Thirlway, *The Law and Procedure of the International Court of Justice* (2013) 1554; Parlett (n1) 359-365;370-372, discussing *i.a.* (earlier edition) McCorquodale (n1) 286; also 292; White/Abass (n194) 537; Jessup (n2) 17; Peters (n1) 169;cf.475; Roberts, 'Hybrid' (n7) 34; discussion *infra*.nn671;677.

[217] See Peters (n1) 169 ('dual claim');175;317;338; Paparinskis, 'Countermeasures' (n5) 288-292; Paparinskis, 'New' (n8) 640-641; Roberts, 'Hybrid' (n7) 16-18;32;34-37;39-40; Mazzeschi, 'Impact on the Law of Diplomatic Protection' in Kamminga and Scheinin (eds), *The Impact of Human Rights Law on General International Law* (2009) 218-219; Paddeu, *Justification* (n53) 279 (fn.301); McCorquodale (n1) 285; Fitzmaurice, *LP* (n69) 687; Amerasinghe (n14) 47;152;164;308-309; *infra*.n348. Cf.Vermeer-Künzli, 'As If: The Legal Fiction in Diplomatic Protection' (2007) 18 EJIL 37, 57.

[218] *ARSIWA*, 160.

[219] Szurek, 'The Notion of Circumstances Precluding Wrongfulness' in Crawford/others, *Responsibility* (n6) 434; Crawford, *GP* (n2) 275; Paddeu, *Justification* (n53) 108;cf.37-52;61-62 (ILC unclear).

[220] See Szurek (n219) 435-436; also Paddeu, *Justification* (n53) 64-65;71-72;82;107-110; Crawford, *GP* (n2) 275. Generally *supra*.Ch.I(II)(B)-(D).

[221] See Crawford, *GP* (n2) 278-280; Paddeu, *Justification* (n53), particularly 23-25;35-52;100-128; Chs.2-3;5-6 (self-defence/countermeasures);Ch.8 (necessity).

which certain consequences of responsibility might still follow.[222] Article 27 of the ARSIWA outlines, for instance, that compensation may be payable for 'material loss' caused by breach, notwithstanding reliance on a CPW.[223] This thesis does not address this issue.[224] Assuming that CPWs preclude breach, but not necessarily reparation,[225] Part C considers two CPW – countermeasures and self-defence – vis-à-vis overlapping individual and interstate claims, asking how far they may be relied upon against a State or individual with effects upon the claims of the other.[226]

[222] Crawford, *GP* (n2) 319;278-280; and extensive discussion Paddeu, *Justification* (n53), particularly 11-12;23;49-50;61-66;77-94;100-128; generally Chs.1-3 (distinction); Chs.4-7 (different CPWs); Szurek (n219) 435-436; Lowe, 'Precluding Wrongfulness or Responsibility' (1999) 10 EJIL 405.

[223] *ARSIWA*, Art.27(b), also 190; Crawford, *GP* (n2) 318; Szurek (n219) 436-437; Paddeu, *Justification* (n53) 77-94.

[224] For comprehensive discussion: Paddeu, *Justification* (n53).

[225] *Supra*.nn219-223.

[226] *Supra*.n43. Cf.Crawford, *GP* (n2) 319-320, discussing ILC, 'Fifty-First Session' (1999) 1 ILCYB 1, 174; Paddeu, *Justification* (n53) 79;92-93.

IV. Conclusion

Having considered the basis for responsibility, its consequences and invocation by States, and setting out how CPW are taken to operate, the next Chapter turns to outlining when individuals may invoke responsibility and how far their claims may overlap with those brought by States. Parts B and C then consider whether various rules relating to admissibility, reparation, and CPW may operate to preclude one or both of such overlapping claims.

CHAPTER TWO: OVERLAPPING INDIVIDUAL AND INTERSTATE CLAIMS

This Chapter outlines the circumstances in which overlapping interstate and individual claims may arise.[227] It begins by considering the mechanisms through which individuals may bring 'international claims' invoking the responsibility of States,[228] before turning to possible overlaps with interstate invocation of responsibility.[229] Chapters III-VII then examine how the bringing and settling of claims may result in overlapping claims being precluded, while Chapter VIII considers the operation of CPWs. As highlighted in the Introduction, 'overlap' signifies that both individuals and States may, *prima facie*, invoke a given State's responsibility for violations of international law arising from the same factual circumstances.[230]

I. Individual invocation of responsibility

For individuals, lacking the full complement of State rights under international law,[231] no general secondary rules exist for invoking State responsibility.[232] The ARSIWA contain no such rules,[233] and are inapplicable 'to obligations of reparation to

[227] Similarly considering overlapping claims before principles precluding multiple claims: Shany (n4) Ch.4; Shany (n7) Pt.I, particularly 34-37 (individual/interstate overlap). On 'overlap': *supra*.nn12-13; *infra*.n230.

[228] Generally, those 'based on a rule of international law': Nollkaemper (n6) 9; cf.*Illinois Central Railroad v Mexico* (1926) 20 AJIL 794 (US-Mex.Cl.Comm.) 796-797; *infra*.nn290ff.

[229] *Supra*.nn83-98;227.

[230] *Supra*.nn12-13;62-64.

[231] E.g., on the subject/object distinction: *Oppenheim's* (n73) 846-847; Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht* (E.Lauterpacht ed, 1970) 136-137 ('traditional view');141-143; Parlett (n1) 14-15;26-30;36-37;353-363; also McCorquodale (n1) 281-282; Peters (n1) 14;42-44; Higgins, *Themes and Theories* (2009) 75; Bollecker-Stern, *Le Préjudice Dans La Théorie de La Responsibilité Internationale* (1973) 94-95; Mugerwa (n2) 249;265-266.

[232] See *ADM v Mexico (Award)* ICSID Case-ARB(AF)/04/05 (21.Nov.2007) [118] (under custom 'only…States may invoke…responsibility'), referencing *ARSIWA*, Art.33(2); also ibid.209-210; Crawford, *GP* (n2) 549.

[233] *ARSIWA*, 210;254; Crawford, *GP* (n2) 541;549; *supra*.n6.

the extent that these arise towards or are invoked by' non-States,[234] with Article 33(2) providing a 'without prejudice' rule vis-à-vis 'any right, arising from the international responsibility of a State, which may accrue directly to any' non-State.[235]

In disengaging the ARSIWA from responsibility to individuals, the commentary nonetheless acknowledges that individuals may sometimes invoke responsibility and claim reparation 'on [their] own account and without the intermediation of any State'.[236] As discussed in later Chapters,[237] individuals may potentially either invoke responsibility for breach of primary international obligations owed to them,[238] or for the fulfilment of secondary obligations, including of reparation, resulting from breach of interstate obligations.[239] Regardless of whose rights are involved, individual claims are brought for breach, through various mechanisms.[240] As will be seen in the following sections, these are usually established by treaty and are particularly prevalent in the investment and human rights fields,[241] though other contexts are also relevant.[242]

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[234] *ARSIWA*, 193.

[235] ibid. Art.33(2); also Crawford, *GP* (n2) 548-549; Weiss (n1) 799; Peters (n1) 172-173.

[236] *ARSIWA*, 210. Similarly Parlett (n1) 96;339; Weiss (n1) 815; Nollkaemper (n6) 98.

[237] *Infra*.nn1463;2007-2009.

[238] See *ARSIWA*, 210; Peters (n1) 172-173; authorities *infra*.nn1463;2007-2009.

[239] See Roucounas (n4) 399; authorities *infra*.nn1463;2007-2009. Cf.Peters (n1) 167-169.

[240] Similarly Roberts, 'Triangular' (n5) 372-373; *ARSIWA*, 209-210.

[241] Crawford, 'Part' (n6) 932; *ARSIWA*, 210; Crawford, *GP* (n2) 549; Hess (n7) 137. Cf.*infra*.nn290ff.

[242] Generally Weiss (n1) 798;809-814; Tomuschat (n105) 986-990; PICT, *Courts and Tribunals*, <http://www.pict-pcti.org/> (13.Nov.2017); Romano/Alter/Shany, *Adjudication* (n12); also Shany (n7) 5-7; Jessup (n2) 18; *infra*.Pt.(C).

A. Investment law

Nationals of a State party to an investment treaty are often able to bring claims for breach of treaty obligations against another State party before an international tribunal.[243] Such mechanisms are commonly found in BITs,[244] operating within or outside the ICSID framework,[245] and increasingly in free trade agreements,[246] such as NAFTA,[247] as well as in other multilateral agreements, such as the ECT.[248] Similar mechanisms are found in agreements establishing *ad hoc* adjudicatory bodies like the IUSCT.[249] These procedures enable individuals to invoke State responsibility for breach of treaty-based standards,[250] and to claim reparation for resulting damage.[251]

[243] E.g., Crawford, *GP* (n2) 587-588; Weiss (n1) 812-813; Parlett (n1) 103-119; Roberts, 'Triangular' (n5) 354;364-365;382; Schreuer, 'Investment Arbitration' in Romano/Alter/Shany, *Adjudication* (n12) 300-302;310-311; Peters (n1) 283;285; McCorquodale (n1) 291-294.

[244] E.g., Model BITs: UK (2008) Art.8; US (2012) Art.24; Germany (2008) Art.10, reproduced McLachlan, Shore and Weiniger, *International Investment Arbitration* (2nd edn, 2017); Crawford, *GP* (n2) 589-590; Parlett (n1) 104.

[245] See ICSID, Art.25; generally Schreuer, 'IA' (n243) 298-299.

[246] Leathley, *International Dispute Resolution in Latin America* (2007) 26-33.

[247] NAFTA Arts.1116;1117; similarly CAFTA, Art.10.16. See Schreuer, 'IA' (n243) 302-304; Baudenbacher and Clifton, 'Courts of Regional Economic and Political Integration Agreements' in Romano/Alter/Shany, *Adjudication* (n12) 263-265. NAFTA is considered under Pt.(A) not Pt.(C) as 'not aim[ing] at…deep integration': ibid.263. Cf.Peterson, 'NAFTA Parties Unveil Text' *IA.Rep.* (1.Oct.2018) (restricting investor-State arbitration).

[248] ECT, Art.26; Schreuer, 'IA' (n243) 304.

[249] CSD, Art.II(1); Parlett (n1) 99.

[250] See *ARSIWA*, 210; Schreuer, 'IA' (n243) 297;308-309.

[251] Generally Parlett (n1) 104-105; Schreuer, 'IA' (n243) 310.

B. Human rights

Individuals may invoke responsibility in the human rights field through three kinds of mechanism.[252] First, certain treaties provide access to a Court to determine, with binding effect, allegations of State party violations vis-à-vis individuals, and whether reparation is due: the ECtHR,[253] AfCtHPR,[254] and, at least indirectly, the IACtHR.[255] Second, both the AmCHR and ACHPR additionally establish Commissions to which individuals may complain about violations.[256] These Commissions make recommendations and specify reparation.[257] Finally, other mechanisms, including under various UN treaties, allow bodies to receive petitions from individuals claiming to be victims of a State's violation of its obligations under those treaties.[258] These treaty bodies

[252] Generally Tomuschat (n105) 986-988; Crawford, *GP* (n2) 585-586; Parlett (n1) 307-337; Weiss (n1) 809-811; McCorquodale (n1) 290; Mackenzie and others, *Manual on International Courts and Tribunals* (2010) Pt.V.

[253] ECHR Arts.34;41; discussion Tomuschat (n105) 986-988; *Oppenheim's* (n73) 1001; Parlett (n1) 307-312;331-335; Greer, 'Europe' in Moeckli and others (eds), *International Human Rights Law* (3rd edn, 2018) 447-450;451-458.

[254] ACHPR.Prot., Arts.3;5(3);27(1);34(6); generally Parlett (n1) 330-331; Heyns and Killander, 'Africa' in Moeckli/others, *IHRL* (n253) 476-478; Gherari, 'African Mechanisms' in Crawford/others, *Responsibility* (n6) 781.

[255] Although only accessible to the Commission/States (AmCHR, Art.61(1)), individuals 'ha[ve] full standing' after 'case…submitted': Antkowiak, 'The Americas' in Moeckli/others, *IHRL* (n253) 432. Moreover, the Court may require, *i.a.*, 'compensation…to the injured party' (AmCHR, Art.63(1)). See Tomuschat (n105) 987-988; *Oppenheim's* (n73) 1028-1029; Parlett (n1) 328-330; Ebobrah, 'International Human Rights Courts' in Romano/Alter/Shany, *Adjudication* (n12) 229;240; Rivier (n168) 740-760; Weiss (n1) 810; Leathley (n246) 70; Antkowiak (n255) 432-435. Cf.*infra*.n261.

[256] AmCHR Arts.44;50(3); see Antkowiak (n255) 429-430; Leathley (n246) 62;65; ACHPR, Arts.55-58; see Heyns/Killander (n254) 471-474, particularly 472 ('accepts…complaints'); Parlett (n1) 328-331.

[257] AmCHR Arts.50(3);51(2); Antkowiak (n255) 430; Heyns/Killander (n254) 473-474; Gherari (n254) 787-788 (recommendations/prescribing reparation).

[258] ICCPR.Prot., Arts.1-2; ICESCR.Prot., Arts.1-2; CEDAW.Prot., Arts.1-2; UNCAT, Art.22(1); CERD, Art.14(1); CRPD.Prot., Art.1; CRC.Prot., Arts.1;5; ICPMW, Art.77(1); CPED, Art.31(1); generally *Oppenheim's* (n73) 1001; Connors, 'United Nations' in Moeckli/others, *IHRL* (n253) 387-388;393-397; Tomuschat (n105) 986-988; Crawford, *GP* (n2) 585-586; Weiss (n1) 809-810; Parlett (n1) 312-320. On ILOFOAC: Mackenzie/others (n252) [16.3],[16.5]; Shany (n7) 48-49.

express their views, and/or make recommendations for action.[259] Certain treaty bodies also make reparations findings.[260]

These mechanisms have differences, particularly insofar as some do not involve binding judicial determinations.[261] Nonetheless, as Chapter I outlined, responsibility is invoked when a claim of breach is made.[262] All of these mechanisms allow individuals to allege human rights violations, and are generally regarded as enabling invocation of State responsibility.[263]

C. Other fields

While investment law and human rights are perhaps the best-known examples, responsibility may be invoked by individuals in various other fields.[264] For present

[259] ICCPR.Prot., Art.5(4) ('views'); similarly UNCAT, Art.22(7); ICPMW, Art.77(7); CPED, Art.31(5); ICESCR.Prot., Art.9 ('views...recommendations'); similarly CEDAW.Prot., Art.7(3); CRC.Prot., Art.10(5); CERD, Art.14(7)(b) ('suggestions…recommendations'); similarly CRPD.Prot., Art.5; also HRC.Res.5/1, UN.Doc.A/HRC/5/21 (18.Jun.2007) [85] ('complaint procedure'), discussed Parlett (n1) 321-322; Connors (n258) 381-382; HRC 'special procedures', including WGAD: ibid.377-381; generally HRC website: http://www.ohchr.org/en/hrbodies/hrc/pages/hrcindex.aspx.

[260] Tomuschat (n105) 987-988; Peters (n1) 176; HRC, 'General Comment No.33' (2008) UN.Doc.CCPR/C/GC/33 [12] quoted *infra*.n263, also [20]; *Bradshaw*, *infra*.n263; generally Connors (n258) 395.

[261] See Crawford, *GP* (n2) 586 ('"views" expressed by treaty monitoring bodies...non-binding'); Tomuschat (n105) 988 (no 'binding effect...recommendations or suggestions'); Parlett (n1) 316-317;320; Nollkaemper (n6) 177-178. Cf.Connors (n258) 393 ('quasi-judicial');395 ('not…legally binding'), referencing Gen.Comm.No.33 (n260) [11]; Shany (n7) 16; Amerasinghe (n14) 304; Ebobrah (n255) 236-237; Gherari (n254) 788.

[262] *Supra*.nn83-87.

[263] *ARSIWA*, 210; similarly Weiss (n1) 809-811; *Oppenheim's* (n73) 1001; Crawford, *GP* (n2) 549; Tomuschat (n105) 986-987; also Gen.Comm.No.33 (n260) [12] ('decisions…state…Committee's findings on…violations alleged...and...remedy'); *Bradshaw v Barbados*, DocCCPR/C/51/D/489/1992 (29.Jul.1994). [5.3], cited Ebobrah (n255) 237; *Musicue v Colombia*, Case-9853, Rep.4/98 (IACHR, 7.Apr.1998) [19] ('proceedings...determination as to State responsibility'). Cf.Rivier (n168) 753-754.

[264] Cf.Crawford, *GP* (n2) 592 ('Other fields…consular relations'); *ARSIWA*, 210.

purposes, three may be noted.[265] First, tribunals have, at various times, been established to address large numbers of individual, including war-related, claims.[266] Individual claims for reparation were brought, for instance, before post-WWI mixed arbitral tribunals ('MATs').[267] Importantly, the claims belonged to those individuals.[268] Claims were made before the UNCC for reparation resulting from Iraq's internationally unlawful invasion of Kuwait.[269] Many were likewise 'individual and corporate claims' belonging to those claimants, notwithstanding their filing by governments.[270] Further, while most claims for violations of international law before the EECC were interstate,[271] provision was made for certain individual claims, albeit filed by the States.[272]

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[265] Cf.UNCLOS, Arts.187;292 (prompt release/Area-related contractors), discussed Murphy, 'International Judicial Bodies for Resolving Disputes between States' in Romano/Alter/Shany, *Adjudication* (n12) 186-187; also Shany (n4) 60-63; NAAEC, Art.14, discussed Weiss (n1) 811-812; Shany (n7) 221-222. These are not specifically considered: UNCLOS, Art.292(2) because States must consent to individuals claiming 'on [their] behalf' (ITLOS Rules, Art.110), meaning no international overlap is possible (Murphy (n265) 186-187; cf.Shany (n4) 61-63 (domestic); *infra*.n1445); NAAEC, Art.14 because it concerns 'fail[ure] to effectively enforce [*domestic*] environmental law'.

[266] Generally: Kokott, 'The Exhaustion of Local Remedies' (2004) 69 ILA.Rep.Conf. 606, 609; Murphy, Kidane and Snider, *Litigating War: Arbitration of Civil Injury by the Eritrea-Ethiopia Claims Commission* (2013) 42-49; Holtzmann and Kristjánsdóttir, *International Mass Claims Processes* (2007); van Houtte, Delmartino and Yi, *Post-War Restoration of Property Rights Under International Law*, vol.1 (2008) Ch.2; Holtzmann, 'Mass Claims' in *MPEPIL* (2008); Demirkol, 'Does an Investment Treaty Tribunal Need Special Consent for Mass Claims?' (2013) 2 Camb.JI&CL 612, 626-627.

[267] Generally Parlett (n1) 72-73; e.g., Treaty of Versailles, Art.297(e), quoted *infra*.n1236, Art.231 (Germany responsible for 'all…loss and damage' of Allies/nationals resulting from 'aggression'); cf.Houtte/Delmartino/Yi (n266) 15-16; *Ethiopia's Claim 4 (Decision.7)* (2007) 135 ILR 251 [22].

[268] Parlett (n1) 73; Schreuer, *Decisions* (n2) 329-330; *Shimoda v Japan* (1963) 32 ILR 626 (Tokyo.DC) 637-638; *infra*.n1238.

[269] Parlett (n1) 101. Although 'administrative', UNCC rulings followed UNSC violation findings: Petrović, 'The UN Compensation Commission' in Crawford/others, *Responsibility* (n6) 850; van Houtte, Das and Delmartino, 'The United Nations Compensation Commission' in de Greiff (ed), *The Handbook of Reparations* (2006) 324;327; also *Decision.7* (n267) [30]; Gowlland-Debbas, 'Introduction' in Gowlland-Debbas (n202) 11.

[270] Houtte/Delmartino/Yi (n266) 62; Houtte/Das/Delmartino (n269) 333; also Caron, 'International Claims and Compensation Bodies' in Romano/Alter/Shany, *Adjudication* (n12) 293. Cf.Parlett (n1) 102.

[271] *Eritrea's Damages (Fin.Award)* (2009) XXVI UNRIAA 505 [3] ('almost entirely [State] claims...rather than claims on behalf of...nationals'),[25]; Houtte/Delmartino/Yi (n266) 49; Murphy/Kidane/Snider (n266) 57, *infra*.n1824.

[272] Murphy/Kidane/Snider (n266) 57 ('claims remained those of...nationals'); Peters (n1) 208.

Second, various regional agreements establishing common markets allow individual claims.[273] Perhaps most well-known are individual claims under EU law for breaches of Member States' treaty obligations,[274] including human rights violations.[275] The Andean Court of Justice also receives individual applications regarding alleged breach of Member State obligations under the Cartagena Agreement.[276] The Caribbean Court of Justice ('CCJ') hears certain individual cases concerning 'interpretation and application' of the CARICOM treaty.[277] In MERCOSUR,[278] individuals may claim regarding violations of the Treaty of Asunción and related agreements and decisions,[279] while the System of Central American Integration[280] provides individuals with access to the Central American Court of Justice ('CACJ') to determine disputes concerning that system.[281] In Africa, the COMESA Court of Justice hears individual claims, including

[273] Generally Baudenbacher/Clifton (n247), particularly 251-252;269;273; Mackenzie/others (n252) [9.1.1]-[10.3.14]; Tomuschat (n105) 989-990; Shany (n7) 53.

[274] Generally Baudenbacher/Clifton (n247) 252-255; Simma and Pulkowski, '*Leges Speciales* and Self-Contained Regimes' in Crawford/others, *Responsibility* (n6) 153; Weiss (n1) 813-814; McCorquodale (n1) 293; *infra*.nn305-306. For space reasons, BCJ/EFTA Court are omitted: see PICT (n242); Baudenbacher/Clifton (n247) 256-260; Mackenzie/others (n252) [9.2.1]-[9.2.10].

[275] See Ebobrah (n255) 232-233; Greer (n253) 461-463;cf.461 ('rare').

[276] Cartagena Protocol, Art.25; generally Leathley (n246) 121-127, particularly 122-123; Baudenbacher/Clifton (n247) 260-262. On the Andean Community: Leathley (n246) 107;115-120.

[277] Chaguaramas Treaty, Art.211, also Art.222. See *TLC v Guyana* [2009] CCJ 1 [18]-[20]; *Time for Action: Report of the West Indian Commission* (1992) 500. Generally Baudenbacher/Clifton (n247) 268-271; Leathley (n246) 130;134-135;142-150.

[278] Mercado Común del Sur: Leathley (n246) 151. See Asunción Treaty, Art.1; generally Leathley (n246) 152; Baudenbacher/Clifton (n247) 265-268.

[279] Olivos Protocol, Art.39; see Leathley (n246) 172-173; also 155;159-162; Baudenbacher/Clifton (n247) 266-267. Cf.*infra*.n533.

[280] See Tegucigalpa Protocol, Arts.1ff. Generally Leathley (n246) Ch.9.

[281] See CACJ Statute (interstate disputes (Arts.22(a);23), including consistency with 'Law of Central American Integration' (Art.22(c)), open to 'any interested party'); generally Leathley (n246) 203-209.

regarding alleged Member State treaty violations;[282] the EACJ hears claims concerning the East African Community Treaty's 'interpretation and application',[283] including individual claims against Member States;[284] and the ECOWAS Court of Justice[285] is open to, *inter alia*, individuals alleging human rights violations.[286] Finally, the South African Development Community (SADC), has a Tribunal[287] which was, until suspension of its operation in 2012,[288] competent to consider, *inter alia*, individual claims concerning 'interpretation and application of the Treaty'.[289]

Third, while claims before domestic courts would not normally be considered international,[290] tending rather to be for breach of *domestic* law,[291] domestic courts do sometimes 'decide international claims: that is, claims that in whole or in part are based on a rule of international law'.[292] Because of how domestic law incorporates international law,[293] 'the same international legal standards' might be applied domestically as

[282] COMESA Treaty, Art.26; generally PICT (n242).

[283] EAC Treaty, Art.27. Art.9 establishes the Court.

[284] EAC Treaty, Art.30; also Arts.34;44; Heyns/Killander (n254) 467 (no 'explicit jurisdiction' but Court addresses 'human rights issues...constitut[ing] [treaty] violations').

[285] Established by ECOWAS Treaty, Art.15.

[286] ECOWAS Protocol, Art.4; also Art.6; Heyns/Killander (n254) 467; Ebobrah (n255) 233-234.

[287] SADC Treaty, Arts.9;16.

[288] See Heyns/Killander (n254) 467; *infra*.n1372.

[289] SADC Protocol, Arts.14-15.

[290] Nollkaemper (n12) 524;526-527; Nollkaemper (n6) 9. Cf.Higgins, *Themes* (n231) 80.

[291] See Shany (n4) 79-80;142; generally 2-4;79-86 (dualism); *Chevron/Texaco v Ecuador (Third.Int.Award. Jurisdiction/Admissibility)* PCA.Case-2009-23 (27.Feb.2012) [4.76]; cf.Tzanakopoulos (n34) 137-144;149.

[292] Nollkaemper (n6) 9, also 44; similarly Nollkaemper (n12) 526-527; Tzanakopoulos (n34) 144; also Shany (n4) 5;10-13; Weiss (n1) 811 (ATS).

[293] See Tzanakopoulos (n34) 142-143; Nollkaemper (n6) 12;44;69-81;117-120;124-129;232-234; Shany (n4) 12;82-85.

internationally.[294] More generally, 'domestic law may … coincide, in substance, with international norms'.[295] In either case, claims against a State for violation of such domestic obligations may be considered an invocation of responsibility,[296] enlivening potential overlap with claims before international courts.[297] Such claims may be brought before the allegedly responsible State's own courts,[298] or sometimes before third-State courts,[299] with 'traditional barriers' like State immunity now often 'removed or considerably relaxed'.[300]

Domestic court claims may be brought in the fields already considered, including in investment law,[301] and vis-à-vis human rights.[302] Indeed, human rights treaties

[294] Shany (n4) 13; also 85-86;93;104; Nollkaemper (n12) 528.

[295] Tzanakopoulos (n34) 143; also 144; Parlett (n1) 279; Shany (n4) 86; Nollkaemper (n12) 527-528.

[296] See Nollkaemper (n6) 7-10;44-45;98-106;110-112;117-118;131-132;Ch.8, particularly 166-173;190;213;224;233; Nollkaemper (n12) 526-527;528; Shany (n4) 13;97;105;141-142;143 ('substance of…rights and remedies…not…source of validity');145; McCorquodale (n1) 293; Peters (n1) 49-50;184;485-488; similarly Tzanakopoulos (n34) 143-144;146-147;148-149;cf.149-150; *infra*.n306.

[297] Shany (n4) 97;Chs.1;4; Schreuer, *Decisions* (n2) 329 ('Identity of Claims'); Nollkaemper (n12) 527-528; Nollkaemper (n6) 247-251; *infra*.n448. E.g., *Dahanayake v Sri Lanka*, DocCCPR/C/87/D/1331/2004 (25.Jul.2006) [6.5] (constitution ICCPR 'equivalent'); *Tasheku v Nigeria*, Case-ECW/CCJ/RUL/12/12 (ECOWASCJ, 12.Jun.2012) [16] (constitutional rights 'analogous'); *Waste Management v Mexico (Award)* (2000) 121 ILR 29 [28] ('duplication of proceedings'); *Azurix v Argentina (Annulment)* ICSID Case-ARB/01/12 (1.Sept.2009) [109]. Generally *infra*.Chs.IV-VII.

[298] Nollkaemper (n6) 15;cf.50-52;96-97; Higgins, *Problems and Processes* (1994) 51; Shany (n4) 13; e.g., *infra*.nn301-307. Cf.Nollkaemper (n12) 528.

[299] E.g., *infra*.n310.

[300] Shany (n4) 13; similarly Higgins, *Themes* (n231) 80-81; Hess (n7) 235. Cf.Benvenisti, 'Individual Remedies for Victims of Armed Conflicts in the Context of Mass Claims Settlements' in Hestermeyer and others (eds), *Coexistence, Cooperation and Solidarity* (2012) 1094; Nollkaemper (n6) 15.

[301] Weiss (n1) 813; Hess (n7) 234-237; Tzanakopoulos (n34) 153 ('"fork in the road" provision[s]'); similarly Schreuer, 'IA' (n243) 306; Shany (n4) 36-37;152-153;157; Nollkaemper (n6) 32 (fn.55);37-38; Parlett (n1) 100-101, referencing *Dallal v Bank Mellat* (1985) 75 ILR 151 (EWHC), overlapping (see 158-159) with *Dallal v Bank Mellat* (1983) 75 ILR 126 (IUSCT). On local remedies: Tzanakopoulos (n34) 152; Schreuer, 'IA' (n243) 305; Nollkaemper (n12) 529; Shany (n4) 27-31; Schreuer, *The ICSID Convention: A Commentary* (2nd edn, 2009) 416; Amerasinghe (n14) 269-274; Douglas, *The International Law of Investment Claims* (2009) 29-30.

[302] Shany (n4) 10; Parlett (n1) 279; Nollkaemper (n6) 29;36-37;39;42;91;127-129; cases *supra*.n297.

commonly require individuals to have exhausted local remedies before bringing an international claim,[303] meaning that the international claim's 'substance' must have been litigated domestically.[304] Many regional treaties also envisage domestic-court claims: EU law claims, for example, invoke State responsibility for treaty breach,[305] even if originally filed domestically,[306] while other treaties require local remedy exhaustion.[307] Domestic law claims have also arisen from the same circumstances as individual claims before MATs,[308] the UNCC,[309] and the EECC.[310] Various other violations of international law could at least potentially give rise to domestic proceedings.[311] In this thesis, individual claims before domestic courts will, accordingly, be considered to invoke State

[303] See ECHR, Art.35(1); ICCPR.Prot., Arts.2;5(2)(b); CERD, Art.14(7)(a); ICESCR.Prot., Art.3(1); CEDAW.Prot., Art.4(1); UNCAT, Art.22(4)(b); CRC.Prot., Art.7(5); ICPMW, Art.77(3)(b); CPED, Art.31(2)(d); CRPD.Prot., Art.2(d); AmCHR, Art.46(1)(a); ACHPR, Art.56(5); ACHPR.Prot., Art.6(2). Generally Amerasinghe (n14) 64-83, particularly 74-77; also Shany (n4) 29; Tomuschat (n105) 986-987; Nollkaemper (n12) 527;529; Nollkaemper (n6) 26-27;36-37.

[304] *Guzzardi v Italy* (1980) ECHR SerA.No39 [71]-[72], cited Shany (n4) 30;138; *Vojnović v Croatia*, DocCCPR/C/95/D/1510/2006 (30.Mar.2009) [7.7]; similarly *Elettronica Sicula S.pA (US v Italy) (Judgment)* [1989] ICJ.Rep. 15 [59]. Generally Amerasinghe (n14) 319-321; DADP, 73; Crawford, *GP* (n2) 583; Tzanakopoulos (n34) 153; *infra*.nn551-556;843-845.

[305] Weiss (n1) 813-814;815; also Weiss, 'Trade and Investment Law' in Sacerdoti and others (eds), *General Interests of Host States in International Investment Law* (2014) 76.

[306] See Shany (n4) 11;16;33-34;97, referencing TFEU (now) Art.267; also Greer (n253) 461; Peters (n1) 483;489; *Karoussiotis v Portugal* ECHR 2011-II 15 [73]-[74]; similarly Leathley (n246) 123 (Cartagena Protocol, Art.30).

[307] COMESA Treaty, Art.26; SADC Protocol, Art.15(2).

[308] *Factory at Chórzow (Jurisdiction)* [1927] PCIJ.Rep. SerA.No9, 10 (Germano-Polish MAT/Polish courts); *Certain German Interests* [1925] PCIJ.Rep. SerA.No6, 20, discussed Shany (n4) 42-43; examples *infra*.n1445.

[309] See Houtte/Das/Delmartino (n269) 367-368; Shany (n4) 159; *infra*.n449.

[310] *Nemariam v Ethiopia (No.1)* (2003) 135 ILR 671 (USCADC), discussed *infra*.nn1322-1325; also Murphy/Kidane/Snider (n266) 57.

[311] Generally Shany (n4) Ch.1; Nollkaemper (n6) 7-9;27ff and authorities throughout; Tzanakopoulos (n34) 141-142; *infra*.n448.

responsibility where appropriate, and particularly where they overlap with interstate claims, to which we now turn.[312]

II. Interstate invocation of responsibility

Particularly as interstate claims commonly 'originate in injuries to private individuals',[313] it is perhaps unsurprising that such claims may overlap with those brought by individuals.[314] Chapter I outlined that interstate claims are brought pursuant to the rules reflected in ARSIWA Article 42 ('injured' States) or Article 48 (for violation of *erga omnes* (*partes*) obligations).[315] In outlining the extent of possible overlap with individual claims, it is helpful to further subcategorise Article 42 claims, for, as Chapters III-VII establish, the application of various rules of preclusion vis-à-vis overlapping individual and interstate claims often depends on what type of overlap is involved, and the type of overlap is in turn commonly reflected in what kind of interstate claim is brought.[316]

First, 'injured' States may exercise 'diplomatic protection',[317] being:

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[312] Generally *supra*.n36; *infra*.nn448-453.

[313] Lauterpacht (n231) 293-294; also *Mavrommatis Palestine Concessions* [1924] PCIJ.Rep. SerA.No2, 12, quoted *infra*.n640. Cf.Ratliff, '*Parens Patriae:* An Overview' (2000) 74 Tul.LR 1847,1857.

[314] Generally *infra*.Pt.III; authorities *supra*.nn6;12-13;22; also Jessup (n2) 137. Overlap in international criminal law (e.g., Shany (n4) 10-11;34-36; Shany (n7) 9;39-40) is omitted as not involving overlapping invocations of State responsibility.

[315] *Supra*.nn90;95.

[316] Cf.Shany (n7) 35 (only diplomatic protection overlaps, providing individual-interstate 'competition'); also 37; *infra*.Chs.III(IV);IV(III);V(I)-(II);VI(V);VII(II). Similarly Roberts, *infra*.n361; *infra*.n371.

[317] *ARSIWA*, 242, referencing *Barcelona Traction* (n69) [33]; also Gaja, 'Concept' (n182) 944 ('bilateral obligations'); Crawford, 'ThirdRep' (n144) [97],[100]; Vermeer-Künzli, 'Interest' (n183) 577; DADP, 26;87. Cf.Crawford, *GP* (n2) 566.

> the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State ... .[318]

Diplomatic protection claims are commonly based on primary rules protecting individuals' 'person or property in accordance with an international minimum standard'.[319] The individual in respect of whose injury the State claims must be its national,[320] and must exhaust any available local remedies before the claim is brought.[321] Conventionally, the State 'assert[s] its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law',[322] and is, pursuant to a 'fiction', 'deemed' to be injured as a result of the individual's injury.[323] Diplomatic protection claims are thus considered 'indirect', with the State injured only 'through its national',[324] and reparation is usually 'an indemnity corresponding to the damage which the nationals of the injured State have suffered'.[325]

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[318] DADP, Art.1; also authorities *infra*.nn641-643.

[319] Dugard, 'Diplomatic Protection' in Crawford/others, *Responsibility* (n6) 1051; also DADP, 22-23; Crawford, *GP* (n2) 568; Paparinskis, 'Countermeasures' (n5) 279; Borchard, *The Diplomatic Protection of Citizens Abroad* (1915) 349; *Brownlie's* (n77) 613-622; *Oppenheim's* (n73) 910-922; *infra*.nn817ff.

[320] DADP, Art.3, 30-31; also *Oppenheim's* (n73) 512.

[321] DADP, Art.14, 70-76; Dugard, 'DP' (n319) 1061; Shany (n4) 27-30.

[322] *Mavrommatis* (n313) 12; also *Barcelona Traction* (n69) [78],[87]; *Reparations* (n69) 181-182; *Nottebohm Case (Liechtenstein v Guatemala)* [1955] ICJ.Rep. 4, 24; Amerasinghe (n14) 45-47; DADP, 25; Dugard, 'DP' (n319) 1052; Dugard, 'First Report on Diplomatic Protection' [2000] 2(1) ILCYB 205 [36],[62]; Borchard (n319) 18;353; Peters (n1) 390-391; Meron, 'The Incidence of the Rule of Exhaustion of Local Remedies' (1959) 35 BYBIL 83, 88; Tomuschat (n105) 985; Aréchaga (n69) 573; Garcia-Amador, 'Report' (n2) [98]-[100].

[323] DADP, 25; also Dugard, 'DP' (n319) 1052; Dugard, 'FirstRep' (n322) [12],[36],[61],[67]; Vermeer-Künzli, 'Fiction' (n217) 39-40;60; Amerasinghe, *Diplomatic Protection* (2008) 21-23; *infra*.Ch.IV(I)(C).

[324] DADP, 74; also Clapham (ed), *Brierly's Law of Nations* (7th edn, 2012) 269; Wittich (n73) 129; Borchard (n319) 351. See, widely quoted, Vattel, *The Law of Nations* (1867) 161: '[w]hoever uses a citizen ill, indirectly offends the state', cited, *i.a.*, DADP, 25; Borchard (n319) 351; Peters (n1) 390.

[325] *Chórzow (Merits)* (n80) 27-28, cited DADP, 97-98; Peters (n1) 171; also Bennouna, 'Preliminary Report on Diplomatic Protection' [1998] 2(1) ILCYB 309 [22]-[23]; *Brierly's* (n324) 256; *Restatement* (n107) 347;

By contrast, States may bring 'direct' injury claims,[326] 'without the involvement of one of the victim State's nationals',[327] and without exhausting local remedies.[328] In such cases, 'it is State prerogatives that are at stake', with the State 'affect[ed] ... in its status as an independent personality';[329] 'the injured State represents principally its own interests rather than the interests of its nationals'[330] and 'has a distinct reason of its own' to claim.[331]

Third, interstate claims may be 'mixed'.[332] This terminology envisages "direct" State claims brought concurrently with diplomatic protection,[333] given that '[a] single set of facts giving rise to international legal proceedings may contain elements of both'; indeed 'most cases of direct injury contain ... elements of diplomatic protection'.[334] The DADP outline that claims not 'brought preponderantly on the basis of an injury to a

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Aréchaga (n69) 574-575; *Diallo (Guinea v DRC) (Compensation)* [2012] ICJ.Rep. 344, 391 (Sep.Op.Greenwood) (human rights).

[326] On direct/indirect claims: DADP, 74-76; also Borchard (n319) 353 (direct 'violation of...rights affecting the collectivity or people as a whole'; indirect 'violation of [citizens'] rights'); 357;362;384; Wyler/Papaux (n158) 628. Direct/indirect refers to *who* is affected (Wittich (n73) 129, citing *i.a.* Garcia-Amador, 'SixthRep' (n105) [30]; also Aréchaga (n69) 577; ILC, 'Fifty-Third Session' (2001) 1 ILCYB 1, 146 (Pellet)), not other potential uses (as to which: Wittich (n73) 122-129), including vis-à-vis direct/indirect damage, pertaining to causation (see ibid.122-125; Aréchaga (n69) 568-569; *ARSIWA*, 204; cf.Graefrath (n107) 96).

[327] Wittich (n73) 129. Cf.Amerasinghe (n14) 146; *infra*.Ch.IV(III)(B).

[328] DADP, Art.14(3), 74; Meron (n322) 84; Wittich (n73) 121.

[329] *Certain Property (Liechtenstein v Germany)* ICJ.Pleadings, Obs.Liechtenstein [6.27].

[330] Meron (n322) 84-85, quoted Amerasinghe (n14) 160.

[331] DADP, 74. Similarly Meron (n322) 88.

[332] DADP, 74; Wittich (n73) 157. Cf.Aréchaga (n69) 577 ('Composite claims').

[333] See Aréchaga (n69) 577 ('state...claim on its own behalf simultaneously with...claim on behalf of…nationals'); DADP, 74; also Thirlway (n216) 1549;1554; Wittich (n73) 170. Cf.*Liechtenstein's Pleadings* (n329), Obs.Liechtenstein [6.30] ('same conduct' breaches 'concurrence of different rules').

[334] Meron (n322) 85-86, quoted Amerasinghe (n14) 160; similarly DADP, 74; Thirlway (n216) 1554.

national' are "direct", with no need to exhaust local remedies.[335] The claims are then 'regarded as a unity' rather than 'split into [their] constituent elements'.[336]

Claims brought pursuant to Article 42 may thus be of three kinds. By contrast, as Chapter I foreshadowed, Article 48 claims concern *erga omnes* obligations – those 'owed to the international community as a whole'[337] – and *erga omnes partes* obligations, protecting a group of States' 'collective'[338] or 'common' interest.[339] These are different from diplomatic protection claims,[340] with standing depending not on nationality but on being part of the international community,[341] or relevant group of States (such as treaty parties),[342] and pursuing the 'collective' interest.[343] Nonetheless, as Chapter I noted, States might be 'injured' under Article 42 where they are 'specially affected' by breach of

[335] DADP, Art.14(3), discussed 74-76; also Meron (n322) 86; Amerasinghe (n14) 160;164; Wittich (n73) 157; cf.136.

[336] Meron (n322) 86, quoted Amerasinghe (n14) 160; also 150; Wittich (n73) 157;162;170; Thirlway (n216) 1554-1555.

[337] *ARSIWA*, Art.48(1)(b); also *Barcelona Traction* (n69) [33].

[338] *ARSIWA*, Art.48(1)(a), 276; also Vermeer-Künzli, 'Interest' (n183) 577-579.

[339] *Obligation to Prosecute or Extradite (Belgium v Senegal) (Judgment)* [2012] ICJ.Rep. 422 [68],[69], discussed Crawford, 'Chance' (n96) 203-204.

[340] See Mazzeschi (n217) 224 (distinguishing 'wide'/'strict' diplomatic protection (emphasis removed)); Vermeer-Künzli, 'Interest' (n183) 556-561;564-579; Dugard, 'Diplomatic Protection' in *MPEPIL* (2009) [52]; Gaja, 'Is a State Specially Affected When Its Nationals' Human Rights Are Infringed?' in Vohrah and others (eds), *Man's Inhumanity to Man* (2003) 382;375-376, quoting *Barcelona Traction* (n69) [33]; Gaja, 'The International Court of Justice's Approach to Injuries Suffered by Individuals' (Oxford, 8.May.2014) <https://podcasts.ox.ac.uk/international-court-justices-approach-injuries-suffered-individuals>; ILC, 'Fifty-Second Session' (2000) 1 ILCYB 1, 43-44 (Gaja); DADP, 87-89; Kato, 'The Role of Diplomatic Protection' in Komori and Wellens (eds), *Public Interest Rules of International Law* (2009) 198;202-204.

[341] Dugard, 'MPEPIL' (n340) [52]; Vermeer-Künzli, 'Interest' (n183) 557;566-567;576;578; Gaja, 'Affected' (n340) 375-376; Mazzeschi (n217) 230-231.

[342] *Armed Activities (DRC v Uganda) (Judgment)* [2005] ICJ.Rep.168 (Sep.Op.Simma) [35]-[37], discussed Vermeer-Künzli, 'Interest' (n183) 567-568;576; Mazzeschi (n217) 229-230; also Amerasinghe (n14) 69-70; Lauterpacht (n231) 299-300.

[343] *ARSIWA*, 276; *infra*.n417; also Gaja, 'Compliance' (n190) 961; Crawford, *GP* (n2) 551.

an *erga omnes (partes)* obligation, including if their nationals are victims.[344] In cases concerning nationals, States then have alternative routes for invoking responsibility: under Article 48 or through diplomatic protection.[345] The distinction is important for later Chapters, particularly, as Chapter VII highlights, for reparations purposes.[346]

III. Overlapping claims

Interstate claims in all of these categories may overlap with individual claims in the investment, human rights, and other fields discussed in Part I(A).[347]

A. Investment law

Beginning with investment law, States, including an investor's State of nationality, may claim for treaty breach in the same circumstances as investors.[348]

First, States might claim under the same treaty as an investor, with BITs,[349] and multilateral agreements such as NAFTA[350] and the ECT,[351] as well as that establishing the

[344] See Mazzeschi (n217) 227-228;229-231; Gaja, 'Compliance' (n190) 958; ILC, '52nd' (n340) 66 (Simma); also Gaja, 'Injuries' (n340); Tams, *Enforcing Obligations* Erga Omnes *in International Law* (2005) 134-135; cf.Gaja, 'Affected' (n340) 379-382; generally *supra*.n98; *ARSIWA*, Art.42(b)(i), cf.279; *Oppenheim's* (n73) 5; cf.*Prosecute/Extradite* (n339) [70] (left open); Gaja, 'Concept' (n182) 943-944; also Crawford, 'Multilateral' (n74) 428 (fn.241).

[345] Mazzeschi (n217) 227-228;231-232; Crawford, *GP* (n2) 587; ILC, '52nd' (n340) 66 (Simma) ('two sets of rules at…disposal'); also Vermeer-Künzli, 'Interest' (n183) 555;579-581.

[346] *Infra*.nn1904-1907.

[347] Similarly *supra*.nn6-8;12-22. Cf.*supra*.nn264;316.

[348] Generally Roberts, 'Hybrid' (n7) 7;67 ('overlap'); Paparinskis, 'Countermeasures' (n5) Pt.III(B)-(D), 282 ('overlapping claims');297-298. Cf.*infra*.n367. On 'parallel' claims: ibid.287;289;291-296;333; similarly Paparinskis, 'New' (n8) 620;640-641; Roberts, 'Hybrid' (n7) 16-17;35;40-41.

[349] E.g., Model BITs: UK (2008) Art.9; US (2012) Art.37(1); Germany (2008) Art.9, reproduced McLachlan/Shore/Weiniger (n244).

IUSCT,[352] commonly containing, in addition to investor-State dispute resolution clauses, provisions for the arbitration of *interstate* disputes concerning their 'interpretation' and/or 'application'.[353] Second, States might claim for breach of customary international law obligations regarding the treatment of aliens,[354] which the treaty-based standards invoked by individuals tend substantially to reflect.[355] Finally, States might claim pursuant to *different* treaties but in circumstances potentially overlapping with investor-State claims: for instance, FCN treaties generally allow interstate claims regarding obligations akin to those in investment law.[356] Moreover, interstate WTO proceedings may concern similar issues as investor-State claims,[357] as evidenced by concurrent WTO and investor-State claims being brought against Australia concerning tobacco plain packaging,[358] against

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[350] NAFTA, Art.2004; discussion Baudenbacher/Clifton (n247) 263-264.

[351] ECT, Art.27.

[352] CSD, Art.II(3).

[353] Roberts, 'Hybrid' (n7) 6-7; Parlett (n1) 104; Potestà, 'State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties' in Boschiero and others (eds), *International Courts and the Development of International Law* (2013) 754; Berman (n18) 72; Douglas (n301) 2-6; Bernasconi-Osterwalder, 'State-State Dispute Settlement in Investment Treaties' *IISD Best.Pract.Ser.* (Oct.2014) 3;7; Trevino, 'State-to-State Investment Treaty Arbitration' (2014) 5 JIDS 199, 199-201; Potestà, 'Towards a Greater Role for State-to-State Arbitration' in Lalani and Lazo (eds), *The Role of the State in Investor-State Arbitration* (2015) 250;253-254; Recanati, 'Diplomatic Intervention and State-to-State Arbitration as Alternative Means for the Protection of Foreign Investments' in Sacerdoti/others, *General* (n305) 425.

[354] Recanati (n353) 426, referencing, *i.a.*, *Barcelona Traction* (n69); generally *supra*.n319.

[355] Spiermann (n58) 205.

[356] Recanati (n353) 425;426-431; Roberts, 'Hybrid' (n7) 2;7; Sacerdoti, 'Diplomatic Conciliation of Investment Disputes' in Cremona and others (eds), *Reflections on the Constitutionalisation of International Economic Law* (2014) 405-408; e.g. *Interhandel (Switzerland v US) (Prel.Obj.)* [1959] ICJ.Rep. 6, 24; *ELSI* (n304) [48].

[357] Authorities *infra*.nn358-360; Leathley (n246) 32; Weiss (n305) 87-88; Gourgourinis, 'Reviewing the Administration of Domestic Regulation in WTO and Investment Law' in Baetens (ed), *Investment Law Within International Law* (2013) 299-305; Shany (n7) 8;49-50; also Shany (n4) 56-60. While remedies are WTO-specific, State responsibility is usually invoked: Gomula, 'Responsibility and the World Trade Organization' in Crawford/others, *Responsibility* (n6), particularly 793-795;797-801.

[358] Hartmann, 'When Two International Regimes Collide' (2017) 21 UCLAJILFA 204, particularly 204 ('overlapping disputes'); 224-225;228-230; Weiss (n305) 87-88. See *Australia-Plain Packaging Requirements Applicable to Tobacco Products-Panel.Rep.* (28.Jun.2018) WT/DS435/R;WT/DS441/R; WT/DS458/R;WT/DS467/R (WTO); *Philip Morris v Australia (Jurisdiction/Admissibility)* PCA.Case-2012-12 (17.Dec.2015) (investor-State) [588] and [178] (legislation). Although not a national, Philip Morris

Mexico in the context of US-Mexico disputes regarding Mexico's imposition of corn syrup taxes,[359] and against the US in the context of US-Canada disputes concerning the softwood lumber trade.[360]

Regarding the type of potential overlap,[361] while investment law obligations are not owed *erga omnes*,[362] interstate claims pursuant to 'interpretation' and/or 'application' clauses can encompass diplomatic protection claims.[363] Such claims have been brought under FCN treaties,[364] and, in *Italy/Cuba*, a BIT.[365] Those particular claims did not overlap with individual proceedings.[366] However, despite suggestions that diplomatic

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reportedly supported interstate claims: McCabe CLC, 'Australia's Plain Packaging Laws at the WTO' <http://untobaccocontrol.org/kh/legal-challenges/australias-plain-packaging-laws-wto/> (3.Oct.2017).

[359] Ewing-Chow, 'Thesis, Antithesis and Synthesis' (2007) 30 UNSWLJ 548, 550-552; Pauwelyn, 'Adding Sweeteners to Softwood Lumber' (2006) 9 JIEL 197,198-199;200-201; Losari and Ewing-Chow, 'A Clash of Treaties' (2015) 16 JWIT 274, 285-295; Parlett (n1) 114-118; Paparinskis, 'Countermeasures' (n5) 335-336. See *Mexico-Tax Measures on Soft Drinks-Panel.Rep.* (7.Oct.2005) WT/DS308/R; *Mexico-Tax Measures on Soft Drinks-App.Bod.Rep.* (6.Mar.2006) WT/DS308/AB/R (WTO); *ADM* (n232); *Corn Products* (n14); *Cargill v Mexico (Award)* ICSID Case-ARB(AF)/05/2 (18.Sept.2009) (investor-State); also Crawford, 'Chance' (n96) 218-220; Shany (n7) 55; *infra*.nn2004ff.

[360] Pauwelyn (n359) 198-199;200-201. E.g. *US-Final Countervailing Duty Determination Certain Softwood Lumber from Canada-App.Bod.Rep.* (19.Jan.2004) WT/DS257/AB/R; *US-Final Countervailing Duty Determination Certain Softwood Lumber from Canada-Recourse by Canada to Article 215-App.Bod.Rep.* (5.Dec.2005) WT/DS257/AB/RW (WTO, against US); *Canfor v US (Prel.Qu.)* UNCITRAL (6.Jun.2006) [54]ff (investor-State); Shany (n4) 59; *infra*.Ch.V(II)(C)(v).

[361] Cf.*infra*.n371, particularly Roberts, 'Hybrid' (n7) 6-10 ('typology of State-to-State claims').

[362] Paparinskis, 'Countermeasures' (n5) 331; also Paparinskis, 'New' (n8) 623; Roberts, 'Hybrid' (n7) 38; Gaja, 'Concept' (n182) 944; cf.Peters (n1) 319-321.

[363] E.g., *LaGrand (Germany v US) (Judgment)* [2001] ICJ.Rep. 466 [42]; *Mavrommatis* (n313) 15-16;29; Roberts, 'Hybrid' (n7) 7; Parlett (n1) 104-105; Amerasinghe (n323) 340; Amerasinghe (n14) 275; Potestà, 'Potential' (n353) 756;758-759; Potestà, 'Republic of Italy v Republic of Cuba' (2012) 106 AJIL 341, 345; Bernasconi-Osterwalder (n353) 7-10; Potestà, 'Role' (n353) 256-259;261-262; Trevino (n353) 206.

[364] *ELSI* (n304) [48]-[52]; *Interhandel* (n356) 28-29; Roberts, 'Hybrid' (n7) 7; Paparinskis, 'Countermeasures' (n5) 290; Recanati (n353) 425; Potestà, 'Italy/Cuba' (n363) 345.

[365] *Italy v Cuba (Int.Award)* UNCITRAL (15.Mar.2005) [23]-[25] (diplomatic protection/State's rights), discussed Roberts, 'Hybrid' (n7) 7; Potestà, 'Italy/Cuba' (n363) 342; Potestà, 'Potential' (n353) 754;758; Bernasconi-Osterwalder (n353) 9-10; Trevino (n353) 206; Potestà, 'Role' (n353) 251;258-259; Recanati (n353) 437-440.

[366] Indeed, cf.*infra*.n1617.

protection claims cannot be brought where treaties provide for investor-State dispute settlement,[367] the practice and literature convincingly demonstrates that, treaty exclusions aside,[368] that possibility persists.[369] Consequently, there is undoubtedly scope for future overlapping diplomatic protection and investor-State claims.[370]

Other interstate claims, not brought as diplomatic protection,[371] may also overlap with investor-State proceedings.[372] Thus, Mexico's interstate *Cross-Border Trucking* claim, discussed further in Chapters IV and VI, did not purport to be diplomatic protection but nonetheless preceded investor-State claims concerning the same alleged NAFTA violations.[373] While some argue that WTO proceedings may amount to

[367] See Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2004) 74 BYBIL 151,190-191, discussed Paparinskis, 'Countermeasures' (n5) Pt.III(C); similarly Douglas (n301) 94-100; also *Ecuador v US (Exp.Op.Reisman)* PCA.Case-2012-5 (24.Apr.2012) [3],[23]-[26],[30],[36]-[38],[57], discussed Roberts, 'Hybrid' (n7) 10-14; Potestà, 'Role' (n353) 255-256; authorities Paparinskis and Howley, 'Article 5: Submission by a Non-Disputing Party to the Treaty' in Euler, Gehring and Scherer (eds), *Transparency in International Investment Arbitration* (2015) 218 (fn.95), including Roberts, 'Hybrid' (n7) 43;49;52; Amerasinghe (n323) 341.

[368] *Infra*.Ch.III(II)(B); Paparinskis, 'Countermeasures' (n5) 267.

[369] See *Italy/Cuba* (n365), *supra*.n365; Roberts, 'Hybrid' (n7) 6-20 (cf.47-48); Roberts, 'Triangular' (n5) 392-393; Paparinskis, 'Countermeasures' (n5) 267, Pts.III(C)-(D); Crawford, *GP* (n2) 590-591; Paparinskis/Howley (n367) 218; also *Ecuador/US* (n85) [204]; Berman (n18) 72; *Plama Consortium v Bulgaria (Jurisdiction)* ICSID Case-ARB/03/24 (8.Feb.2005) [150]; *ADM* (n232) [81] (Sep.Op.Rovine); *infra*.n373.

[370] Similarly Potestà, 'Potential' (n353) 761;cf.766-767.

[371] Distinguishing diplomatic protection/interpretation/'declaratory' claims: Roberts, 'Hybrid' (n7) 7-10, also Bernasconi-Osterwalder (n353) 7-8. Distinguishing diplomatic protection/'abstract interpretation' cases: Potestà, 'Potential' (n353) 755-756; also 761-765; similarly Potestà, 'Role' (n353) 254-255;264-271; Trevino (n353) 204-210; cf.210-211; Paparinskis, 'Countermeasures' (n5) 313-315; authorities *infra*.n968. The distinction is addressed *infra*.Ch.IV(III).

[372] Roberts, 'Hybrid' (n7) 8-10;58.

[373] *Cross-Border Trucking Services (Ch.20.Panel Fin.Rep.)* File-USA-MEX-98-2008-01 (6.Feb.2001), discussed vis-à-vis overlapping claims: Roberts, 'Hybrid' (n7) 9-10; Bernasconi-Osterwalder (n353) 15-16, both noting later investor-State proceedings: *CANACAR v US (Arb.Not.)* <https://www.state.gov/s/l/c29831.htm> (2.Apr.2009). See *infra*.nn990;1734; also MacDonald, 'NAFTA Cross-Border Trucking' (2009) 42 VJTL 1631,1652-1655; *Canfor* (n360) [240] (NAFTA investor/interstate claims allowed).

diplomatic protection in particular circumstances,[374] they are also generally considered "direct", with local remedy exhaustion not required.[375] Other recent interstate claims, not overlapping with individual invocations of responsibility, but clearly related to them,[376] have concerned questions of interpretation in ongoing investor-State proceedings,[377] and interpretation subsequent to an investor-State award with which one State was unhappy.[378]

Later Chapters elaborate the distinction between diplomatic protection and other interstate claims, and its relevance to rules potentially precluding overlapping interstate and investor-State claims.[379] It suffices here to note that investor-State claims may overlap – and have overlapped – with Article 42 interstate claims, including diplomatic protection.

[374] See Sacerdoti, 'The Role of Lawyers in the WTO Dispute Settlement System' in Yerxa and Wilson (eds), *Key Issues in WTO Dispute Settlement* (2005) 129; Choi, 'The Present and Future of The Investor-State Dispute Settlement Paradigm' (2007) 10 JIEL 725, 728-729; Weiss (n305) 87; cf.Shany (n7) 59.

[375] See Palmeter and Mavroidis, *Dispute Settlement in the World Trade Organization* (2004) 35; also Shany (n7) 59; *US-Section 211 Omnibus Appropriations Act-Panel.Rep.* (6.Aug.2001) WT/DS176/R [8.95] ('local remedies...not applicable'); cf.Choi (n374) 728-729 (local remedies excluded).

[376] Roberts, 'Hybrid' (n7) 7-9;58. Cf.*supra*.n230; *infra*.nn377-378.

[377] See *Empresas Lucchetti v Peru (Award)* (2004) 19 ICSID.Rev.-FILJ 359 [7],[9] (Peru-Chile proceedings concerning investor-State case), discussed Roberts, 'Hybrid' (n7) 8;58; Potestà, 'Potential' (n353) 754; Bernasconi-Osterwalder (n353) 10-11; Recanati (n353) 435. The claims were against different States.

[378] *Ecuador/US* (n85) [40]ff, consequent on *Chevron/Texaco v Ecuador (Part.Award)* PCA.Case-2007-02 (30.Mar.2010), discussed Roberts, 'Hybrid' (n7) 8-9;58; Bernasconi-Osterwalder (n353) 11-14; Trevino (n353) 202-203; Potestà, 'Role' (n353) 252;254-255; Recanati (n353) 435-436. Responsibility was not invoked: *infra*.n1016.

[379] Cf.*supra*.nn326;371.

B. Human rights

Interstate human rights claims may also overlap with those brought by individuals.[380] First, human rights treaties allowing individual claims tend to also contain interstate dispute resolution mechanisms,[381] allowing parties either to invoke State responsibility for violations,[382] and/or to claim regarding the treaty's 'interpretation or application'.[383] Both have resulted in overlapping claims. Thus, Ireland brought ECtHR proceedings against the UK regarding treatment of prisoners in Northern Ireland,[384] as did some of the detained individuals.[385] After the 2008 conflict between Georgia and Russia, the former brought claims against the latter under the CERD,[386] and ECHR.[387] Thousands of individuals brought ECHR claims arising from the same conflict against one or both States.[388] The ICJ *Belgium/Senegal* proceedings were preceded by individual UNCAT proceedings against Senegal alleging certain of the same breaches.[389] Cyprus brought

[380] Generally Vermeer-Künzli, 'Concurrence' (n8) 270;274-276; ILC, 'Fiftieth Session' (1998) 1 ILCYB 1, 26-27 (Simma/Economides); Paparinskis, 'Countermeasures' (n5) 291; Gaja, 'General' (n22) 169 ('parallel claim').

[381] Generally Mackenzie/others (n252) Chs.11-16; Weiss (n1) 806; Connors (n258) 393; Amerasinghe (n323) 32-33; Roberts, 'Hybrid' (n7) 32; Mégret, 'Nature of Obligations' in Moeckli/others, *IHRL* (n253) 105.

[382] ECHR, Art.33; ICCPR, Art.41(1); UNCAT, Art.21(1); ICESCR.Prot., Art.10; CRC.Prot., Art.12; ICPMW, Art.76; CPED, Art.32; CERD, Arts.11-13; AmCHR, Art.45(1) (IACHR); ACHPR, Arts.47;49.

[383] CERD, Art.22; CEDAW, Art.29; UNCAT, Art.30; ICPMW, Art.92; CPED, Art.42; AmCHR, Art.62(1); ACHPR.Prot., Arts.3(1);5.

[384] *Ireland v UK (Judgment)* [1978] ECHR SerA.No.25 [92]-[143].

[385] *Donnelly v UK* (1973) 16 YBkECHR 212, 262-266, discussed Shany (n7) 36.

[386] *Application of CERD (Georgia v Russia) (Prel.Obj.)* [2011] ICJ.Rep. 70, 77-79;85.

[387] *Georgia v Russia (II)*, App.38263/08 (ECtHR, 13.Dec.2011) [40]-[47],[56]-[57]; Greer (n253) 450.

[388] 'Hearing in the Inter-State Case Georgia v. Russia (II) Concerning the 2008 Armed Conflict' *ECHR Pr.Rel.* (22.Sept.2011).

[389] *Prosecute/Extradite* (n339) [27]; *Guengueng v Senegal*, DocCAT/C/36/D/181/2001 (19.May.2006) [3.1]-[3.12].

claims against Turkey, arising out of activities in northern Cyprus and resulting in a compensation award,[390] in circumstances in which 'overlapping' individual claims against Turkey were acknowledged.[391] Finally, Ukraine recently brought CERD proceedings against Russia concerning, *inter alia*, alleged violations in Crimea,[392] and proceedings alleging ECHR breaches in Crimea and the East.[393] According to the ECtHR, 'more than 1,400 individual applications apparently related to the events in Crimea or the hostilities in Eastern Ukraine are currently pending', against Russia and/or Ukraine.[394] Moreover, while interstate treaty-body procedures, including under the ICCPR, are not commonly used,[395] interstate ICCPR claims have been brought elsewhere,[396] and the possibility of future overlapping interstate-individual claims cannot be excluded.[397]

Second, with many human rights obligations existing under customary international law,[398] potential overlap arises between individual treaty claims and interstate claims under custom.[399] Third, as noted above, rules regarding the treatment of

[390] *Cyprus/Turkey (Compensation)* (n95) [58].

[391] ibid.[14]; see *Varnava v Turkey* ECHR 2009-V 13.

[392] *Application of ICSFT and CERD (Ukraine v Russia) (Prov.Meas.)* ICJ Order (19.Apr.2017) [32]-[34].

[393] 'ECHR Deals with Cases Concerning Crimea and Eastern Ukraine' *ECHR Pr.Rel.345/14* (26.Nov.2014); 'ECHR Communicates to Russia New Inter-State Case Concerning Events in Crimea and Eastern Ukraine' *ECHR Pr.Rel.296/15* (1.Oct.2015), discussing *Ukraine v Russia*, App.20958/14; *Ukraine v Russia (IV)*, App.42410/15; *Ukraine v Russia (III)*, App.49537/14; generally Greer (n253) 450.

[394] ECHR Pr.Rel.296/15 (n393) 2.

[395] Connors (n258) 393; Paparinskis, 'Countermeasures' (n5) 291. Cf.Keane, 'ICERD and Palestine's Inter-State Complaint, *EJIL:Talk!* (30.Apr.2018).

[396] E.g. *Diallo (Guinea v DRC) (Merits)* [2010] ICJ.Rep 639 [63],[64],[75],[87] (ICCPR); *Armed Activities* (n342) [190] (ICCPR/ACHPR/UNCAT); also Shany (n7) 35;44-46.

[397] See Shany (n7) 34-35;44-46.

[398] E.g. *Brownlie's* (n77) 642-643.

[399] Cf.*Diallo (Merits)* (n396) [87]; Vermeer-Künzli, 'Concurrence' (n8) 274-275; Amerasinghe (n323) 33; Shany (n7) 34-35;44-46.

aliens require States to meet an 'international minimum standard',[400] which now 'corresponds largely with the standards expounded in the principal international human rights treaties'.[401] Consequently, individual and interstate human rights and investment claims might overlap.[402] Liechtenstein's *Certain Property* proceedings against Germany, for instance, alleged expropriation of individual property,[403] where the relevant national had earlier instituted ECtHR proceedings.[404]

Finally, interstate claims in other fields may overlap with individual human rights claims.[405] Thus, Mexico brought ICJ proceedings in *Avena*, concerning US compliance with VCCR obligations vis-à-vis some fifty Mexican nationals,[406] while individual IACHR proceedings were initiated regarding at least eight of those nationals.[407] The French testing challenged in *Nuclear Tests* was simultaneously the subject of individual

[400] *Supra*.n319.

[401] Dugard, 'MPEPIL' (n340) [18]; also Tomuschat (n105) 985; Amerasinghe (n323) 37-38; Mazzeschi (n217) 223; Shany (n7) 8-9; Gaja, 'Affected' (n340) 373; Vinuales, 'Sovereignty in Foreign Investment Law' in Douglas/Pauwelyn/Vinuales, *Foundations* (n14) 326; Paparinskis, 'Analogies' (n14) 79-80; *infra*.n422.

[402] Shany (n7) 8-9;67;84; Juratowich (n12) 34. Cf.Levine, 'The Interaction of International Investment Arbitration and the Rights of Indigenous Peoples' in Baetens, *Investment* (n357) 109 (concurrent individual investment/human rights claims), referencing *Eureko v Slovakia (Jurisdiction/Arbitrability/Suspension)* PCA.Case-2008-13 (26.Oct.2010), particularly [58]; *infra*.n1478.

[403] *Liechtenstein's Pleadings* (n329), Mem.Liechtenstein [5.27]-[5.31].

[404] Shany (n7) 8;35;46, referencing *Prince Hans-Adam II of Liechtenstein v Germany* ECHR 2001-VIII 7; *Certain Property (Liechtenstein v Germany) (Prel.Obj.)* [2005] ICJ.Rep 6 [17].

[405] Generally Shany (n7) 8-10;35-37; *infra*.n412.

[406] *Avena* (n152) [15]-[16], discussed DADP, 75; Crawford, *GP* (n2) 592-593; Parlett (n1) 94-96.

[407] See *Medellin v US*, Case-12644, Rep.90/09 (7.Aug.2009) (Medellin/Cardenas/Garcia) [65]; *Arias v US*, Pet.15-12, Rep.73/12 (17.Jul.2012) [44]; *Rodriguez v US*, Pet.1672-11, Rep.63/12 (29.Mar.2012) [55]; *Moreno Ramos v US*, Pet.4446/02, Rep.61/03 (10.Oct.2003) [45]-[55]; *Diaz v US*, Pet.259-11, Rep.133/11 (19.Oct.2011) [8]; *Fierro v US*, Case-11331, Rep.99/03 (29.Dec.2003) [52]-[59]. Cf.*Avena* (n152) 24-26 (numbers 31;36-39;41-42;44). Generally Shany (n4) 48-49;139;141. Further: *Right to Information on Consular Assistance (Adv.Op.)* [1999] IACHR Ser.A.No16 [2],[61] (ICJ proceedings not preventing),[49] (no 'rul[ing] on...examples'), referenced Shany (n7) 35;46;241; Shany (n4) 48.

ECommHR and HRC proceedings,[408] and ECtHR proceedings were brought regarding the conduct involved in the interstate *Legality of Use of Force* cases.[409] In the *Arctic Sunrise* UNCLOS proceedings, concerning detention of a vessel and those on board,[410] the relevant individuals had also filed ECtHR applications,[411] the Netherlands acknowledging the consequent 'overlap'.[412] Finally, the EECC addressed interstate claims arising from the Eritrea/Ethiopia conflict,[413] while an African Commission claim, concerning victims of the same conflict, was brought against the two States.[414]

In this field, all kinds of overlapping interstate claims are possible. First, State responsibility for human rights violations may be invoked under Article 48, with *erga omnes* obligations including those 'concerning the basic rights of the human person'.[415] Indeed, if one considers that *erga omnes* obligations are characterised by being non-bilateral,[416] in the sense that they protect a 'collective' interest,[417] rather than reaching an

[408] Shany (n7) 36, referencing *Examination of the Situation in Accordance with the Court's Judgment in Nuclear Tests (New Zealand v France)* [1995] ICJ.Rep. 288; *Bordes v France*, DocCCPR/C/57/D/645/1995 (22.Jul.1996); *Tauira v France* (1995) 83 DR 112.

[409] Shany (n7) 9-10;40, referencing, *i.a.*, *Legality of Use of Force (Serbia and Montenegro v Belgium) (Prel.Obj.)* [2004] ICJ.Rep. 279; *Banković v Belgium* ECHR 2001-XII 333.

[410] *Arctic Sunrise (Netherlands v Russia) (Merits)* PCA.Case-2014-02 (14.Aug.2015) [140],[144].

[411] ibid.[134].

[412] ibid.[147]. Cf.Shany (n7) 68.

[413] Generally *Eritrea* (n271) [3]; *supra*.n271; *infra*.nn1504;1824.

[414] *Interights v Eritrea and Ethiopia* (2003) AHRLR 74 [40],[49]-[51]; Sotomayer, 'The Rule Against Duplication of Procedures in the Regional Systems of Human Rights Protection' [2009] NDWP 2 <http://www.nd.edu/~ndlaw/cchr/papers/Andres_%20Duplication_Procedures.pdf> 4; Gherari (n254) 785; discussion *infra*.nn1500-1505;1537-1538;1604-1610.

[415] *Barcelona Traction* (n69)[34]; *ARSIWA*, 278.

[416] See Arangio-Ruiz (n182) [131]-[132], particularly [92], quoted Ragazzi, *The Concept of International Obligations* Erga Omnes (1997) 201-202; cf.202-203 (disagreeing); Tams, *Enforcing* (n344) 129-131 and authorities, though contesting (ibid.130-136) a 'structural approach' focusing on obligations being 'non-bilateralisable' (ibid.130). He argues *erga omnes* obligations can be bilateral: ibid.134-136. But strictly, States are 'assimilated to the State to whom a bilateral obligation is due': Gaja, 'Compliance' (n190) 958, also 959; Sicilianos (n204) 1139; Dawidowicz, *Third-Party Countermeasures in International Law* (2017)

'importance' threshold,[418] then arguably *all* customary human rights obligations are owed *erga omnes*.[419] Additionally, multilateral human rights treaties contain obligations owed *erga omnes partes*.[420] Interstate human rights claims may thus be brought for *erga omnes (partes)* violations.

However, as foreshadowed above, human rights claims may also be diplomatic protection,[421] the ICJ explaining in *Diallo* that:

> Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights.[422]

91; Paparinskis, 'Countermeasures' (n5) 330-331; cf.Crawford, 'Responsibility to the International Community as a Whole' (2001) 8 Ind.JGLS 303, 321; *supra*.nn191-203. Further: Fitzmaurice, 'Second Report on the Law of Treaties' [1957] 2 ILCYB 16 [125]-[126] (human rights 'absolute rather than...reciprocal'), discussed Tams, *Enforcing* (n344) 57;cf.133 (not every absolute obligation *erga omnes*) and Ragazzi (n416) 200-201;cf.201-203; similarly Mégret (n381) 89-91. Cf.Simma/Pulkowski (n274) 160-161.

[417] *Supra*.n338; also Arangio-Ruiz (n182) [131]; Sicilianos (n204) 1139 ('extra-State interests'). Obligations are still owed to each State: *supra*.nn188-203.

[418] Arangio-Ruiz (n182) [92], discussed *supra*.n416; see Tams, *Enforcing* (n344) 136 ('material approach'); generally 136-157; also Ragazzi (n416) 203 ('intrinsic value'); Vermeer-Künzli, 'Interest' (n183) 566 ('fundamental'). Nonetheless, it may inhere in "collective" interests that the obligations are sufficiently important: cf.Tams, *Enforcing* (n344) 133-135;136ff; also Zoller (n144) 90-91.

[419] Similarly Borelli/Olleson (n197) 1185; see discussion Tams, *Enforcing* (n344) 119, referencing, *i.a.*, IDI, 'The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States' 63(II) IDIA 338, Art.1; Mégret (n381) 89-91;106; Arangio-Ruiz (n182) [131],[134]; Gaja, 'Injuries' (n340); also Gaja, 'Affected' (n340) 374; *Restatement* (n107) 179-180. Cf.Tams, *Enforcing* (n344) 138 (*Barcelona Traction* (n69) [34] focus 'basic' human rights); Crawford, 'FirstRep' (n77) [63].

[420] Crawford, 'ThirdRep' (n144) [92]; *ARSIWA*, 277; Mégret (n381) 106;89-91, referencing, *i.a.*, *Reservations to the Convention on Genocide (Adv.Op.)* [1951] ICJ.Rep. 15, 23; *Austria v Italy* (1961) 4 YBkECHR 116, 138-142; *Prosecute/Extradite* (n339) [69]; Gaja, 'Affected' (n340) 381; discussion Tams, *Enforcing* (n344) 120-121; Rivier (n168) 756.

[421] *Supra*.nn344-345; ILC, '50th' (n380) 22;26;27 (Hafner/Simma/Economides); Gattini, 'A Trojan Horse for Sudeten Claims?' (2002) 13 EJIL 513, 537.

[422] *Diallo (Guinea v DRC) (Prel.Obj.)* [2007] ICJ.Rep. 582 [39].

Some suggest that this passage simply applies the minimum standard as reflected in human rights norms.[423] Nonetheless, the Court found particular treaty provisions violated in *Diallo*,[424] apparently therefore regarding 'human rights and the international standard as distinct primary rules that could give rise to diplomatic protection'.[425] The ECtHR in *Cyprus/Turkey* similarly acknowledged that in certain interstate claims, a State:

> denounces violations by another Contracting Party of the basic human rights of its nationals (or other victims). In fact such claims are substantially similar not only to those made in an individual application … but also to claims filed in the context of diplomatic protection … .[426]

The EECC, considering alleged IHL and human rights violations,[427] likewise held that 'some of both States' claims [were] made in the exercise of diplomatic protection'.[428] Accordingly, overlapping individual human rights and interstate diplomatic protection claims are possible.

Other interstate claims overlapping with individual human rights actions may be 'direct' or 'mixed'.[429] Thus, the *Arctic Sunrise* Tribunal considered the Netherlands' UNCLOS claims 'direct',[430] while *Avena* is generally considered 'mixed',[431] Mexico bringing the case 'in its own right and in the exercise of its right of diplomatic

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[423] See Amerasinghe (n323) 38;73-74;76; *Brierly's* (n324) 259-260; discussion Paparinskis, 'Countermeasures' (n5) 325-326; Shany (n4) 27-28.

[424] *Diallo (Merits)* (n396) [73],[74],[80],[82],[84]-[85],[97]. Cf.*Brierly's* (n324) 259-260.

[425] Paparinskis, 'Countermeasures' (n5) 327. Similarly Crawford, *GP* (n2) 587.

[426] *Cyprus/Turkey (Compensation)* (n95) [45]; see *infra*.nn703-704;1712.

[427] See EECC Agreement, Art.5(1); *Eritrea* (n271) [22]; Nollkaemper (n6) 106.

[428] *Eritrea* (n271) [25]; *Ethiopia's Damages (Fin.Award)* (2009) XXVI UNRIAA 631 [25]; authorities *infra*.n1826.

[429] Generally *supra*.nn326ff.

[430] *Arctic.Sun. (Merits)* (n410) [173], see *infra*.n658. Cf.*infra*.nn934-942.

[431] DADP, 75; Crawford, *GP* (n2) 584; Thirlway (n216) 1551.

protection'.[432] The Court determined that local remedies need not be exhausted, given the 'interdependence' of State and individual rights involved.[433]

The distinction between *erga omnes (partes)*, diplomatic protection, 'direct', and 'mixed' claims is considered further in Part B vis-à-vis particular rules of preclusion.[434] The important point here is that individual human rights claims potentially overlap with all kinds of interstate claims, across various fields.

C. Other fields

In the other fields noted in which individuals might bring claims, there is also potential overlap with interstate proceedings. The interstate *Chórzow* case, for instance, overlapped with individual MAT claims.[435] Interstate claims were also brought before the UNCC,[436] giving rise to potential overlap with individual claims.[437] Further, while most EECC claims were interstate,[438] as noted, overlap did eventuate between those claims and individual human rights actions.[439]

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[432] *Avena* (n152) [40].

[433] ibid. See Roberts, 'Hybrid' (n7) 40;42; Parlett (n1) 112; Amerasinghe (n323) 33; *infra*.nn659;957-960;1035-1037.

[434] Cf.*supra*.n371.

[435] See *Chorzow (Jurisdiction)* (n308) 30, discussed Shany (n4) 43. Further: *infra*.nn1445-1446;1778.

[436] See Houtte/Das/Delmartino (n269) 337 (category F). Further: *infra*.nn1782-1784.

[437] E.g., *Seventh Instalment of Individual Claims For Damages up to US$100,000 (Category 'C')* UN.Doc.S/AC26/1999/11 (UNCC, 24.Jun.1999), discussed *infra*.n1784.

[438] *Supra*.n271.

[439] *Supra*.n414.

The regional economic agreements allowing individual claims also provide for interstate dispute settlement.[440] Claims under such interstate procedures, occasionally employed in practice,[441] could potentially overlap with individual proceedings for the same violations.[442] Moreover, with regional agreements often providing human rights[443] and investment protections,[444] individual or interstate claims could overlap with the investment, WTO, and human rights claims discussed above.[445] For the reasons already noted, interstate claims might be diplomatic protection, 'direct', or *erga omnes (partes)*.[446]

Finally, while interstate disputes before domestic courts are unusual,[447] individual claims before domestic courts may concern the same challenged conduct as that in

[440] Generally Mackenzie/others (n252) Chs.9-10; Baudenbacher/Clifton (n247) 252-262;265-271; Murphy (n265) 183; Leathley (n246) Chs.3;5-9; also Shany (n7) 44-45. See (1) EU courts (TFEU, Art.259); Greer (n253) 461; (2) Andean Court (Cartagena.Prot., Art.24); (3) CCJ (Chaguaramas Treaty, Art.211); (4) MERCOSUR (Olivos Protocol, Arts.1;6-24;33); (5) CACJ (CACJ Statute, Arts.22(a);23); (6) COMESA CJ (COMESA Treaty, Art.24); (7) EACCJ (EAC Treaty, Arts.27-28); (8) ECOWASCJ (ECOWAS Treaty, Art.76, ECOWAS.Prot., Art.3); (9) SADCT (SADC Protocol, Art.14). Cf.*supra*.Pt.I(C).

[441] E.g., *Dispute Between Uruguay and Brazil Concerning Tobacco (Award 08/2005)* MERCOSUR Tribunal (5.Aug.2005); *infra*.n1010; cf.Simma/Pulkowski (n274) 154 (UK/France EU claim, not pursued); Jazairy, 'Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights', UN.Doc.A/HRC/33/48 (2.Aug.2016) [57] (third-State EU claims).

[442] Cf.*infra*.nn534-535.

[443] Shany (n7) 68-71; Ebobrah (n255) 232-234; Greer (n253) 461-463; *supra*.nn284-286.

[444] Shany (n7) 67; Sattorova, 'Investor Rights under EU Law and International Investment Law' (2016) 17 JWIT 895, 898-913;917-918;896-897, discussing *Eureko* (n402), see [58],[247] (BIT/EU 'equivalence'),[249] ('duplication'),[250]-[263]; *Electrabel v Hungary (Jurisdiction/Applicable Law/Liability)* ICSID Case-ARB/07/19 (30.Nov.2012) [4.177]; Leathley (n246) 116-120;134-135;158-164; Charlotin, 'Twin Arbitrations' *IA.Rep.* (24.Aug.2018) (EU/investment proceedings).

[445] Shany (n7) 53;59 (WTO);67;70-72; generally *supra*.Pts.I(A)-(B);III(A)-(B).

[446] *Supra*.Pts.II;III(A)-(B); further: *Restatement* (n107) 222 (EU law diplomatic protection); cf.Simma/Pulkowski (n274) 154.

[447] Nollkaemper (n12) 529; Nollkaemper (n6) 95-96 (cf.exceptions); cf.Shany (n4) 46-48.

international interstate proceedings in various circumstances.[448] Indeed, domestic individual claims were brought in many of the situations already noted in which individual and interstate claims overlapped internationally.[449] More generally, the requirement to exhaust local remedies in interstate diplomatic protection claims,[450] including vis-à-vis certain interstate human rights claims,[451] raises – for the same reasons noted above[452] – an inevitable overlap between interstate international and individual domestic proceedings.[453]

IV. Conclusion

This Chapter has outlined mechanisms for the invocation of State responsibility by individuals before investment, human rights, and other tribunals, and the possibility for overlap with interstate claims, of varying kinds, arising from the same circumstances.

[448] See Nollkaemper (n6) 247;249 (potential 'overlap' 'in substance'); Shany (n4) 11;13;45-63 (with examples); Nollkaemper (n12) 529-530; Tzanakopoulos (n34) 141-142;164; *Distomo Massacre* (2003) 129 ILR 556 (Bundesgerichthof) 567. Cf.*supra*.n13.

[449] See *Chórzow*, *supra*.nn308;435; *Nemariam*, *supra*.n310; *Danikovic v Netherlands* (2000) Case.759/99SKG (Amsterdam.CA), discussed Nollkaemper (n6) 28-29;249, discussing overlap with *Use of Force* (*supra*.n409); US-based litigation concerning the *Avena* situation (*supra*.nn406-407), discussed Shany (n4) 1;48-53; domestic decisions concerning softwood lumber (*supra*.n360), discussed ibid.1;58-59; *Prince Hans-Adam II v Cologne* (1999) 149 ILR 1 (Cologne.CA); *Re Prince Hans-Adam II of Liechtenstein* (1998) 149 ILR 26 (BVerfG), concerning *Certain Property* (*supra*.nn403-404; *infra*.n1425); *Habre* (2000) 125 ILR 569 (Senegal.Cour.Cass.), connected with *Prosecute/Extradiate* (*supra*.n389); UNCC-related UK litigation, discussed *Fifteenth Instalment of 'E4' Claims* UN.Doc.S/AC.26/2002/16 (20.Jun.2002) [57]ff; Hess (n7) 143.

[450] *Supra*.n321; *infra*.Ch.III(II)(C).

[451] ICCPR, Art.41(1)(c); ICESCR.Prot., Art.10(1)(c); UNCAT, Art.21(1)(c); CERD, Art.11(3); ICPMW, Art.76(1)(c); AmCHR, Art.46(1)(a); ACHPR, Art.50. Cf., not expressly requiring: ECHR, Art.33; CRC.Prot., Art.12; CPED, Art.32; CERD, Art.22; CEDAW, Art.29; UNCAT, Art.30; ICPMW, Art.92; CPED, Art.42; but see *Georgia/Russia(II)* (n387) [84]; *ELSI* (n304) [50]. Generally Amerasinghe (n14) 64-83;305-308; Dodge, 'National Courts and International Arbitration' (2000) 23 Hast.I&CLR 357, 365; Nollkaemper (n12) 527; also Shany (n4) 162.

[452] *Supra*.n304.

[453] Nollkaemper (n6) 247 (diplomatic protection 'in substance…overlap[s] with claims...before…domestic courts');27; Shany (n4) 27-31;138.

Part B addresses how, given that overlap, the actions of either a State or individual in bringing and settling claims affects the other's ability to invoke responsibility. Part C considers how far CPWs may be invoked to preclude both such overlapping claims.

PART B

Chapter II having established that individual and interstate claims may overlap, Part B considers how far the actions of States and individuals in bringing claims under international law, for judicial determination or through other settlement mechanisms, may result in preclusion of the other's claims.

Generally speaking, one incident may cause injury to multiple States, who may each invoke responsibility vis-à-vis the same act; one State's claim does not prevent invocation by others also meeting the necessary conditions.[454] Logically, a State or individual's invocation of responsibility should likewise not prejudice the other's ability to claim, assuming an available procedure.[455] Indeed, Article 16 of the DADP leaves unaffected rights of States and individuals to resort to non-diplomatic protection procedures,[456] the Special Rapporteur observing that States are not 'obliged to abstain from exercising [diplomatic protection] when the individual enjoys a remedy under a human rights or foreign investment treaty',[457] unless, presumably, there is agreement otherwise.[458]

[454] *ARSIWA*, Art.46, 270-271; *infra*.n572; similarly Paparinskis, 'Countermeasures' (n5) 289.

[455] See Gaja, 'The Position of Individuals in International Law' (2010) 21 EJIL 11,13-14; Simma/Pulkowski (n274) 159; Paparinskis, 'Countermeasures' (n5) 289-290;297. Generally *supra*.nn217;348;380.

[456] DADP, Art.16, 87-89. Also Gaja, 'Position' (n455) 13-14; Roberts, 'Hybrid' (n7) 16-17;35; Crawford, *GP* (n2) 586.

[457] Dugard, 'FirstRep' (n322) [73]; also Roberts, 'Hybrid' (n7) 17;36; Paparinskis, 'Countermeasures' (n5) 293; Crawford, 'The International Law Commission's Articles on Diplomatic Protection Revisited' in Maluwa, du Pelssis and Tladi (eds), *The Pursuit of a Brave New World in International Law* (2017) 141; Vermeer-Künzli, 'Concurrence' (n8) 271-272;276;cf.277; cf.Pellet, 'The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts' in Crawford/others, *Responsibility* (n6) 90; Gattini, 'Trojan' (n421) 536-537.

[458] See *infra*.Ch.III(II)(B); Roberts, 'Triangular' (n5) 392-393.

However, the conduct of States or individuals in circumstances of overlap may engage various principles of international law affecting the other's capacity to claim,[459] either by rendering one claim inadmissible,[460] or preventing reparation being awarded.[461] This Part considers three ways such effects could materialise, namely through:

(1) waiver of claims;[462]

(2) instituting judicial proceedings, potentially engaging the principle of *res judicata*, and treaty clauses with similar effect;[463] or not doing so, potentially meaning that local remedies have not been exhausted;[464] and

(3) prior receipt of reparation, potentially engaging the principle precluding double recovery.[465]

Chapter III provides a general introduction to the principles with which this Part is concerned, preceding consideration in Chapters IV-VII of their application to the

[459] Similarly focusing on international rules: Shany (n4) 2;23.

[460] Shany considers, vis-à-vis overlapping claims between different tribunals, certain of the same principles, including local remedies: ibid.27-33;178; *res judicata*, waiver-related principles, and abuse of rights: ibid.Chs.5-6; Shany (n7) Chs.5-6; likewise Wehland (n13), particularly Ch.6 (*res judicata*/*lis pendens*). Matters of discretion, like 'comity', also considered therein (respectively Ch.6(2)(B), Ch.6.1, Ch.7), are not considered here. Cf.Shany (n7) 223;260-263; Shany (n4) 172;176-181; Wehland (n13) [4.83] (*res judicata* 'non-discretionary'),[4.94]-[4.95]; Crawford, 'Chance' (n96) 221-224; Pauwelyn and Salles, 'Forum Shopping Before International Tribunals' (2009) 42 Corn.ILJ 77, 86;102. Vermeer-Künzli considers admissibility vis-à-vis overlapping human rights/diplomatic protection claims: Vermeer-Künzli, 'Concurrence' (n8) 270ff. Further authorities *infra*.nn462-465.

[461] *Infra*.n465. On the distinction: *infra*.nn602-605. Similarly: Vermeer-Künzli, 'Concurrence' (n8) 288.

[462] Similarly: Paparinskis, 'Analogies' (n14) 104-105; Paparinskis, 'New' (n8) 643-646; also Peters (n1) 175;212-213; Sohn/Baxter (n58) 201;207; Roberts, 'Triangular' (n5) 395-399; *supra*.n460.

[463] Cf.Roberts, 'Hybrid' (n7) 40;43; Paparinskis, 'Countermeasures' (n5) 297-298; Vermeer-Künzli, 'Concurrence' (n8) 273;277-279; Peters (n1) 317; *supra*.n460.

[464] Similarly: Roberts, 'Hybrid' (n7) 31 (individual action affecting State claim); Sohn/Baxter (n58) 51;201; *supra*.n460. Cf.*infra*.n534 (CARICOM).

[465] Similarly: Crawford, *GP* (n2) 590; Roberts, 'Hybrid' (n7) 41-42;50; Wehland (n13) [1.32]-[1.33]; Paparinskis, 'New' (n8) 639-640; Shany (n4) 19; also Gattini, 'Trojan' (n421) 538; Gaja, 'General' (n22) 169.

overlapping individual-interstate claims introduced in Chapter II. It outlines the fundamental features of each principle and similarities that justify grouping certain of them together in the following Chapters. Chapter IV then explains when those principles applicable to diplomatic protection claims operate; Chapter V outlines the potential for State or individual waiver to preclude another's overlapping claim; Chapter VI argues that *res judicata* may apply vis-à-vis certain overlapping individual and interstate diplomatic protection or 'mixed' claims; and Chapter VII argues that double recovery precludes reparation where individual claims overlap with interstate claims consequent on individual injury.

CHAPTER THREE: RULES OF PRECLUSION

I. Waiver

Waiver refers broadly to conduct by which a person relinquishes a given right.[466] This includes the right to invoke responsibility, which injured States may lose through waiver,[467] where the renunciation is 'unequivocal'.[468] Any waived claim is inadmissible, and responsibility cannot be invoked.[469]

A. Individual waiver

Although the ARSIWA only address waiver by States, individuals may also waive their right to invoke responsibility pursuant to the procedures discussed in Chapter II.[470] In investment law, for instance, the premise of 'fork-in-the-road' clauses in many BITs is that investors may elect – election between alternative rights being one form of waiver[471] – to claim before either international or domestic tribunals.[472] Indeed, certain treaties

[466] Wilken and Ghaly, *The Law of Waiver, Variation, and Estoppel* (3rd edn, 2012) [3.14],[4.01]; Tams, 'Waiver, Acquiescence, and Extinctive Prescription' in Crawford/others, *Responsibility* (n6) 1036; *Waste.Mgmt. (Award)* (n297) [18]. Cf.Shany (n7) 23 (*electa una via*).

[467] *ARSIWA*, Art.45. 'Valid consent' also precludes wrongfulness (ibid.Art.20). But consent involves prior acceptance, while post-breach waiver 'affects the legal consequences arising from the act': Tams, 'Waiver' (n466) 1041; also Paparinskis, 'New' (n8) 629; Aréchaga (n69) 541.

[468] *ARSIWA*, 267; Tams, 'Waiver' (n466) 1038; Crawford, *GP* (n2) 71; *Armed Activities* (n342) [293], cited Feichtner, 'Waiver' in *MPEPIL* (2012) [8].

[469] *ARSIWA*, Art.45, 266-267; *Armed Activities* (n342) [292]-[293].

[470] Generally *infra*.nn472ff; Spiermann (n58) 204;207; Wehland (n13) [3.101]; Sohn/Baxter (n58) Art.22(4); also *Impregilo v Argentina (Jurisdiction)* ICSID Case-ARB/15/39 (23.Feb.2018) [87]; *ADM* (n232) [174]. It must likewise be 'unequivocal': e.g. *Barbera v Spain* (1989) 11 EHRR 360 [82]; *Association SOS and De Boëry v France* ECHR 2006-XIV 375 [30]; also *Waste.Mgmt. (Award)* (n297) 41 ('clear, explicit…categorical'); Parlett (n1) 93;311.

[471] Wilken/Ghaly (n466) [3.14],[3.08]; *TANESCO v Independent Power Tanzania (Prel.Issues)* ICSID Case-ARB/98/8 (22.Jun.2001) [101]. Cf.Shany (n7) 23.

[472] Douglas (n367) 176-177; Douglas (n301) 27; Wehland (n13) [3.102]. Generally on *electa una via*: Shany (n7) 23;213-217; Shany (n4) 36-37;156-157. E.g. *CMS Gas v Argentina (Jurisdiction)* (2003) 7 ICSID.Rep. 494 [81]; *Banque Meyer* (1923) 3 TAM 639 (Franco-German MAT) 640, cited Cheng (n73)

expressly require investors to waive alternative procedures,[473] with tribunals otherwise refusing to hear claims.[474] Moreover, while contractual exclusive jurisdiction clauses do not generally waive access to investment arbitration for *treaty* claims,[475] tribunals have considered whether investors waived international claims,[476] and accepted settlement and withdrawal thereof.[477] The implication is that investors can waive – expressly, through settlement, or by proceeding elsewhere – investment treaty claims.[478]

337; *SB v Prussian Treasury* (1924) 2 ILR 377 (Reichsgericht), 378. Cf.*Roy* (1931) 6 ILR 421 (UK-Mex.Cl.Comm.) 422-423.

[473] NAFTA, Art.1121; CAFTA, Art.10.18(2); Shany (n7) 209; Salles, *Forum Shopping in International Adjudication* (2014) 251; discussion *Ethyl v Canada (Jurisdiction)* (1998) 7 ICSID.Rep. 12 [90].

[474] E.g. *Waste.Mgmt. (Award)* (n297) 49; *Pac Rim Cayman v El Salvador (Exp.Op.Reisman (Waiver))* ICSID Case-ARB09/12 (22.Mar.2010) [36]; *Railroad Development v Guatemala (Jurisdiction)* ICSID Case-ARB/07/23 (17.Nov.2008) [75]-[76], discussed *Railroad Development v Guatemala (Clarification)* ICSID Case-ARB/07/23 (13.Jan.2009) [12]-[13]; *San Sebastian v El Salvador (Award)* ICSID Case-ARB/09/17 (14.Mar.2011) [114]-[116]; *Detroit International Bridge v Canada (Jurisdiction)* PCA.Case-2012-25 (2.Apr.2015) [320],[336]-[337]; *Supervisíon v Costa Rica (Award)* ICSID Case-ARB/12/4 (18.Jan.2017) [330]-[331]; *Renco v Peru (Jurisdiction)* UNICTRAL (15.Jul.2016) [189]; also *EAIB v Slovakia (Sec.Juris.Award)* PCA.Case-2010-17 (4.Jun.2014) [264].

[475] See Wehland (n13) [3.109]-[3.116]; Peters (n1) 325; Schreuer, 'IA' (n243) 307-308; Spiermann (n58) 190-199;201-203;207-209; Shany (n4) 63-77;80, discussing, e.g., *Vivendi v Argentina (Annulment)* (2004) 6 ICSID.Rep. 340 [76],[96],[98]-[102]. Cf.Douglas (n301) Ch.10; *infra*.nn1086;1489-1491.

[476] E.g., *Duke Energy v Ecuador (Award)* ICSID Case-ARB/04/19 (12.Aug.2008) [159]; *Burlington v Ecuador (Jurisdiction)* ICSID Case-ARB/08/5 (2.Jun.2010) [117]-[120]; *Lemire v Ukraine (Award)* ICSID Case-ARB/06/18 (28.Mar.2011) [85]-[91]; *Eureko v Poland (Part.Award)* UNCITRAL (19.Aug.2005) [168]-[184]; *Aguas del Tunari v Bolivia (Jurisdiction)* ICSID Case-ARB/02/3 (21.Oct.2005) [118]; also *ADM* (n232) [174]; *Occidental v Ecuador (Jurisdiction)* ICSID Case-ARB/06/11 (9.Sept.2008) [70]-[74],[76]-[81],[85],[88]; generally *PacRim (Opinion)* (n474) [35]-[42]; Wehland (n13) [3.113].

[477] Wehland (n13) [3.102]; Douglas (n301) 36; Paparinskis, 'New' (n8) 644. E.g., *Note of Settlement (SGS v Pakistan)* (2004) 8 ICSID.Rep. 451; *Lemire* (n476) [85]-[91]; *Azpetrol v Azerbaijan (Award)* ICSID Case-ARB/06/15 (8.Sept.2009) [105] (settlement; no 'dispute'); *EVN v Macedonia (Award)* ICSID Case-ARB/09/10 (2.Sept.2011) [15]; *Orascom v Algeria (Award)* ICSID Case-ARB/12/35 (31.May.2017) [524]; *Abaclat v Argentina (Cons.Award)* ICSID Case-ARB/07/05 (29.Dec.2016).

[478] Similarly Douglas (n301) 36; Juillard, 'Calvo Doctrine/Calvo Clause' in *MPEPIL* (2007) [26]; also *Hochtief v Argentina (Liability)* ICSID Case-ARB/07/31 (29.Dec.2014) [165]-[166]. On settlement as waiver: Crawford, 'ThirdRep' (n144) [261]; cf.Gattini, 'Trojan' (n421) 540.

Individual waivers have also been considered in other fields,[479] including vis-à-vis human rights, with tribunals allowing certain waivers of individual claims invoking responsibility for breach,[480] and accepting individual settlements.[481]

B. Waiver and third parties

While both States and individuals may therefore waive claims, waiver by one party to an obligation cannot preclude invocation of responsibility by another to whom that obligation is also owed: States cannot, for instance, waive third-State rights.[482] Other entities can likewise only waive their own rights.[483] Questions regarding the applicability of this principle to overlapping individual and interstate claims have arisen in practice, both vis-à-vis purported waiver of interstate claims by individuals (through, for instance, 'Calvo' clauses),[484] and interstate waiver of individual claims (through, for instance,

[479] See *Hummingbird Rice v Suriname* [2012] CCJ 1 [23].

[480] *Zu Leiningen v Germany* ECHR 2005-XIII 187,194 (generally 'free to renounce' claim's pursuit); *Assoc.SOS* (n470) [30]; *Kimel v Argentina (Merits)* (2008) IACHR Ser.C.No.177 [26]-[27]; *Garrido v Argentina (Reparation)* (1998) IACHR Ser.C.No.39 [72]; *Barrios Altos v Peru (Reparation)* (2001) IACHR Ser.C.No.87 [33],[38]-[39]; also *Durand/Ugarte v Peru (Reparations)* [2001] IACHR 19 [28]-[32]; Parlett (n1) 93;311-312. Cf.*Trymbach v Ukraine*, App.44385/02 (ECtHR, 12.Jan.2012) [61],[65] (waive treaty rights within limits); *ARSIWA*, 165 (rights unwaivable); Merrills, *The Development of International Law by the European Court of Human Rights* (2nd edn, 1993) 60-63 (public interest cases sometimes continue);177-185 (see ECHR, Art.37); Spiermann (n58) 181;186; *infra*.n1082.

[481] *Kezer v Turkey*, App.58058/00 (ECtHR, 5.Oct.2004) 3-4 ('friendly settlement' 'express[] waiver'); *Chagos Islanders v UK* (2012) 162 ILR 318 (ECtHR) [81]; *Calvelli v Italy (Merits)* ECHR 2002-I 3 [54]-[55] (settlement, not 'victim'); also Paparinskis, 'New' (n8) 644.

[482] Tams, 'Waiver' (n466) 1039; Crawford, *GP* (n2) 71;563-564; also *ARSIWA*, 165. On individuals: *Jurisdictional Immunities (Germany v Italy: Greece Intervening) (Counterclaims)* [2010] ICJ.Rep. 310, 373;396 (Diss.Op.Cancado); *infra*.Ch.V.

[483] Feichtner (n468) [13]; Wehland (n13) [3.94]; also Tams, 'Waiver' (n466) 1039; Crawford, *GP* (n2) 565. Generally *infra*.Ch.V. Cf.*Orascom* (n477) [524]-[525] (company's settlement bound shareholder).

[484] Feichtner (n468) [13]; authorities *infra*.nn1067ff.

waiver clauses in peace agreements).[485] Chapter V considers the effect of such purported waivers.

II. Principles concerning the institution and conclusion of judicial proceedings

The second set of admissibility principles relates to an individual or State's institution and conclusion of judicial proceedings as a means for invoking State responsibility,[486] and the potential effects on the other's capacity to claim. Chapter II outlined that overlapping individual-interstate claims may arise where individuals can invoke State responsibility. Various treaties enabling individuals to do so contain provisions addressing multiple claims.[487] It is therefore fitting to begin by examining these provisions, which – as will be shown – reflect, in terms or application, generally applicable rules of international law.[488] At least two types of provision are directed towards overlapping claims: those aiming to avoid multiplicity, and those requiring it.[489]

[485] ibid.[14]; authorities *infra*.nn1118ff.

[486] See *ARSIWA*, 256; *supra*.nn86-87.

[487] *Infra*.Pt.II(A)-(B); generally Shany (n7) Chs.5(1)(A)(II),5(2)(A)-(C).

[488] *Infra*.nn508ff.

[489] Similarly Shany (n4) 89;128; also Hobér (n13) 368; *infra*.n536.

A. *Res judicata* and provisions precluding multiple claims

As to the first, certain treaties enabling individual complaints, particularly in the human rights field, contain provisions rendering multiple claims inadmissible.[490] Thus, Article 35(2)(b) of the ECHR precludes the ECtHR hearing an individual application:

> substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

The ECtHR has found matters 'substantially the same' where they concern 'substantially the same person, facts and complaints',[491] or sometimes, apparently more stringently, 'where the parties, the complaints and the facts are identical'.[492]

Under the AmCHR, Commission communications are inadmissible where their 'subject' is 'pending in another international proceeding for settlement'[493] or they are 'substantially the same as one previously studied by the Commission or by another international organization'.[494] The IACtHR, like the ECtHR, regards these provisions as

[490] Generally: Sotomayer (n414); Connors (n258) 394-395; Antkowiak (n255) 429; Greer (n253) 454; Heyns/Killander (n254) 472; Shany (n7) 213ff. Cf.*Le Bridge v Moldova*, App.48027/10 (ECtHR, 27.Mar.2018) [25] (jurisdictional),[26] (admissibility).

[491] *Pauger v Austria* (1995) 80-A DR 170,174; similarly *Harkins v UK*, App.71537/14 (ECtHR, 15.Jun.2017) [42]; *Vojnović v Croatia*, App.4819/10 (ECtHR, 26.Jun.2012) [28] ('essentially'); *Yukos v Russia* (2012) 54 EHRR 19 [520]-[522]. Generally Zwart, *The Admissibility of Human Rights Petitions* (1994) 181. Cf.*Kafkaris v Cyprus*, App.9644/09 (ECtHR, 21.Jun.2011) [68] ('same factual basis').

[492] *Khadzhimuradov v Russia*, App.21194/90 (ECtHR, 10.Oct.2017) [80]; cf.Shany (n7) 218-219. See *infra*.Ch.VI, particularly *infra*.nn1474ff;1552ff.

[493] AmCHR, Art.46(1)(c), read with Art.47(a).

[494] AmCHR, Art.47(d).

applicable when 'identity between the cases' exists, in the sense that 'the parties are the same, that the object of the action is the same, and that the legal grounds are identical'.[495]

For their part, certain UN human rights treaties preclude individual communications: (i) if '[t]he same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement';[496] (ii) 'unless ... [t]he same matter has not been, and is not being, [so] examined';[497] or (iii) 'unless ... [t]he same matter is not being [so] examined'.[498] Such exclusions apply where 'the same parties, the same facts and the same substantive rights' are at issue,[499] or similar tests are met.[500]

Human rights applications to the ECOWAS Court are similarly disallowed 'whilst the same matter has been instituted before another International Court for adjudication',[501] the Court observing that 'the same case' should not be 'brought before

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[495] *Saramaka People v Suriname* (2007) IACHR Ser.C.No.172 [48], quoting *Baena Ricardo v Panama* (1999) IACHR Ser.C.No.61 [53]; also *Shaw v Jamaica*, Case-12018, Rep25/99 (IACHR, 9.Mar.1999) [25] ('same rights, facts, persons and issues'); generally Shany (n7) 223-224; *infra*.Ch.VI, particularly *infra*.nn1483ff.

[496] ICESCR.Prot., Art.3(2)(c); CEDAW.Prot., Art.4(2)(a); CRC.Prot., Art.7(4); CRPD.Prot., Art.2(c).

[497] UNCAT, Art.22(4)(a); ICPMW, Art.77(3)(a). Cf.*Koptova v Slovakia*, DocCERD/C/57/D/13/1998 (8.Aug.2000) [6.3] (no rule), but see Shany (n7) 61;216 (reservations); Mackenzie/others (n252) [14.14]; Connors (n258) 394.

[498] ICCPR.Prot., Art.5(2)(a); similarly CPED, Arts.31(2)(c);30(2)(e). Reservations include previously determined matters: Shany (n7) 60-61;215-216; Zwart (n491) 178; e.g., *Fanali v Italy* (1983) 78 ILR 54 (HRC) [5.1].

[499] *S v Sweden*, Doc.CAT/C/59/D/691/2015 (27.Jan.2017) [7.3].

[500] E.g., *Sierra v Spain*, Doc.E/C12/59/D/4/2014 (CESCR, 29.Sept.2016) [6.4]; *Vojnović v Croatia*, DocCCPR/C/112/D/2068/2011 (30.Oct.2014) [6.2]. Cf.Shany (n7) 218-219, citing *i.a.* HRC, 'General Comment No.24' (1994) UN.Doc.CCPR/C/21/Rev.1/Add.6 [14] ('legal right and...subject matter...identical'); *infra*.Ch.VI, particularly *infra*.nn1479ff.

[501] ECOWAS Protocol, Art.4.

several international bodies'.[502] The African Commission only considers non-State communications which '[d]o not deal with cases which have been settled by those States involved',[503] indicating that 'for a matter to fall within the [provision's] scope ... it should have involved the same parties, [and] the same issues'.[504] Any such settlement is also 'tak[en] into account' in determining the admissibility of individual AfCtHR applications.[505] Finally, a claim before the Andean Court 'excludes the possibility of simultaneous recourse for the same purpose' to national courts,[506] while the SADC Rules allow a stay of proceedings if 'a national court is already [seized] of the matter and the same relief is sought'.[507]

Provisions such as these, designed 'to avoid a plurality of international proceedings relating to the same cases',[508] bear a similarity – as tribunals have sometimes expressly acknowledged[509] – to principles of *res judicata* and/or *lis pendens*.[510] *Res*

[502] *Koraou v Niger* (2008) AHRLR 182 (ECOWASCJ) [51].

[503] ACHPR, Art.56(7). Generally Shany (n7) 225; *infra*.nn1606ff.

[504] *Gunme v Cameroon* (2009) AHRLR 9 (ACommHPR) [86]; also *Spilg v Botswana* (2011) AHRLR 3 (ACommHPR) [110].

[505] ACHPR.Prot., Art.6(2); Gherari (n254) 786.

[506] Cartagena Protocol, Art.25, also Art.31.

[507] SADCT Rules, Rl.60 (original apparently containing error ('ceased')).

[508] *Yukos/Russia* (n491) [520]; *Karoussiotis/Portugal* (n306) [62]; similarly *Celniku v Greece*, App.21449/04 (ECtHR, 5.Jul.2007) [39]; *Koraou/Niger* (n502) [50]-[51]; *Kethusegile-Juru v SADC Parl.For.* [2010] SADCT 2 [10]; also *Harkins/UK* (n491) [41]; *Kafkaris/Cyprus* (n491) [67] ('ensure[s]...finality').

[509] *Res judicata*: *Saramaka/Suriname* (n495) [56]; *Shaw/Jamaica* (n495) [22],[37],[45]; *SINTRAOFAN v Colombia*, Pet.1470-05, Rep.140/09 (IACHR, 30.Dec.2009) [75]; *Spilg/Botswana* (n504) [110]; *Sudan HRO v Sudan* (2009) AHRLR 153 (ACommHPR) [104]. *Lis pendens*: *Fajardo v Nicaragua*, Case-11381, Rep.14/97 (IACHR, 12.Mar.1997) [42]. Also *Koraou/Niger* (n502) [52] (both); *VØ v Norway*, DocCCPR/C/25/D/168/1984 (17.Jul.1985) [4.1] (*non bis in idem*).

[510] Gherari (n254) 784 (ACHPR provision 'stems from...principle of *res judicata*...found in other regional systems', referencing ECHR/AmCHR); Wehland (n13) [6.47]; Zwart (n491) 183; Ouguergouz, *The African Charter on Human and Peoples' Rights* (2003) 613-619; Shany (n7) 212ff;218 (ICCPR *lis pendens*);223-225 (AmCHR/ACHPR *res judicata*-like); cf.60;213-216 (ECHR/UNCAT/CEDAW/ICPMW *electa una*

judicata precludes a party from relitigating a claim already judicially decided, other than through appeal.[511] It is premised on the desirability of finality in litigation,[512] in the interests of both the public and the defendant, with justice requiring that persons not be subjected to recurring claims.[513] The related *lis pendens* doctrine precludes claims being brought in parallel.[514]

Res judicata is recognised across domestic legal systems,[515] and as a general principle of international law.[516] It operates where a judicial tribunal renders a final merits decision,[517] and the second claim shares three "identities" with the first: cause of action, subject-matter or object, and parties.[518] The first and second require the legal grounds, or

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via); similarly Shany (n4) 156; Salles (n473) 251 (fork-in-the-road);cf.252. Cf.*X v Belgium* (1956) 24 ILR 391 (ECommHR) 392 (decisions not *res judicata*).

[511] Handley, *Spencer Bower and Handley: Res Judicata* (4th edn, 2009) [1.01]; ILA, 'Interim Report on *Res Judicata* and Arbitration' (2004) 25 Arb.Int. 35, 36.

[512] E.g. Shany (n7) 22;165;223; Handley (n511) [1.10]; Wehland (n13) [4.56]; cf.*supra*.n508.

[513] Handley (n511) [1.10]; Barnett, *Res Judicata, Estoppel, and Foreign Judgments* (2001) [1.13]; ILA, 'InterimRep.' (n511) 36; Lange, *The Doctrine of Res Judicata in Canada* (2000) 4; McDermott, *Res Judicata and Double Jeopardy* (1999) [3.01]-[3.09]; Shany (n4) 160; Reinisch, 'The Use and Limits of *Res Judicata* and *Lis Pendens*' (2004) 3 LPICT 37,43; Shany (n7) 165; Hobér (n13) 120; Wehland (n13) [4.55]-[4.56]; Salles (n473) 268; *Dallal* (n301) 162.

[514] Shany (n7) 22; Brower and Henin, 'Res Judicata' in Kinnear and others (eds), *Building International Investment Law* (2016) 56.

[515] See ILA, 'InterimRep.' (n511) 36;41-54; Hobér (n13) Ch.II; Barnett (n513) [1.12] ('ancient precedents'); Reinisch (n513) 43; *Delimitation of the Continental Shelf (Nicaragua v Colombia) (Prel.Obj.)* [2016] ICJ.Rep. 100;142-143 (Joint.Diss.Op); *Sooknanan v Med.Council Guyana* [2014] CCJ 18 [5] ('ancient legal principle').

[516] *Nicaragua/Colombia* (n515) [58]; Cheng (n73) 336; ILA, 'InterimRep.' (n511) 55-57; Lowe, '*Res Judicata* and the Rule of Law in International Arbitration' (1996) 8 Af.JICL 38, 39; Reinisch (n513) 44-48; Brown (n109) 155; Shany (n7) 245-246 (alternatively custom); Shany (n4) 159-160; *Waste Management v Mexico (Prel.Obj.)* (2004) 6 ICSID.Rep. 549 [39]; *Apotex Holdings v US (Award)* ICSID Case-ARB(AF)/12/1 (25.Aug.2014) [7.11]. Cf.*India-Measures Affecting the Automotive Sector-Panel.Rep.* (21.Dec.2001) WT/DS146/R;WT/DS175/R [7.55]-[7.103].

[517] Handley (n511) [1.02]; Barnett (n513) [1.18]-[1.34]; Shany (n7) 22-23;165.

[518] ILA, 'InterimRep.' (n511) 36; ILA, 'Final Report on Res Judicata and Arbitration' (2009) 25 Arb.Int. 67 [29]; *Nicaragua/Colombia* (n515) [55] (parties, object, 'legal ground');143 (Joint.Diss.Op); Lowe (n516) 40; Wehland (n13) [6.52]; Pauwelyn/Salles (n460) 103; Cheng (n73) 339-340;343-346 (doubting

rights, and claimed relief in each proceeding to be the same.[519] The third requires that the same legal persons be party to each claim.[520] Where the conditions are satisfied, the later claim is inadmissible.[521] Because *lis pendens* is of less clear status internationally,[522] but in any event requires the same identities,[523] the focus here is on *res judicata*.[524]

There are similarities between the requirements for *res judicata* (and/or *lis pendens*) to operate and the provisions discussed above, each depending on the presence of comparable claim "identities".[525] Where these provisions apply, it is therefore unnecesary to consider whether *res judicata* might also operate.[526] However, not every treaty enabling individual claims contains such provisions, and some only exclude simultaneous proceedings.[527] Moreover, apart from the AmCHR, the provisions *prima facie* restrict only individual, not interstate, claims.[528] Potential scope therefore remains for *res judicata* to operate between overlapping individual and interstate claims, either as

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cause/object distinction); similarly *Apotex* (n516) [7.13]-[7.16]; Shany (n4) 133;138; Shany (n7) 24; Salles (n473) 271-272. Cf.*Automotive* (n516) [7.66].

519 Reinisch (n513) 62; also *Nicaragua/Colombia* (n515) [55]; Shany (n7) 25; Shany (n4) 138-144. Cf.*infra*.Ch.VI(II)-(III).

520 ILA, 'InterimRep.' (n511) 44; Wehland (n13) [6.53]-[6.56]; Handley (n511) [1.02]; also Shany (n4) 133-135; cf.*infra*.Ch.VI(IV).

521 *Nicaragua/Colombia* (n515) [48].

522 Hobér (n13) 325;330-331; Crawford, 'Chance' (n96) 224; Wehland (n13) [6.95]-[6.99]; Shany (n4) 158-159; Salles (n473) 277-281; cf.Shany (n7) 244.

523 Salles (n473) 277; Wehland (n13) [4.82]; *Chevron/Ecuador (TIA)* (n291) [4.77].

524 Additionally, as *lis pendens* operates only during the first proceedings, *res judicata* alone permanently precludes claims: Vermeer-Künzli, 'Concurrence' (n8) 274; Shany (n7) 212.

525 *Supra*.nn491-492;495;499-500;518-520; also Wehland (n13) [6.52].

526 Cf.Shany (n7) 223.

527 See Connors (n258) 394; Shany (n7) 218 (HRC); Salles (n473) 252; e.g., *supra*.nn497-498.

528 See Shany (n7) 224; *Georgia/Russia(II)* (n387) [79]; cf.*Cyprus v Turkey* (1996) 86A DR 104,135.

such[529] or, as certain bodies have recognised, as founding an abuse of process objection,[530] for which various treaties provide.[531]

It might appear that neither the provisions discussed, nor *res judicata*, could render a later claim inadmissible where a State or individual has already instituted overlapping proceedings, because there will, at the least, be no party identity.[532] Nonetheless, Chapter VI argues that both may apply between certain similar claims.

B. Provisions preventing overlapping individual and interstate proceedings

In addition to those provisions just discussed, certain treaties expressly control overlapping interstate and individual claims.[533] First, under Article 222(c) of CARICOM, individuals may bring CCJ claims where, *inter alia*, 'the Contracting Party entitled to

[529] Similarly Salles (n473) 267; Shany (n7) 254; cf.*Cyprus/Turkey (ECommHR)* (n528) 134 (provision 'reflects...basic legal principle'); *Durand/Ugarte v Peru* (1999) IACHR Ser.C.No.50 [45]-[49] (referencing *res judicata*, not Art.47(d)).

[530] *Conde v Spain*, Doc.CCPR/C/92/D/1527/2006 (1.Apr.2008) [4.2] (communication 'based on exactly the same facts' abusive); also *Hylton v Jamaica*, DocCCPR/C/57/D/600/1994 (16.Jul.1996) [6.3]; *Agiza v Sweden*, Doc.CAT/C/34/D/233/2003 (20.May.2005) [4.4],[9.2]; *Kethusegile-Juru* (n508) [10] ('abuse of remedies through concurrent proceedings'). Generally Shany (n4) 192-193; Shany (n7) 258-259; Zwart (n491) 164-168; Wehland (n13) [7.29]-[7.52]; *infra*.nn1434-1435;1565;1581;1764-1765. Cf.*SPP v Egypt* (1985) 106 ILR 501 (ICSID) [63].

[531] See ECHR, Art.35(3)(a); ICCPR.Prot., Art.3; ICESCR.Prot., Art.3(2)(f); CEDAW.Prot., Art.4(2)(d); UNCAT, Art.22(2); CRC.Prot., Art.7(3); ICPMW, Art.77(2); CPED, Art.31(2)(b); CRPD.Prot., Art.2(b); also AmCHR, Art.47(c) ('out of order').

[532] See Shany (n4) 134; Roberts, 'Hybrid' (n7) 40; Paparinskis, 'Countermeasures' (n5) 297; cf.298; Ewing-Chow (n359) 552; Pauwelyn (n359) 200-201; Hobér (n13) 376; Brown (n109) 155; Potestà, 'Role' (n353) 264; Brownlie, *Principles of Public International Law* (7th edn, 2008) 51; cf.Nollkaemper (n6) 251.

[533] Thus avoiding party identity issues: Shany (n4) 136 ('individual and...state exercising diplomatic protection...same parties for...applying jurisdiction-regulating rules designed to curb multiple proceedings'). Further *infra*.Ch.VI(IV). Individual MERCOSUR procedures are available '[u]nless…claim refers to…matter that…led to [interstate] Dispute Settlement procedure': Olivos Protocol, Art.41. However, individual claims are presented to State's 'National Chapter' (ibid.), which 'espouse[s]' it: Leathley (n246) 155; also 172-173; Perotti, 'Los Particulares y Las Controversias En El Mercosur' (2008) 122 Cuestión Logística 46. Accordingly, no individual-interstate overlap can result. Gwynn assisted here, particularly vis-à-vis Spanish-language materials.

espouse the claim ... has (i) omitted or declined to espouse [it], or (ii) expressly agreed that the persons concerned may espouse the claim instead'.[534] The Court understands this provision as a 'means ... to avoid a duplication of suits', 'a procedural device to avoid a State allegedly in violation being twice vexed, once by an injured private entity and again by the Contracting Party of that private entity'.[535] Second, Article 27 of ICSID provides:

> No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention ... .

It is likewise concerned with avoiding a 'multiplicity of claims and claimants'.[536] Both provisions allow individual or State conduct to preclude the other's claims.[537] Under CARICOM, State conduct dictates whether *individuals* are able to claim, though the CCJ also regards the State as 'surrender[ing] its right to bring its own proceedings' where it consents to the individual acting.[538] ICSID's Article 27 allows the requisite individual consent to prevent *the State's* claim,[539] though tribunals have also held that individuals are obligated to refrain from 'seeking' diplomatic protection where Article 27 applies.[540]

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[534] Chaguaramas Treaty, Art.222(c). See *Myrie v Barbados* [2012] CCJ 3 [2]; Baudenbacher/Clifton (n247) 269-270. Similarly: OECD, 'Draft Convention on the Protection of Foreign Property' (1967) Art.7, discussed Roberts, 'Hybrid' (n7) 43-44; Paparinskis, 'Countermeasures' (n5) 282; Sohn/Baxter (n58) Art.23(1), 201.

[535] *TLC/Guyana* (n277) [43].

[536] ICSID, *Documents Concerning the Origin and the Formulation of the Convention*, vol.II (1968) 242; also 273-274;303;372; similarly Schreuer, *ICSID* (n301) 419; Roberts, 'Triangular' (n5) 394; Roberts, 'Hybrid' (n7) 45-46; Juratowich (n12) 15; also Kaufmann-Kohler (n19) 308 ('duplication'); Paparinskis, 'Countermeasures' (n5) 283; Shany (n7) 194.

[537] See ICSID (n536) 1032; *ARSIWA*, 165. Cf.*supra*.n464.

[538] *Myrie/Barbados* (n534) [25]; also Paparinskis, 'Countermeasures' (n5) 282.

[539] Schreuer, *ICSID* (n301) 417, discussing *Autopista v Venezuela (Jurisiction)* (2001) 16 ICSID.Rev.-FILJ 469 [140].

[540] Under Art.26 ('[c]onsent...to arbitration...to the exclusion of any other remedy'): *Banro v DRC* (2003) 17 ICSID.Rev.-FILJ 382 [20], discussed Schreuer, *ICSID* (n301) 418-419; also *Tokios Tokelės v Ukraine (Ord.No.3)* ICSID Case-ARB/02/18 (18.Jan.2005) [22].

These provisions do not, unlike those discussed previously, expressly reference the 'same' claims,[541] yet similarity between interstate and individual-State claims appears presumed, with the exclusions envisaging that 'the claim' or 'a dispute' might be addressed through other procedures.[542] More particularly, CARICOM focuses on whether the claim has been 'espouse[d]', which the CCJ has confirmed denotes claims by way of diplomatic protection.[543] ICSID's Article 27 also precludes concurrent individual and diplomatic protection claims,[544] with the words 'or bring an international claim' interpreted as precluding only the exercise of diplomatic protection.[545] The operation of both provisions thus depends on whether the relevant interstate claim is diplomatic protection, a matter addressed in Chapter IV.

Nonetheless, Article 27 operates 'only from the moment that the consent' of the individual and State 'becomes mutual'.[546] Diplomatic protection might thus be commenced *before* this time.[547] Moreover, because similar provisions exist in only some

[541] Cf.*supra*.nn490ff.

[542] Cf.Shany, *supra*.n533. Similarly *Chevron/Ecuador (TIA)* (n291) [4.74] ('"the dispute" in [fork-in-the-road] context must mean "the same dispute"...material identity or sameness'); Hobér (n13) 364; Shany (n4) 132;149-150; Reinisch (n513) 67-68; Schreuer, *ICSID* (n301) 421.

[543] *Myrie/Barbados* (n534) [14],[25]-[26]; generally Schreuer, *ICSID* (n301) 415.

[544] E.g., *Banro* (n540) [15]-[23]; *Autopista* (n539) [138]; *Tokios (Order)* (n540) [21]; Schreuer, *ICSID* (n301) 419-422; Kjos, *Applicable Law in Investor-State Arbitration* (2013) 92; Peters (n1) 309.

[545] See Schreuer, *ICSID* (n301) 420-421; Roberts, 'Hybrid' (n7) 45-47;59; Paparinskis, 'Countermeasures' (n5) 313-314; Potestà, 'Potential' (n353) 762; *infra*.nn968ff. Cf.Bernasconi-Osterwalder (n353) 17-18.

[546] Paparinskis, 'Countermeasures' (n5) 281; also 305-306;312-313. Generally Schreuer, *ICSID* (n301) 424-425.

[547] Schreuer, *ICSID* (n301) 425; Roberts, 'Hybrid' (n7) 44-45; Paparinskis, 'Countermeasures' (n5) 312-315; Trevino (n353) 214; Juratowich (n12) 21; ICSID (n536) 350.

BITs, Article 27 is unlikely to codify custom,[548] meaning it may be avoided by the exercise of diplomatic protection by a non-ICSID State.[549] Consequently, even where provisions addressing individual-interstate overlap exist, there is scope to consider whether *res judicata* might operate.[550]

C. Multiple claims requirements

Quite differently from provisions aiming to preclude overlapping claims, one common admissibility requirement actually supports multiplicity.[551] This rule requires that an injured individual exhaust local remedies before interstate diplomatic protection claims – or claims 'preponderantly' so – may be brought 'in respect of [their] injury'.[552] Exhaustion is required under customary international law,[553] and many, particularly human rights, treaties.[554] Claims are inadmissible if the requirement is applicable and unsatisfied.[555] Thus, unlike where the existence of overlapping claims may render the

[548] See Paparinskis, 'Countermeasures' (n5) 284-285; also 282-283; Juratowich (n12) 16-17;19-21; Potestà, 'Italy/Cuba' (n363) 346; also Roberts, 'Hybrid' (n7) 46-47.

[549] Schreuer, *ICSID* (n301) 418; Paparinskis, 'Countermeasures' (n5) 317 and see *Autopista* (n539) [135]-[140]. Cf.*supra*.n540.

[550] Similarly Salles (n473) 267.

[551] Shany (n4) 89; also 27-30;128; Amerasinghe (n14) 401; Dodge (n451) 360; Nollkaemper (n6) 27. The situation differs where individuals are domestically successful: *infra*.nn841;843;850;1779; also Shany (n4) 28.

[552] DADP, Art.14; generally *supra*.nn321;335.

[553] ibid.71; *ARSIWA*, 265.

[554] Authorities *supra*.n451.

[555] *ARSIWA*, Art.44(b).

second inadmissible, a claim in 'essence' the same must have been previously brought, albeit domestically.[556]

Individuals are only required to exhaust remedies before domestic courts, not potentially available international remedies.[557] Nonetheless, as Chapter II outlined, claims brought by individuals and States before, respectively, domestic and international fora, may be regarded as overlapping.[558] Because State claims may be precluded if the individual fails to act,[559] the local remedies rule deserves to considered together with the other admissibility rules herein.

III. Principles concerning reparation

Claims may be settled and reparation paid through both adjudication and other dispute resolution mechanisms.[560] In the context of overlapping individual-interstate claims, it is apt to consider the potential operation of the principle precluding double recovery to preclude one entity's reparation claim.[561]

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[556] *ELSI* (n304) [59], discussed Thirlway (n216) 620; Nollkaemper (n6) 260;247, *supra*.n453; similarly *X v Austria* (1968) 26 Collection 55, 64 (matter 'substantially raised'), quoted Amerasinghe (n14) 320; authorities *supra*.n304.

[557] Paparinskis, 'Countermeasures' (n5) 301-302 (proposing otherwise *de lege ferenda*); DADP, 88; ILC, 'Diplomatic Protection: Comments and observations' (2006) UN.Doc.A/CN.4/561, 54 (Austria); also Schabas, *The European Convention on Human Rights: A Commentary* (2015) 768. Cf.Sohn/Baxter (n58) 165;202-203.

[558] *Supra*.Ch.II(III)(C).

[559] Roberts, 'Hybrid' (n7) 31, and authorities *supra*.n464; Cucos, 'The Position of the Individual in Post-Codification Diplomatic Protection' (2014) 5 CYBP&PIL 181,191; Pellet, 'The Second Death of Euripide Mavrommatis?' (2008) 7 LPICT 33, 37; Douglas (n301) 29; *Restatement* (n107) 347.

[560] Vermeer-Künzli, 'Concurrence' (n8) 276; *supra*.nn86-88; Paparinskis, 'Countermeasures' (n5) 282.

[561] *Supra*.n465.

A. Double recovery

Double recovery commonly refers to 'recovery by the injured party of more than its assessed damage or injury.'[562] Its preclusion prevents a party being unjustly enriched through a 'double claim',[563] including before different tribunals,[564] from different respondents,[565] or multiple times for loss resulting from more than one breach.[566]

The rule precluding double recovery can operate as an aspect of *res judicata*.[567] However, a distinct equitable rule prevents duplication of relief, regardless of whether *res judicata* operates,[568] including when claims involve different parties.[569] Significantly, the

[562] Crawford, 'ThirdRep' (n144) [248].

[563] *Gold Looted from the Netherlands* (1963) 44 ILR 448 (Italy-Netherlands Conc.Comm.) 471.

[564] See *Chevron/Ecuador (PA)* (n378) [517],[557] (domestic actions); similarly *Occidental v Ecuador (Award)* (2004) 12 ICSID.Rep. 59 [209]; *Hochtief v Argentina (Jurisdiction)* ICSID Case-ARB/07/31 (24.Oct.2011) [121]-[122]; *Waste.Mgmt. (Award)* (n297) [27] (waiver avoids); *Thunderbird Gaming v Mexico (Award)* UNCITRAL (26.Jan.2006) [118]; *Renco/Peru* (n474) [84]-[88].

[565] *ARSIWA*, 275 (vis-à-vis Art.47); *Neth.Gold* (n563) 471; also *Eritrea* (n271) [46] (no damages 'reflecting...donations or payments not required or expected to be repaid'); *infra*.n916.

[566] *SD Myers v Canada (Part.Award)* (2000) 8 ICSID.Rep. 18. [316]; *Ethiopia* (n428) [329],[366]; *Duke/Ecuador* (n476) [476]; *Total SA v Argentina (Liability)* ICSID Case-ARB/04/1 (21.Dec.2010) [198]; generally Ripinsky and Williams, *Damages in International Investment Law* (2008) 101; Handley (n511) [21.04]; Crawford, 'ThirdRep' (n144) [248]; similarly Wittich, 'Compensation' in *MPEPIL* (2012) [34]; *ARSIWA*, 230.

[567] See Handley (n511) [1.04],[19.01]-[19.02] (*transit in res judicatum*),[27.03]; Barnett (n513) [1.37],[1.41]-[1.42]; Salles (n473) 268; *Hochtief (Liability)* (n478) [180].

[568] Barnett (n513) [1.45] ('double satisfaction'), referencing *Kohnke v Karger* [1951] 2 KB 670, 675-676; *Cuttel v Bentz* [1985] 6 WWR 193 (BCCA),198, referenced Lange (n513) 132; ILA, 'InterimRep.' (n511) 43 (distinguishing 'former recovery'/'equitable...double satisfaction'); Crawford, 'ThirdRep' (n144) [249] ('principle...subsumed in general principle of full (equitable) reparation'); also *Nagel v Czech Republic (Fin.Award)* (2003) 13 ICSID.Rep. 30 (SCC) [239]; *infra*.nn602-605.

[569] See *Kohnke* (n568) 675-676; *Neth.Gold* (n563) 471; *Burlington v Ecuador (Counterclaims)* ICSID Case-ARB/08/5 (7.Feb.2017) [1080]-[1086]; *infra*.nn570;580ff.

rule can therefore operate when 'different persons or entities are entitled to bring what is effectively the same claim before different forums.'[570]

This latter, equitable, aspect of the principle, which is the focus here, is well-recognised in international law.[571] Thus, the ICJ in the *Reparations Case* held that, while no rule prioritised between diplomatic and functional protection claims arising from an individual's injury,[572] '[i]nternational tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State'.[573] The ARSIWA commentary to Article 46, addressing multiple injured States, quotes this as evidencing that States 'claiming in respect of the same wrongful act' should 'coordinate their claims so as to avoid double recovery.'[574]

Similarly, because investment treaties commonly protect both companies and their shareholders,[575] separate entities affected by given conduct may claim.[576] Tribunals have allowed shareholder claims in such circumstances, including over respondent State objections concerning double recovery.[577] Nonetheless, aside from when double recovery

[570] Crawford, 'ThirdRep' (n144) [248].

[571] Similarly *Burlington (Counterclaims)* (n569) [1083].

[572] *Reparations* (n69) 185.

[573] ibid.186. Cf.*Barcelona Traction* (n69) [53],[98].

[574] *ARSIWA*, 271; also Wu, 'Addressing Multiplicity of Shareholder Claims in ICSID Arbitrations Under Bilateral Investment Treaties' (2010) 6 AIAJ 134,151; Paparinskis, 'Countermeasures' (n5) 300.

[575] Ripinsky/Williams (n566) 150-154; Paparinskis, 'Countermeasures' (n5) 316; Bottini, 'Indirect Shareholder Claims' in Kinnear/others, *Building* (n514) 203ff.

[576] Douglas (n367) 173-175; Wu (n574) 134-135;137-139; Hobér (n13) 343; Salles (n473) 275; Crawford, 'Revisited' (n457) 157-158; generally Douglas (n301) Ch.11. Cf.*Barcelona Traction* (n69) [90],[96].

[577] Generally Wu (n574) 153; also Wehland (n13) [1.32]-[1.34]; Bottini (n575) 216-218; e.g., *Enron v Argentina (Annulment)* ICSID Case-ARB/01/3 (30.Jul.2010) [123]-[124]; *Azurix (Annulment)* (n297) [113]-[130]; *Suez v Argentina (Jurisdiction)* ICSID Case-ARB/03/17 (16.May.2006) [51].

is considered 'hypothetical',[578] tribunals have recognised that it must be prevented, by: (i) suggesting there are 'pragmatic ways' of addressing such situations;[579] (ii) asserting, *Reparations*-style, that international law has 'mechanisms' for avoiding double recovery;[580] (iii) emphasising that compensation awarded to one entity would be accounted for in the other's claim;[581] or (iv) making orders to ensure no double recovery results.[582] In the infamous *Lauder* case, for example, involving separate proceedings by a company and its owner, one tribunal rejected the applicability of *lis pendens* because the parties and claims were different.[583] Nonetheless, it noted the 'risk':

> that damages be concurrently granted by more than one court or arbitral tribunal, in which case the ... second deciding court or arbitral tribunal could take this fact into consideration when assessing the final damage.[584]

Similarly, the *Micula* tribunal, to avoid double recovery,[585] allocated damages in a way that 'dispose[d] of the total amount that Romania has to pay fully to discharge its

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[578] *Azurix (Annulment)* (n297) [114]; also *Impregilo (Jurisdiction)* (n470) [148]. Cf.*Pan American Energy v Argentina (Prel.Obj.)* ICSID Cases-ARB/03/13;ARB/04/8 (27.Jul.2006) [219] ('danger...real').

[579] *Enron* (n577) [124].

[580] Wu (n574) 153; e.g. *Azurix (Annulment)* (n297) [116], referencing *Camuzzi v Argentina (Jurisdiction)* ICSID Case-ARB/03/2 (11.May.2005) [91] and *Bayindir v Pakistan (Jurisdiction)* ICSID Case-ARB/03/29 (14.Nov.2005) [270]; *Chevron/Ecuador (PA)* (n378) [557]; also *Perenco v Ecuador (Dismiss.Counterclaims)* ICSID Case-ARB/08/6 (18.Aug.2017) [52]; *Suez (Jurisdiction)* (n577) [51]; *Burlington (Counterclaims)* (n569) [1086]; Douglas (n301) 457.

[581] *Impregilo v Argentina (Award)* ICSID Case-ARB/07/17 (21.Jun.2011) [139]; *Azurix (Annulment)* (n297) [117]; *Urbaser v Argentina (Jurisdiction)* ICSID Case-ARB/07/26 (19.Dec.2012) [253]; *Hochtief (Liability)* (n478) [180]; *Suez v Argentina (Award)* ICSID Case-ARB/03/19 (9.Apr.2015) [38]-[40]; *infra*.n584; also *Union Fenosa v Egypt (Award)* ICSID Case-ARB/4/4 (31.Aug.2018) [11.33].

[582] *Railroad Development v Guatemala (Award)* ICSID Case-ARB/07/23 (29.Jun.2012) [265]; also *Venezuela Holdings v Venezuela (Award)* ICSID Case-ARB/07/27 (9.Oct.2014) [378]-[381]; *ADM v Mexico (Correction/Interpretation)* ICSID Case-ARB(AF)/04/05 (10.Jul.2008) [21]-[24]; *Occidental* (n564) [209]; *infra*.nn585-586.

[583] *Lauder v Czech Republic* (2001) 9 ICSID.Rep. 66 [171]; further *infra*.nn1452;1573.

[584] ibid.[172]; also Shany (n4) 135; Roberts, 'Hybrid' (n7) 42; Paparinskis, 'Countermeasures' (n5) 300; *BCB v Belize (Award)* PCA.Case-2010-18 (19.Dec.2014) [190].

[585] *Micula v Romania (Award)* ICSID Case-ARB/05/20 (11.Dec.2013) [1246].

obligations' without 'deal[ing] with the specific entitlement of each Claimant individually'.[586]

Regarding human rights, the ECtHR, in *Petroiu*, found a compensable unlawful taking of property where domestic courts had already held the applicant entitled to possession.[587] The Court held that it could not sanction the unjust enrichment that would result:

> si la requérante devait obtenir en plus de la mise en possession de l'immeuble, ultérieurement, une somme au titre de la satisfaction équitable pour préjudice matériel, calculée sur la base de la valeur de cet immeuble: en effet, la requérante obtiendrait alors deux fois la valeur dudit bien… .[588]

Implicitly recognising the double recovery principle, the Court considered the application an abuse of process,[589] as it did in another case concerning multiple requests for compensation for the same damage,[590] and as the Commission indicated it would where compensation received through 'friendly settlement' had provided 'complete redress'.[591] The IACHR has also recognised the rule against double recovery,[592] while other treaty bodies cease to regard individuals as "victims" once settlement is reached.[593] Even under

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[586] ibid.[1247].

[587] *Petroiu v Romania (Revision)*, App.33055/09 (ECtHR, 7.Feb.2017) [20]-[21].

[588] ibid.[25].

[589] ibid.[26],[30]. Similarly *Vidu v Romania (Revision)*, App.9835/02 (ECtHR, 17.Jan.2017) [17]-[30].

[590] *Migliore v Italy*, App.58511/13 (ECtHR, 12.Nov.2013) [39]-[40]. Similarly *Alves v Portugal*, App.56297/11 (ECtHR, 21.Jan.2014) [14]-[15],[17].

[591] *Andronicou/Constantinou v Cyprus* (1995) 82A DR 102,113 (though also discussing victim status), referencing *Inze v Austria* (1987) ECHR Ser.A.No.126 [32].

[592] *Mapiripán Massacre (Merits)* (2005) IACHR Ser.C.No.134 [214] (domestic damages),[287]; *La Cantuta/Sánchez v Peru (Merits)* (2006) IACHR Ser.C.No.162 [210], both discussed *Fujimori*, File-AV/19-2001 (SC.Peru, 7.Apr.2009) [780], discussed Nollkaemper (n6) 209.

[593] E.g., *X v Austria*, Doc.CEDAW/C/64/D/67/2014 (11.Jul.2016) [6.7]; *Dahanayake/Sri Lanka* (n297) [6.5]; *supra*.n481. Generally Zwart (n491) 62-69; Nollkaemper (n6) 262.

the ICCPR Protocol, which allows the HRC to consider a claim already heard elsewhere,[594] an applicant awarded reparation by the ECtHR was not considered a 'victim', and their claim was consequently inadmissible.[595]

As to other international tribunals, the UNCC expressly recognised that double recovery must be avoided,[596] as did the EECC,[597] while the CCJ declared double recovery 'contrary to elementary judicial principles'.[598] The *Arctic Sunrise* Tribunal awarded the Netherlands compensation for 'non-material damages in relation to the arrest, detention, and prosecution of [persons] on board', resulting from Russian UNCLOS violations.[599] As individual ECHR claims were still pending, it was unnecessary to 'consider the possibility of double compensation', but the Tribunal thereby implicitly recognised the principle.[600]

International tribunals thus recognise that international law prevents double recovery from materialising, including, importantly, where it would result from claims brought by multiple claimants against a single defendant.[601]

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[594] *Supra*.nn498;527.

[595] *Smirnova v Russia*, Doc.CCPR/C/81/D/712/1996 (5.Jul.2004) [9.3]-[9.4].

[596] *Category 'C' Claims against Iraq* (1994) 109 ILR 205 (UNCC) 267; *First Instalment of 'E3' Claims* UN.DocS/AC26/1998/13 (UNCC, 17.Dec.1998) [434]; *infra*.n1784; generally Houtte/Das/Delmartino (n269) 367-368;374-375; Shany (n7) 225.

[597] *Ethiopia* (n428) [329],[366].

[598] *BCB v Belize* [2013] CCJ 4 [47].

[599] *Arctic Sunrise (Netherlands v Russia) (Compensation)* PCA.Case-2014-02 (10.Jul.2017) [85].

[600] ibid.[86].

[601] *Supra*.nn569-570;572-573;579-586;600. Cf.Roberts, 'Hybrid' (n7) 42 ('discretionary').

The rule precluding double recovery may apparently operate either to bar a later claim entirely or to reduce the compensation awarded.[602] Thus, while one tribunal considered that where damage is 'fully repaired', a later claim 'may become inadmissible',[603] another suggested that – unless formulated as *res judicata* – double recovery instead concerns how reparation is calculated.[604] The two approaches are logically distinct.[605] Nonetheless, given its potential operation vis-à-vis admissibility, and its relationship with *res judicata*, double recovery is considered together with other admissibility issues in Part B.

B. Identity of damage

While *res judicata* operates where the three identities are present,[606] the equitable double recovery rule focuses on double compensation for the 'same loss'.[607] For instance, shareholders are commonly awarded damages under BITs for losses in dividends and share value.[608] However, such losses are generally 'derivative'[609] or 'reflective'[610] of

[602] Crawford, 'ThirdRep' (n144) [248]; *infra*.nn603-604. On difficulties where claimed 'remedies diverge': Paparinskis, 'Countermeasures' (n5) 300; also Roberts, 'Hybrid' (n7) 67; Borchard (n319) 370.

[603] *Orascom* (n477) [495], also [496]-[518]. Cf.[488] ('dispute...effectively one and the same'); *Brownlie (7th)* (n532) 51; also *supra*.n595.

[604] *Hochtief (Liability)* (n478) [180]; also *Azurix v Argentina (Jurisdiction)* (2003) 10 ICSID.Rep. 416 [101] (merits); *Sempra v Argentina (Annulment)* ICSID Case-ARB/02/16 (10.Jun.2010) [104].

[605] *Supra*.Ch.I(II)(C)-(D) (distinguishing invocation/reparation).

[606] *Supra*.n518.

[607] E.g. *Burlington (Counterclaims)* (n569) [1081]; *VH* (n582) [378]; *ADM (Correction/Interpretation)* (n582) [21]; *Cuttel/Bentz* (n568) 205.

[608] Ripinsky/Williams (n566) 157-161; *infra*.n611.

[609] E.g. *Inmaris v Ukraine (Jurisdiction)* ICSID Case-ARB/08/8 (8.Mar.2010) [112]; generally Wisner, 'Derivative Actions and Indirect Claims' in Ortino/others, *Investment* (n18) 74-76; *infra*.n611.

[610] E.g. Douglas (n301) 416;418-420; *Johnson v Gore Wood* [2002] 2 AC 1, 66; *infra*.n611.

those suffered by the company. Insofar as the loss ceases to exist once the company is compensated, the shareholder cannot obtain separate reparation.[611] Similarly, in *Chórzow*, the 'interests' of two German companies were 'interdependent and complementary',[612] ultimately dependent on the same undertaking's value, meaning that both could not be separately compensated.[613] Nonetheless, not all shareholder losses are necessarily identical with those of the company; personal damage additional to losses in share value may, for instance, be separate.[614] The difficulty, vis-à-vis overlapping individual-interstate claims, addressed in Chapter VII, is distinguishing individual and interstate losses that are the same from those that are not.

IV. Conclusion

This Chapter has provided an overview of waiver; treaty-based rules addressing overlapping claims; the local remedies requirement; and the principles of *res judicata* and double recovery. All have the potential, given certain State or individual conduct, to preclude the other's claims. Their application may be divided according to two conditions.

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[611] See *Johnson* (n610) 35-37;62 (dividend loss/share value diminution reflecting company's loss); *Orascom* (n477) [498]ff; also *Diallo (Compensation)* (n325) (Sep.Op.Greenwood) [2] (share value diminution 'in substance...same' as company's claim); similarly *supra*.n581; *Headstart v Y2K Finance* (2008) Case-BVIHCV2007/0278 (ECSC) [67]-[69]; Wu (n574) 141-142; generally Wälde and Sabahi, 'Compensation, Damages, and Valuation' in Muchlinski, Ortino and Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008) 1101-1103; *Oppenheim's* (n73) 520 ('loss indirectly'); Crawford, 'Revisited' (n457) 158 ('derivative claims' for 'reflective loss');cf.160 ('not…derivative'); Meron, 'The Insurer and the Insured under International Claims Law' (1974) 68 AJIL 628, 641; *Twenty-Second Instalment of 'E3' Claims* UN.DocS/AC26/2002/32 (UNCC, 12.Dec.2002) 132 (Annex, Summary ('contractual chain')).

[612] *Chórzow (Merits)* (n80) 48.

[613] ibid.48-49, also 55-56; Crawford, 'ThirdRep' (n144) [248]; Wu (n574) 151.

[614] *Johnson* (n610) 35-36; Douglas (n301) 417; also Wu (n574) 143; *Chórzow (Merits)* (n80) 48-49;55-56.

First, the application of certain rules depends on the type of claim at issue. The local remedies rule applies only vis-à-vis interstate *diplomatic protection* claims. Certain treaty-based provisions likewise exclude overlapping individual-interstate *diplomatic protection* claims.[615] The difference between diplomatic protection and other interstate claims must be examined to appreciate when these rules operate.[616]

Second, certain other rules depend on two claims being the 'same' or sufficiently so.[617] Thus, because third-party rights cannot be waived,[618] waiver only functions to preclude claims belonging to the same party.[619] *Res judicata* and similar treaty-based exclusions operate where two claims share sufficient "identities",[620] and double recovery applies where the same *damage* is alleged.[621] The application of these rules therefore requires identifying when claims, and rights to claim, are the same.

Chapter IV addresses the distinction between diplomatic protection and other interstate claims, while Chapters V-VII address when overlapping individual-interstate claims are relevantly the same for the purposes of waiver, *res judicata* and related provisions, and double recovery. In both, the concepts of breach and damage, introduced in Chapter I, are utilised. This is for three reasons. First, as Chapter IV demonstrates,

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[615] *Supra*.Pt.II(B)-(C).

[616] See *supra*.nn371;543-545. Similarly: Trevino (n353) 213.

[617] Similarly: Shany (n7) 23-24 (*electa una via*/*res judicata*/*lis pendens*); Shany (n4) 3;131;164; Hobér (n13) 121. See *supra*.Pt.I(A);II(A);III(A)-(B).

[618] *Supra*.nn482-483.

[619] Brownlie, *System* (n76) 58 ('precise identification of...cause of action...called for'); Peters (n1) 213-216; Parlett (n1) 93; Hess (n7) 241.

[620] *Supra*.Pt.II(A), particularly *supra*.nn518-520.

[621] *Supra*.Pt.III(B), particularly *supra*.n607.

these concepts assist in appreciating the distinction between diplomatic protection and other claims, essential for applying admissibility rules dependent thereon. Second, as Chapter V explains, separating rights to invoke responsibility (breach) and to reparation (damage) assists in appreciating how far States and individuals may waive the others' claims. Third, as Chapter VI develops, *res judicata* and provisions operating similarly require – in addition to party identity – (i) cause of action identity; and (ii) identity of 'object' or relief sought.[622] As will be seen, the former requires that two proceedings allege the same *breach*,[623] while the latter concerns reparation for *damage*.[624] The issue of damage identity is, as Chapter VII elaborates, also critical for the rule precluding double recovery.[625] Ascertaining the equivalence of breach and damage in overlapping individual-interstate claims thus assists in determining how similar claims are, aside from party identity, for *res judicata* purposes, and for the potential applicability of double recovery.[626]

[622] *Supra*.nn518-520.

[623] *Infra*.Ch.VI(II).

[624] *Infra*.Ch.VI(III); generally on these concepts *supra*.Ch.I(II)(A)-(C) and authorities.

[625] *Supra*.Pt.III(B), particularly *supra*.n607.

[626] *Infra*.Chs.VI-VII. Cf.Shany (n4) 131-144.

CHAPTER FOUR: THE APPLICATION OF DIPLOMATIC PROTECTION-BASED ADMISSIBILITY RULES

Chapter III highlighted how certain admissibility rules of potential relevance to overlapping individual-interstate claims depend on the distinction between diplomatic protection and other interstate claims:[627]

> (1) individuals must exhaust local remedies before States can bring diplomatic protection claims;
>
> (2) ICSID's Article 27 disallows diplomatic protection claims where an individual has consented to investment arbitration; and
>
> (3) individual claims under CARICOM are precluded unless the State has either failed to exercise diplomatic protection or consented to the individual acting.[628]

In the first two situations, actions of the individual in either agreeing to, or failing to pursue, certain remedies results in the State's claim being inadmissible, while in the third, the State's entitlement to claim prevents the individual from doing so.[629] However, determining when these rules apply depends on accurately identifying which of those interstate claims introduced in Chapter II – Article 42 'injured' State claims, and Article 48 claims for breach of *erga omnes (partes)* obligations – are diplomatic protection.[630] This Chapter argues that the notion of *damage* underlies the correct distinction,[631] and demonstrates when these rules of admissibility are therefore applicable.[632] As Chapters V-VII demonstrate, the distinction between diplomatic protection and other claims is also

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[627] See *supra*.Ch.III(II)(B)-(C). Generally Shany (n4) 134-136; indeed, cf.*supra*.n316.

[628] *Supra*.Ch.III(II)(B)-(C) and authorities therein.

[629] *Supra*.nn464;537-540;559.

[630] See *supra*.nn90;95;371; *infra*.n1044.

[631] *Infra*.Pt.I(A)-(C), particularly authorities *infra*.nn649;814-816;828-836;851.

[632] *Infra*.Pt.III.

important for understanding how and when other rules of preclusion – waiver, *res judicata*, and double recovery – may operate as between overlapping individual-interstate claims. It is, accordingly, addressed in some detail.

I. Article 42 claims: diplomatic protection, 'direct' and 'mixed' claims

As foreshadowed in Chapter II, Article 42 claims can be diplomatic protection, 'direct', or 'mixed' claims, the last incorporating aspects of both.[633] The distinction between diplomatic protection and 'direct' claims has been debated.[634] The 'principal factors' of relevance have been considered 'the subject of the dispute, the nature of the claim and the remedy claimed.'[635] The first identifies 'direct' claims through 'categories of acts' tending to cause direct injury, such as vis-à-vis State officials or property,[636] while the claim's nature concerns whether 'the real interests and objects pursued' are the State's or an individual's,[637] a question often elucidated by the reparation requested.[638]

[633] *Supra*.nn317-336; Fitzmaurice, *LP* (n69) 687.

[634] On the debate: DADP, 74-76; Wittich (n73) 132-137; Meron (n322) 85-89; Amerasinghe (n14) 151-168; Dugard, 'Second Report on Diplomatic Protection' [2001] 2(1) ILCYB 97 [20]-[31]; *infra*.nn635ff; also Shany (n4) 140.

[635] DADP, 75-76; also Meron (n322) 86-89, discussed Amerasinghe (n14) 160-163; Wittich (n73) 134-135; Dugard, 'SecondRep' (n634) [24]-[27].

[636] Meron (n322) 87; similarly DADP, 76; Dugard, 'SecondRep' (n634) [25]; ILC, '53rd' (n326) 142 (Dugard); Garcia-Amador, 'Report' (n2) [41]; Bennouna (n325) [17]; Wittich (n73) 133-134. See authorities *infra*.nn897-899;Ch.VII(II)(C).

[637] Meron (n322) 87, discussed Dugard, 'SecondRep' (n634) [26]; also ILC, '53rd' (n326) 142 (Dugard).

[638] Meron (n322) 88; Dugard, 'SecondRep' (n634) [27]; ILC, '53rd' (n326) 142 (Dugard).

These are useful criteria.[639] However, as Chapter II outlined, the DADP's definition of diplomatic protection focuses on whether the claim is 'for an *injury* caused by an internationally wrongful act ... to ... a [State's] national'.[640] The ICJ considers that definition reflective of customary international law,[641] and the ECtHR has confirmed it.[642] It is likewise reflected in the EECC's case law, the Commission observing that 'some of both States' claims are made in the exercise of diplomatic protection, *in that they are predicated upon injuries allegedly suffered by numbers of [their] nationals*.'[643] The person injured should therefore form the starting-point in distinguishing diplomatic protection and 'direct' claims.[644] A 'mixed' claim is treated as diplomatic protection, at least for local remedies purposes,[645] when 'brought preponderantly on the basis of [such] injury'.[646]

Nonetheless, as Chapter I highlighted, the term 'injury' can refer both to *breach* (legal injury) and *damage* (factual injury).[647] This Chapter argues that diplomatic

[639] See Dugard, 'SecondRep' (n634) [24]-[27]; Wittich (n73) 134-135;136-137; cf.Amerasinghe (n14) 162-163.

[640] DADP, Art.1 (emphasis added). Also *Mavrommatis* (n313) 12 (dispute often 'originates in...*injury* to a private interest', State may 'protect...subjects, when *injured* by acts contrary to international law' (emphasis added)); Amerasinghe (n323) 37 ('injury to person or property'); *Restatement* (n107) §902(2) ('violations…resulting in injury to...nationals'); 347. This is consistent with the criteria *supra*.nn635-638: see Wittich (n73) 181-182; DADP, 75-76; similarly Bollecker-Stern (n231) 100.

[641] *Diallo (Objections)* (n422) [39]; also Paparinskis, 'Countermeasures' (n5) 279.

[642] *Cyprus/Turkey (Compensation)* (n95) [45].

[643] *Eritrea* (n271) [25]; *Ethiopia* (n428) [25] (emphasis added); authorities *infra*.n1826.

[644] See *supra*.n326, particularly Wittich (n73) 129, citing, *i.a.*, Garcia-Amador, 'SixthRep' (n105) [30]; also Aréchaga (n69) 577; ILC, '53rd' (n326) 146 (Pellet).

[645] See *infra*.Pt.III(D).

[646] DADP, Art.14(3), also 75; ILC, '53rd' (n326) 144 (Gaja); ILC, 'Fifty-Fifth Session' (2003) 1 ILCYB 1, 120 (Kateka); also *supra*.nn321;335;552; Wittich (n73) 136 (test requires 'determination of what distinguishes' direct/indirect injury).

[647] *Supra*.Ch.I(II)(A) and authorities therein.

protection claims are brought not for breach of international obligations owed to individuals (*legal* injury),[648] but for individuals' *factual* injury, i.e. damage.[649] This distinguishes them from 'direct' interstate claims.[650] The argument will be made in three parts. Part I(A) outlines why suggestions that the distinction depends on whose rights are breached (i.e. to whom the legal injury is done) are incorrect. Part I(B) demonstrates why arguments that the distinction depends on the kind of obligation allegedly violated are equally unfounded. Part I(C) shows that the distinction *does* depend on which entity suffers damage.

A. Diplomatic protection is not dependent on the legal injury involved

Various scholars suggest that the *rights* involved in diplomatic protection belong to the individual,[651] making particular reference to human rights developments.[652]

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[648] Tomuschat, quoted *infra*.n649; Wittich (n73) 131-132;182; Peters (n1) 390 ('traditional view'); Amerasinghe (n323) 179; Amerasinghe (n14) 164. See *infra*.nn651ff. On 'legal injury': *supra*.nn111ff.

[649] Tomuschat (n105) 985 ('despite having suffered harm in fact, a foreigner cannot…be considered an injured person in the legal sense'); Paparinskis, *supra*.n105; Bollecker-Stern (n231) 97;100–101; Wittich (n73) 129 ('"indirect injury"...wrongful act...resulting in damage to...individual'); Garcia-Amador, 'SixthRep' (n105) [176]; Bennouna (n325) [16]; Peters (n1) 393 (if State rights, 'individuals...affected only *de facto*, not *de jure*');173;cf.171-172; Higgins, *Problems* (n298) 51; cf.*Aerial Pleadings* (n107) 531; also Whiteman, *Damages in International Law* (1937) 284; Fitzmaurice, *LP* (n69) 25-26; Amerasinghe (n323) 69. Cf.ILC, '52nd' (n340) 63 (Hafner) ('hesitant to go into…definition of injury'). Generally *supra*.nn108-110; *infra*.nn803ff.

[650] *Infra*.Pt.I(C), particularly *infra*.nn832-838;851. Similarly Wittich (n73) 129;cf.137 ('"nature of…injury"...circular');150-151 (criticising approach); also 135-136, discussing ideas reproduced Thirlway (n216) 618.

[651] E.g., DADP, 25-26;29; discussion Dugard, 'FirstRep' (n322) [36],[61]-[73]; Bennouna (n325) [13],[16],[21],[50]-[54]; Crawford, *GP* (n2) 77;569; Aréchaga (n69) 578; Pellet (n559) 36-38;42;45-46; Roberts, 'Hybrid' (n7) 31-34; also Borchard (n319) 13-14;353; Vermeer-Künzli, 'Interest' (n183) 560-561. Making same point: Peters (n1) 391; Amerasinghe (n323) 74; Amerasinghe (n14) 48; also Roberts, 'Hybrid' (n7) 33-34.

[652] See Peters (n1) 391-393; Crawford, *GP* (n2) 569;584-585, also quote *infra*.n661; Amerasinghe (n323) 71;73-74, citing *i.a.*, Bennouna (n325), see particularly [14],[33]-[37],[50]-[54] and Garcia-Amador, 'Problems' (n142), see 466;418-422;462-469; Garcia-Amador, 'Report' (n2) [111]-[112]; DADP, 25-26; discussion Dugard, 'FirstRep' (n322) [17]-[32],[36]-[40],[61]-[73]; also Pellet (n559) 40-42; Lauterpacht (n231) 269-299; Roberts, 'Hybrid' (n7) 31-36; cf.Vermeer-Künzli, 'Fiction' (n217) 49;55-56;66-67.

International tribunals have also made reference to individuals' "rights" in this field,[653] and, in certain cases,[654] apparently to distinguish direct and diplomatic protection claims.[655] In two arbitral cases concerning US airline carriers, for instance, the tribunals emphasised that the rights invoked were interstate in determining that local remedy exhaustion was unnecessary.[656] Various tribunals, considering treatment of vessels in alleged violation of UNCLOS,[657] likewise regarded exhaustion of local remedies as unnecessary because the relevant rights under UNCLOS were the State's.[658] Even the ICJ in *Avena* emphasised the question of rights in this context: it considered that diplomatic protection requirements were inapplicable to a claim, concerning the US' alleged breach of VCCR obligations, brought by Mexico 'in its own right and in the exercise of its right

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Generally Vicuna, 'The Changing Law of Nationality of Claims' (2000) 69 ILA.Rep.Conf. 631, 631–634; Dugard, 'DP' (n319) 1052.

[653] E.g., *Interhandel* (n356) 27, quoted Dugard, 'FirstRep' (n322) [64]; Aréchaga (n69) 578, also quoting *Chórzow (Merits)* (n80) 28; *Barcelona Traction* (n69) [35],[78]; *ELSI* (n304) [75] (shareholders' 'rights to control and manage'),[99]; *Arrest Warrants (DRC v Belgium) (Judgment)* [2002] ICJ.Rep. 3 [40] (not invoking 'personal rights'), quoted Amerasinghe (n14) 149; *LaGrand* (n363) [77]; *Avena* (n152) [40] ('individual rights'); *Corn Products* (n14) [170].

[654] Discussing many of these: Wittich (n73) 162–177.

[655] See Crawford, *GP* (n2) 593 (vis-à-vis *Avena* (n152)); Wittich (n73) 164–165 (vis-à-vis *Air Services* (n183)); *infra*.nn656-659.

[656] See *Air Services* (n183) [30]-[32], particularly [30] (taking account, *i.a*, of 'the *juridical* character of the *legal relationship* between States'),[31] (treaty rights 'granted by one *government* to the other *government*') (original emphasis), discussed and criticised Wittich (n73) 163-165; also Amerasinghe (n14) 150 (fn.17);167 (fn.56); Dugard, 'SecondRep' (n634) [27]; *Heathrow Airport Usage Charges (US v UK)* (1992) XXIV UNRIAA 3, 60;68, particularly 60 (treaty 'creates rights and obligations *between the two States*', not 'independent rights' for airlines) (emphasis added);cf.62 (State interest 'predominant'), discussed Wittich (n73) 168-169.

[657] See *M/V "Saiga" (No.2) (SVG v Guinea) (Judgment)* [1999] ITLOS.Rep. 10 [30]; generally Wittich (n73) 170-177; *M/V "Virginia G" (Panama/Guinea-Bissau) (Judgment)* [2014] ITLOS.Rep 4 [48]-[49]; *M/V 'Norstar' (Panama v Italy) (Prel.Obj.)* [2016] ITLOS.Rep 44 [37],[42]-[43]; *Arctic.Sun. (Merits)* (n410) [140]; *Duzgit Integrity (Malta v São Tomé and Príncipe) (Award)* PCA.Case-2014-07 (5.Sept.2016) [62]-[121].

[658] *Saiga* (n657) [97]-[98], cf.[51] (Sep.Op.Wolfrum), both discussed Wittich (n73) 172-175; *Virginia.G* (n657) [157] ('principal rights' State's),[156]-[158]; *Arctic.Sun. (Merits)* (n410) [168],[172]-[173]; *Duzgit* (n657) [151] ('preponderantly for injury to [Malta's] direct or indirect rights'),cf.[155]-[156] (because 'main private entity' settled, no 'remedy in São Tomé', Malta's 'direct claims' 'preponderant'); *Norstar* (n657) [270]-[271]. Cf.Wittich (n73) 166-167 ('hardly any' UNCLOS obligations 'genuine rules on the treatment of aliens'; UNCLOS 'nevertheless explicitly provides for…local remedies rule');173;184-186.

of diplomatic protection' because there was an 'interdependence of the *rights of the State* and of *individual rights*' under the relevant provisions.[659]

It is important to be clear regarding what is meant by "rights" in this context, as careless use of terminology is apt to cause misunderstanding.[660] Insofar as reference is made to individuals' "rights" vis-à-vis their property or person in diplomatic protection claims,[661] this is unsurprising, because (and as will become important in Chapter V): (a) diplomatic protection claims are concerned with individuals and their property;[662] (b) legal rights to property, and certain personal rights, are generally established – and *do* belong to individuals – under *domestic* law;[663] and (c) international claims, such as for expropriation, commonly depend on the existence of such rights, including property rights, within a given domestic system.[664]

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[659] *Avena* (n152) [40] (emphasis added), discussed, e.g., DADP, 75; Crawford, *GP* (n2) 592-593; Parlett (n1) 94-96; Crawford, 'Revisited' (n457) 169-170; authorities *supra*.n433; also Peters (n1) 391-392 (*LaGrand*).

[660] Similarly Dolzer, 'The Settlement of War-Related Claims' (2002) 20 Berk.JIL 296, 303; Thirlway (n216) 1553-1554; Lauterpacht (n231) 296-297; also Higgins, *Problems* (n298) 52-53; McCorquodale (n1) 285 (certain individual 'rights…more…an immunity…or a privilege', referencing Hohfeld); also *infra*.nn684ff.

[661] See Crawford, *GP* (n2) 584 ('diplomatic protection...for the protection of individual rights to personal integrity, property and due process', 'now covered...by...human rights'); Borchard (n319) 12 ('rights...to personal security…personal liberty…private property'), 13-15; Garcia-Amador, 'Problems' (n142) 441; Garcia-Amador, 'SixthRep' (n105) 46 (draft Art.1); DADP, 26; Bollecker-Stern (n231) 118-122; *infra*.nn668;817-818.

[662] *Infra*.nn668;817-818;1803; also *supra*.nn319;661.

[663] Kjos (n544) 242; also Borchard (n319) 13;15;18; Peters (n1) 171;390; Bennouna (n325) [50] ('national...has a legally protected interest at…national level and thus a right'); Garcia-Amador, 'Problems' (n142) 463 ('original [claim] under municipal law'); ILC, '50th' (n380) 29 (Hafner); Aréchaga (n69) 578-579; also Crawford, 'Chance' (n96) 162; discussion Bollecker-Stern (n231) 115-121; Douglas (n301) 41;52-53;70-72; Douglas (n367) 155;194-201;211;273-274.

[664] Kjos (n544) 242;255; Nollkaemper (n6) 253;266 (fn.109), citing Douglas (n367) 197-199, both cited Tomka, Howley and Proulx, 'International and Municipal Law before the World Court' (2015) XXXV Pol.YBIL 11, 32; also 34-35; also Amerasinghe (n323) 37-38;63-64; Pellet (n559) 46-47; Bennouna (n325) [21]; Peters (n1) 170-171;301; cf.Thirlway (n216) 1553-1554. E.g., *Chórzow (Merits)* (n80) 40;46 (property); *Panevezys-Saldutiskis Railway* [1939] PCIJ.Rep. SerA/B.No.76, 17-18 (property); *Mavrommatis* (n313) 7 (contracts); *Azinian v Mexico (Award)* ICSID Case-ARB(AF)/97/2 (1.Nov.1999) [100] (contract), discussed Shany (n4) 32; *Oppenheim's* (n73) 916 (contract); *Shimoda* (n268) 640-641.

Nonetheless, all international claims, including diplomatic protection claims, are brought for violations of *international* obligations.[665] The existence of domestic law rights for an individual does not entail that they also possess 'international rights',[666] and a violation of domestic rights does not necessarily found a claim for breach of international law.[667] At least conventionally, the relevant international rights in diplomatic protection are not individuals' personal and property rights *per se*, but the *State's* right to insist upon 'respect [for] the person and property of [its] nationals' to a given standard.[668] In *Barcelona Traction*, for example, the ICJ asked whether 'a right *of Belgium* [was] violated', even though the allegation of breach depended on 'its nationals' having suffered infringement of their rights as shareholders' under *domestic* law.[669] Indeed, that individual *international* rights are not at issue logically follows from diplomatic protection's having emerged when international law only created rights and duties for

[665] Amerasinghe (n323) 37;39; Peters (n1) 169;388-390; DADP, Art.1 ('internationally wrongful act'); Wittich (n73) 165 (criticising *Air Services*); *supra*.Ch.I(II)(D); cf.Vermeer-Künzli, 'Fiction' (n217) 49;55-56.

[666] *Oppenheim's* (n73) 16; also 847, fn.2. Similarly Peters (n1) 390 ('diplomatic protection relies on [individual's] possibility...to assert...own claim under *domestic* law...But according to...traditional view, this has nothing to do with any [individual] rights…*under international law*' (original emphasis)); Borchard (n319) 13-14;18;27; McNair, *International Law Opinions*, vol.II (1956) 3.

[667] Amerasinghe (n323) 38-39;40-42 (contract);cf.37 (tort, noting 'standard applied over and above...national law'); Amerasinghe (n14) 95-101;116-126;130-131;137-138;390-391; Wittich (n73) 139-140; Crawford, 'Revisited' (n457) 168; Dugard, 'SecondRep' (n634) [63]-[64], discussed Thirlway (n216) 1547; also 1553-1554; ILC, '52nd' (n340) 63 (Hafner); ILA, 'Toronto Conference Report: Diplomatic Protection of Persons and Property' (2006) 72 ILA.Rep.Conf. 353 [39]; Bennouna (n325) [21]; Crawford, 'DP' (n12) 48; Fitzmaurice, *LP* (n69) 697-698; Peters (n1) 390; *Oppenheim's* (n73) 927; Garcia-Amador, 'Problems' (n142) 420; *Spanish Zone of Morocco (UK v Spain)* (1925) II UNRIAA 615, 641; *Azinian* (n664) [99]-[100], discussed Shany (n4) 32; generally 162-163; Bollecker-Stern (n231) 118-121; Jessup (n2) 104; *ARSIWA*, 96; Douglas (n367) 253; *Waste.Mgmt. (Award)* (n297) 45-47; *Impregilo (Award)* (n581) [177] and authorities; cf.*Diallo (Objections)* (n422) [64].

[668] Garcia-Amador, 'Problems' (n142) 427; also Borchard (n319) 18; Pellet (n559) 36; Garcia-Amador, 'SixthRep' (n105) [42]; *supra*.nn319;322; Amerasinghe (n323) 37;76; Peters (n1) 167-168;390-391; cf.190; *Barcelona Traction* (n69) [35]; Bollecker-Stern (n231) 96-97; *infra*.n671.

[669] *Barcelona Traction* (n69) [35] (emphasis added), and see [38],[47]; Bennouna (n325) [21]. Similarly *Diallo (Objections)* (n422) [64], discussed Higgins, *Themes and Theories*, vol.2 (2009) 1317; Tomka/Howley/Proulx (n664) 33; also DADP, 52-53;58-59;66-67; Aréchaga (n69) 579-581; Graefrath (n107) 48-49; Bollecker-Stern (n231) 105.

States.[670] Claims were therefore always brought for breach of the *State's* rights regarding treatment of its nationals,[671] under treaty or customary international law.[672] The relevant international legal rights cannot have belonged to States only in "direct" claims, as *all* international obligations were owed as between States, including those protecting aliens.[673]

It is difficult to agree, as some suggest, that the entire premise of diplomatic protection has changed on account of human rights developments.[674] Individuals are indeed now generally recognised as having international rights, including human rights,[675] and, as Chapter II observed, diplomatic protection claims may be brought for human rights violations.[676] However, even if human rights obligations are *also* owed to individuals, interstate human rights claims are still brought for breach of obligations owed

[670] Peters (n1) 393; Borchard (n319) 18; Crawford, *GP* (n2) 584; DADP, 25; Thirlway (n216) 1553; Bennouna (n325) [16]; Garcia-Amador, 'Report' (n2) [96]; Amerasinghe (n14) 44-45; Roberts, 'Hybrid' (n7) 31; Juratowich (n12) 12.

[671] *Mavrommatis* (n313) 12 and other sources *supra*.nn322;317-318;668-669; also Parlett (n1) 50 ('inter-state rights');66-67; Garcia-Amador, 'Problems' (n142) 462; Wittich (n73) 131-132;165; Peters (n1) 390-391; Amerasinghe (n14) 45-47;105;164 ('injury to...alien which violates international law...also a violation of…state's right'); Mazzeschi (n217) 211-212; DADP, 22-23;25; Borchard (n319) 18;353;357. Cf.Vermeer-Künzli, 'Fiction' (n217) 39;66.

[672] The obligation's source is irrelevant: Amerasinghe (n14) 47;155;162 (criticising Meron (n322) 87); 158; also Wittich (n73) 161;165. E.g., treaty claims: *ELSI* (n304) and *Interhandel* (n356), referenced Amerasinghe (n14) 151-153; Wittich (n73) 135;161;165; cf.DADP, 74 (*Interhandel* 'mixed': 'direct wrong...breach of...treaty'); similarly Wittich (n73) 151-152; Amerasinghe (n14) 162.

[673] Wittich (n73) 131-132; also 151;156;165 (criticising *Air Services*); Amerasinghe (n14) 164; Lauterpacht (n231) 137; Borchard (n319) 18; cf.Higgins, *Themes* (n231) 74-77; Thirlway (n216) 1553; discussion Garcia-Amador, 'Report' (n2) 192-193;cf.194.

[674] See authorities *supra*.nn651-652.

[675] E.g., Peters (n1) 388;168; Crawford, 'DP' (n12). 23; *Oppenheim's* (n73) 847-849, discussed Parlett (n1) 27-28; also 350; Lauterpacht (n231) 142; McCorquodale (n1) 285-286; Roberts, 'Hybrid' (n7) 32-34; Higgins, *Themes* (n231) 74;81ff; DADP, 25-26;87-89; Garcia-Amador, 'Report' (n2) 192; also Jessup (n2) 69-70; Amerasinghe (n14) 72-73; McCorquodale (n1) 285-286; Paparinskis, 'New' (n8) 623; Benvenisti (n300) 1086; Higgins, *Problems* (n298) 53-54;95-96.

[676] *Supra*.nn421-428.

to *States*.[677] Indeed, as Chapter I outlined, States may only invoke responsibility where an obligation owed *to them* is breached.[678] Moreover, not every diplomatic protection claim is brought for human rights violations.[679] Consequently, while a given diplomatic protection claim might concern individuals' international (human) rights, this cannot be determinative as to the claim's characterisation.[680]

The breach in a diplomatic protection claim is therefore, at least *inter alia*, of obligations owed to the State, and the legal injury done to it; breach of international obligations owed to individuals (i.e. individual legal injury) was not always present and need not be.[681] Indeed, if the DADP required "legal injury" to the individual, diplomatic protection would not be 'for an injury *caused* by an internationally wrongful act' to a national,[682] as the 'internationally wrongful act' would *be* the injury.[683]

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[677] *Supra*.nn189-203; see *Diallo (Merits)* (n396) [63]; similarly *Avena* (n152), *supra*.n659, discussed, e.g., Paparinskis, 'Countermeasures' (n5) 286 (fn.106); also 286-287; Roberts, 'Hybrid' (n7) 34-35;36; Crawford, *GP* (n2) 593; Wittich (n73) 179; Paparinskis, 'New' (n8) 640-641; Vermeer-Künzli, 'Interest' (n183) 571;575;579; also Thirlway (n216) 1554 (where individual has rights 'national State...almost certainly...injured in its own rights'); Amerasinghe (n14) 47;164 (quoted *supra*.n671); 309; Simma/Pulkowski (n274) 160-161; discussion Pellet (n559) 52; Roucounas (n4) 399. Generally *supra*.nn216-217.

[678] *Supra*.nn188-206; *Barcelona Traction* (n69) [36]; Nollkaemper (n6) 93;95; DADP, 26, *infra*.n680.

[679] See *infra*.nn715ff. Observing that rules concerning aliens' treatment are sometimes broader than human rights: *Restatement* (n107) §711, 187; Peters (n1) 388; Tomuschat (n105) 985; Mazzeschi (n217) 223; Jessup (n2) 101; also ILC, '52nd' (n340) 66 (Simma). See *infra*.n2156.

[680] See DADP, 26 ('inter-State claim, although...*may* result in...assertion of rights enjoyed by…injured national under international law' (emphasis added)); also Thirlway (n216) 1553-1554; Roberts, 'Hybrid' (n7) 34; Parlett (n1) 92.

[681] See authorities *supra*.nn668-680; cf.Parlett (n1) 92.

[682] DADP, Art.1 (emphasis added).

[683] Similarly: *Biwater Gauff v Tanzania (Award)* ICSID Case-ARB/05/22 (24.Jul.2008) [803] ('"causing *injury*" must mean more than simply the wrongful act itself...otherwise the element of causation would have to be taken as present in every case').

B. Diplomatic protection does not depend on the right invoked

While the rights in diplomatic protection are thus properly the State's, one might conceptualise the "rights" in diplomatic protection as belonging to the individual in an alternative sense, namely that such claims concern the individual's *interests*.[684] Indeed, while accepting that diplomatic protection concerns violation of State rights, key literature has, nonetheless, for the purposes of distinguishing diplomatic protection and 'direct' claims, focused on the 'nature of the injury or right violated',[685] and 'the essence of the substantive right violated, as determined by the objects and interests promoted therein'.[686] Amerasinghe thus argues that 'it is really the nature of the "right" violated as being preponderantly one relating to an alien or his property that needs to be considered in determining the indirectness of the injury.'[687] Accordingly:

> [i]f the state's right in its essence has for its object the protection of its nationals as such and if this is the main interest sought from it … the rule of exhaustion applies to it. … The claim may be for an apology or for an indemnity for damage caused to an alien, or merely damages for the insult to the alien's state, but this would not make a difference if the essence of the substantive right violated is the right to the protection of the alien.[688]

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[684] E.g., Wittich (n73) 165;181;182-183;185; Amerasinghe (n14) 164; Amerasinghe (n323) 179; *infra*.nn686-689; and on the 'interest theory' of rights, e.g., Duijzentkunst, 'Of Rights and Powers' *EJIL:Talk!* (9.Dec.2013); Morss (n74) 64; generally Kramer, Simmonds and Steiner, *A Debate over Rights* (2000); Campbell, 'Legal Rights' in Zalta (ed), *Stanford Encyclopedia of Philosophy* (2017) <https://plato.stanford.edu/archives/win2016/entries/legal-rights/>; Simmonds, *Central Issues in Jurisprudence* (3rd edn, 2008) 326-329; similarly discussion Nollkaemper (n6) 104-106; Parlett (n1) 362-363; also *supra*.n660. Cf.Portmann (n73) 130.

[685] Amerasinghe (n14) 163; also discussed Wittich (n73) 136-137; see *infra*.n689; Dugard, 'SecondRep' (n634) [26].

[686] Amerasinghe (n14) 164.

[687] Amerasinghe (n323) 181.

[688] Amerasinghe (n14) 164; also Wittich (n73) 137 ('most suitable criterion'). Similarly Chappez, *La Règle de l'épuisement Des Voies Des Recours Interns* (1972) 44; Paparinskis, 'Countermeasures' (n5) 279-280. Cf.Riphagen, 'Third Report on State Responsibility' [1982] ILCYB 22 [96].

Wittich elaborates, citing '[t]he main focus' as being 'whether the right invoked has for its specific or primary object the *protection of the private individuals involved* as the ultimate beneficiary ... even if the formal holder of the relevant right is the State'.[689]

The 'right' at issue in a claim depends on what primary obligation has allegedly been breached.[690] Admittedly, diplomatic protection claims were historically brought for breach of obligations concerning the treatment of aliens, undoubtedly concerned with protecting individuals.[691] Diplomatic protection claims now also concern consular protection and human rights obligations,[692] which, although not the same,[693] still concern individuals' well-being.[694] However, the argument that the distinction between diplomatic protection and 'direct' claims rests on the 'right' invoked – and thus the obligation breached – depends on establishing that the rights in diplomatic protection claims *always* concern individual protection, and, conversely, in 'direct' claims, they do not.[695] Neither claim withstands scrutiny.

[689] Wittich (n73) 182 (emphasis added); also 181 ('the *substantive right*...the *interest legally protected* by…relevant *primary norm*' (original emphasis); Amerasinghe (n14) 164 ('predominant interest'); Peters (n1) 173 ('rights...concerned individuals in substance').

[690] See Wittich (n73) 181 ('substantive right as embodied in…primary norm'); generally *supra*.nn93;203.

[691] See sources *supra*.n319; *infra*.nn817-818;1803; Amerasinghe (n14) 164-165; similarly Wittich (n73) 183.

[692] See *LaGrand* (n363) [75]-[77]; *Avena* (n152) [40]; ILC, '50th' (n380) 20 (Bennouna); Crawford, *GP* (n2) 592-593; ILA, 'Toronto' (n667) [28]; *supra*.nn406;421-428;431-433;676; similarly Wittich (n73) 183.

[693] See Wittich (n73) 166.

[694] ibid.183 (human rights); *Avena* (n152) [47] (consular relations).

[695] See *supra*.nn685-689. Cf.Wittich (n73) 184; analysis Nollkaemper (n6) 104-106.

(i) Direct claims based on rules protecting individuals

On the one hand, "direct" claims can be based on alleged violations of obligations protecting individuals.[696] Thus, the *Bosnian Genocide*,[697] *Croatian Genocide*,[698] and *CERD* cases[699] were not brought as diplomatic protection and subject to the local remedies rule,[700] notwithstanding that the Conventions invoked, and the obligations thereunder, are designed for the protection of individuals and groups.[701] The ECtHR has also recognised that certain interstate human rights claims may be brought without exhausting local remedies.[702] Indeed, the Court recently expressly distinguished interstate claims 'substantially similar' to diplomatic protection,[703] from claims which allege ECHR violations but concern 'general issues (systemic problems and shortcomings, administrative practices, etc.)' and where 'the primary goal ... is that of vindicating the public order'.[704] For reasons elucidated below, these kinds of cases may be 'mixed',[705]

[696] Indeed, Amerasinghe suggests that direct claims may result from ECHR violations where 'injury…in substance an interference with…carrying on of [State] functions' (Amerasinghe (n14) 309). This confirms that the *injury* matters, not the rule.

[697] *Application of the Genocide Convention (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ.Rep. 43.

[698] *Application of the Genocide Convention (Croatia v Serbia) (Prel.Obj.)* [2008] ICJ.Rep. 412.

[699] *Georgia/Russia* (n386).

[700] Gaja, 'Position' (n455) 12; Tams, *Enforcing* (n344) 135 (fn.81) (*Genocide* cases 'traditional disputes between...States'); *infra*.n1664.

[701] See *Genocide Case* (n420) 23; *Application of CERD (Georgia v Russia) (Prov.Measures)* [2008] ICJ.Rep. 353 [126].

[702] Authorities *infra*.nn992ff;1034. Cf.*infra*.nn703-704.

[703] *Cyprus/Turkey (Compensation)* (n95) [45], discussed Peters (n1) 394.

[704] *Cyprus/Turkey (Compensation)* (n95) [44]. See *infra*.nn992ff;1712-1715.

[705] *Infra*.Pt(III)(B)(i).

but this necessarily means that diplomatic protection *and* 'direct' aspects are present,[706] and thus that claims for breach of rules protecting individuals may be 'direct' in part.

Moreover, because, as Chapter I established, international responsibility can arise without damage,[707] States could bring claims concerning treatment of aliens, but absent damage to nationals, such as regarding treaty interpretation.[708] Thus, while finding no dispute *in casu*,[709] the *Ecuador/US* Tribunal accepted that a 'tribunal could answer an abstract question of interpretation ... if properly put before it.'[710] Even though such rules protect individuals,[711] and even if, as elucidated below, seeking only declaratory relief does not, in itself, render a claim 'direct',[712] it is difficult to regard such claims as diplomatic protection if no individual has allegedly experienced *any* injury.[713] There is simply nothing on which the 'fiction' – introduced in Chapter II – can operate.[714] Claims

[706] *Supra*.nn332-334.

[707] *Supra*.nn116-119.

[708] See discussion Paparinskis, 'Countermeasures' (n5) 313-315; Roberts, 'Hybrid' (n7) 54-56;58-59; cf.66-68; *infra*.nn709-710;713;967-1002;1016;Pt.III(B)(ii),(C).

[709] *Ecuador/US* (n85) [228].

[710] ibid.[196], also [204]-[205] (apparently distinguishing diplomatic protection),[207], discussion [76]-[115] (Diss.Op.Vinuesa); case discussed Roberts, 'Hybrid' (n7) 8-9;54-55.

[711] *Supra*.n691; Nollkaemper (n6) 103.

[712] *Infra*.nn963-966.

[713] See Paparinskis, 'Countermeasures' (n5) 314-315; *Ambatielos (Greece v UK) (Merits)* [1953] ICJ.Rep. 10, 22-23, discussed Wittich (n73) 151 (interpretation only; no local remedies) and *infra*.nn975ff; ILC, '52nd' (n340) 71 (Tomka) (treaty interpretation not diplomatic protection); similarly *Oppenheim's* (n73) 523 (fn3); ILC, '50th' (n380) 16;29 (Hafner); ILC, '53rd' (n326) 143 (Lukashuk), discussing Dugard, 'SecondRep' (n634) [29]; Sohn/Baxter (n58) 48; also *Brownlie's* (n77) 548. Naturally, damage can be claimed and unproved: e.g., *The Jessie (UK v US)* (1922) 16 AJIL 114, 115, cited DADP, 82; discussion Garcia-Amador, 'SixthRep' (n105) [58]. Cf.*Ambatielos* (n713) 17-18; Vermeer-Künzli, 'Fiction' (n217) 51; also *infra*.n866.

[714] See *supra*.n323; *infra*.nn830ff. Cf.Bollecker-Stern (n231) 32-33; Aréchaga (n69) 546.

concerning obligations centred on individuals are not, consequently, always claims of diplomatic protection.

(ii) Diplomatic protection claims based on rules protecting States

On the other hand, claims that are diplomatic protection, at least in part, may result from violation of obligations primarily for the protection of States, not individuals.[715] First, for instance, claims alleging violation of obligations regulating transboundary harm may be diplomatic protection,[716] even though such obligations concern not individual protection *per se* but the preservation of other *States'* environments.[717] Thus, in the *Aerial Herbicide Spraying* case, Ecuador claimed for both State and individual damage based on, *inter alia*, allegedly wrongful transboundary harm.[718] Local remedies were not mentioned, but Colombia pointed to 'nationality of claims' requirements,[719] and Ecuador confirmed that it 'claim[ed] only *on behalf of its own citizens*', suggesting that diplomatic protection was involved.[720] Likewise, in *Pulp Mills*, concerning alleged environmental pollution,[721] Argentina claimed for 'damage ... suffered directly *and through its nationals*'.[722] In *Trail Smelter*, concerning damage from

[715] Generally *infra*.nn716ff. Cf.Wittich (n73) 184 (vis-à-vis UNCLOS); Nollkaemper (n6) 104-106.

[716] See DADP, 81-82; Dugard, 'Third Report on Diplomatic Protection' [2002] 2(1) ILCYB 49 [68],[80],[83]; ILC, '50th' (n380) 17 (Hafner);14;19-20 (Brownlie); Meron (n322) 98 (fn.2); also ILC, '53rd' (n326) 149 (Hafner); *infra*.nn727-728;731-732.

[717] See *Pulp Mills (Argentina v Uruguay)* [2010] ICJ.Rep. 14 [101]; also Dugard, 'ThirdRep' (n716) [80].

[718] *Aerial Herbicide Spraying (Ecuador v Colombia)* ICJ.Pleadings <www.icj-cij.org>, Mem.Ecuador, Chs.VI-IX (claims);Ch.X, particularly [10.29]ff (reparation). It claimed human rights violations (Ch.IX), but different violations were not distinguished when claiming for individuals' injury: [10.29]ff, particularly [10.37].

[719] ibid., Counter-Mem.Colombia [1.25].

[720] ibid., Rep.Ecuador [3.152] (emphasis added).

[721] See *Pulp Mills* (n717) [170]ff; *Pulp Mills (Argentina v Uruguay)* ICJ.Pleadings, <www.icj-cij.org>, Mem.Argentina, Chs.V-VII, [8.4],[8.24],[8.30].

[722] *Argentina's Pleadings* (n721) [8.29] (emphasis added). Uruguay never raised local remedies objections.

cross-border fumes,[723] the Tribunal indicated that it was not ruling 'upon claims presented by individuals or on [their] behalf',[724] as 'the case was presented ... not as a sum of individual claims for damage to private properties, espoused by the Government, but as a single claim for damage to the national territory.'[725] Nonetheless, it quoted *Chórzow Factory*, acknowledging that individuals' damage 'may, in part, "afford a convenient scale for the calculation of the reparation due"'.[726] This is suggestive of diplomatic protection aspects.[727] Finally, the Space Objects Convention[728] allows States to claim against 'launching State[s]' for damage suffered by themselves or their 'natural or juridical persons'.[729] The local remedies rule is specifically excluded,[730] suggesting that such claims could be diplomatic protection-like.[731]

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[723] See *Trail Smelter (US/Canada)* (1938/1941) III UNRIAA 1905,1917-1918;1920;1922;1924-1931;1965-1966; *infra*.n727.

[724] ibid. 1912;1938.

[725] ibid.1961. State land claims were withdrawn: Jessup (n2) 120.

[726] *Trail Smelter* (n723) 1913, quoting *Chórzow*, *infra*.n812; also 1938; *infra*.nn806ff; *supra*.n325; Jessup (n2) 120 ('injury to…private property'). Money was paid to those affected: Caron, 'The Place of the Environment in International Tribunals' in Austin and Bruch (eds), *The Environmental Consequences of War* (2000) 254; Bollecker-Stern (n231) 109.

[727] Discussing *Trail Smelter* in diplomatic protection context: DADP, 82; Dugard, 'ThirdRep' (n716) [75]; ILC, '50th' (n380) 17 (Hafner); ILC, 'Fifty-Fourth Session' (2002) 1 ILCYB 1, 34;41 (Dugard/Brownlie);cf.48-49 (Yamada/Xue); Meron (n322) 98. Indeed, authorities explain local remedy non-exhaustion as deriving from the arbitration agreement, the injury being 'direct', or the individuals having no 'voluntary link' with Canada: DADP, 82; Dugard, 'ThirdRep' (n716) [75]; also Crawford, 'Revisited' (n457) 166; ILC, '54th' (n727) 43 (Opertti Badan); Meron (n322) 98 (on the 'link'); generally 94-100. The first and third implicitly acknowledge the claim *was* diplomatic protection (cf.ILC, '54th' (n727) 43 (Opertti Badan)), while the second is consistent with a "mixed" claim exhibiting 'preponderantly' (DADP, Art.14(3)) "direct" injury: similarly Dugard, 'ThirdRep' (n716) [84]; ILC, '54th' (n727) 35 (Dugard).

[728] Discussing vis-à-vis diplomatic protection: Dugard, 'ThirdRep' (n716) [80]; ILC, '54th' (n727) 34 (Dugard).

[729] Art.VIII(1).

[730] Art.XI(1). See ILC, '54th' (n727) 34 (Dugard).

[731] *Supra*.n728; *infra*.n732. Cf.ibid.48 (Tomka) (liability, not responsibility); ILC, '50th' (n380) 20 (Bennouna). Generally on diplomatic protection vis-à-vis space-related incidents: ibid.19-20 (Brownlie); Brownlie, *System* (n76) 237;239 (direct); discussion Graefrath (n107) 97.

Moreover, the DADP suggest that, where a person's 'property has suffered environmental harm caused by pollution, radioactive fallout or a fallen space object emanating from [another] State', it is 'unreasonable and unfair to require' exhaustion of local remedies.[732] This suggests that such circumstances *could* involve diplomatic protection. Indeed, diplomatic protection claims could plausibly arise from violations of sovereignty more generally.[733] The EECC, for instance, acknowledged that individual injury, indicative of diplomatic protection,[734] arose not only from *jus in bello* but also *jus ad bellum* violations.[735] IHL obligations may be for individual protection,[736] but those concerning the use of force are not so considered.[737] Consequently, the 'direct'/diplomatic protection claims distinction must lie in the *injury* caused, not the obligation violated.[738]

Second, even though immunities for State officials are held for and by States,[739] States may claim for breach of immunity not only for their injury through State personnel,

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[732] DADP, 81. Similarly Aréchaga quoted *infra*.n1042; Crawford, 'Revisited' (n457) 166-167.

[733] Cf. discussion Nollkaemper (n6) 105-106. See *Heirs of Oswald v Switzerland* (1926) 3 ILR 244; 52 BGE 235 (Swiss.FC) (border violation; compensation claim for injured soldier, though apparently partly for State's direct insurance losses); *Rainbow Warrior (New Zealand v France)* (1985) 74 ILR 241, *infra*.n905; *Legality of Use of Force (Serbia and Montenegro v Belgium)* ICJ.Pleadings, 351-352 (Mem.FRY). Cf.*García/Garza v US* (1926) IV UNRIAA 119 (Mex-US.Cl.Comm.) 120 (whether cross-boundary killing contrary to 'international standard'), discussed Brownlie, *System* (n76) 74-75; Whiteman (n649) 150.

[734] *Supra*.n643.

[735] See *Ethiopia* (n428) [103],[126],[135],[147],[157]-[158],[161],[180]ff,[199]ff,[214]-[262] (*jus in bello*); [291]-[292],[296],[300],[304]-[305],[332],[356],[386],[391]-[393] (*jus ad bellum*). Generally *infra*.nn1824-1843; Murphy/Kidane/Snider (n266) 133-151;183-188;197-202;219-230;233-236;301-303;347-348;352-355.

[736] E.g., ICRC, 'Introduction', *Customary IHL Database* <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapterin_in>; Nollkaemper (n6) 103-104; Parlett (n1) 350; Peters (n1) 194; Paparinskis, 'Countermeasures' (n5) 325.

[737] *Infra*.n769.

[738] See *Ethiopia* (n428) [63] ('illegal use of force...bearing upon inter-State relations'). Cf.*Eritrea* (n271) [210]-[212]; *supra*.nn685-689.

[739] See *Arrest Warrants* (n653) [53]; Jessup (n2) 118-119; Wittich (n73) 185-186; Amerasinghe (n14) 308; Cogan, 'The Regulatory Turn in International Law' (2011) 52 Harv.ILJ 321, 323 (fn.1); Garcia-Amador, 'Report' (n2) [41] Lauterpacht (n231) 136; Thirlway (n216) 619 (on *Hostages*, *infra*.n742)).

but also for individuals' personal damage.[740] Thus, in *Tehran Hostages*, the US sought reparation in a 'mixed claim',[741] both for itself and, exercising diplomatic protection, for its nationals taken hostage.[742] While a bilateral treaty 'ha[d] importance' vis-à-vis 'two private individuals',[743] the ICJ apparently considered that the VCCR and VCDR were the only treaties relevant for all the claims concerning hostages with status thereunder.[744] It found breaches of those treaties vis-à-vis diplomatic/consular officials,[745] and reparation due 'for the injury thereby caused'.[746] The diplomatic protection claim for the officials' personal damage therefore rested on breach of obligations designed for State protection.[747] Similarly, as Thirlway notes,[748] in *Armed Activities*, Uganda made claims regarding the treatment of non-diplomat nationals inside embassy premises, which Congo regarded as diplomatic protection,[749] but the Court accepted was in 'substance' part of the direct VCDR claim.[750] Importantly, it observed that

> [a]cts of maltreatment ... of persons within the Ugandan Embassy were necessarily consequential upon a breach of the inviolability of the Embassy

[740] Jessup (n2) 119 ('supplementary claim may lie for...injury to…individual as such'), quoted Amerasinghe (n14) 159;164, quoted *infra*.n756; *ARSIWA*, 223; cf.DADP, 28. For examples: Jessup (n2) 119; Whiteman (n649) 80-82 (fnn.184-185);136-142; also Borchard (n319) 361;cf.352; similarly *Reparations* (n69) 202 (Diss.Op.Hackworth).

[741] DADP, 74 ('direct violation' and 'injury to…person of...nationals (diplomats and consuls) held hostage'); also Crawford, 'Revisited' (n457) 170.

[742] *Tehran Hostages (USA v Iran) (Judgment)* [1980] ICJ.Rep. 3, 7-8 (Mem.,sub.(c)). The hostage-taking was primarily Embassy-based: ibid.7 (Mem.,sub.(b)(ii)),[17]-[25],[78]. Generally DADP, 74-76.

[743] *Hostages* (n742) [50], also [67],[77]. See Thirlway (n216) 1555 (fn.674);619 (fn.327).

[744] *Hostages* (n742) [46],[49]-[50],[22]; cf.Thirlway (n216) 1555 (fn.674).

[745] See *Hostages* (n742) [67],[76]-[78].

[746] ibid.[90].

[747] *Supra*.nn739;741; also *Liechtenstein's Pleadings* (n329) 308 [6.37] (Obs.Liechtenstein); Thirlway (n216) 619.

[748] Thirlway (n216) 1554.

[749] *Armed Activities* (n342) [306],[328].

[750] ibid.[331]. See Thirlway (n216) 1554.

> premises ... regardless of whether the persons were ... nationals of Uganda or Ugandan diplomats.[751]

Uganda could thus seemingly claim regarding persons, including nationals, where injury resulted from the VCDR breach, without having to exhaust local remedies.[752] Thus, notwithstanding that immunities are not for individual protection,[753] diplomatic protection claims may, much as in respect of functional protection claims,[754] and even if within a larger claim,[755] be brought for individual damage resulting from breach thereof.[756] Indeed, there would otherwise be limited possibilities for 'mixed' claims to arise in State immunities cases.[757]

Third, various claims arising from damage to vessels, including beyond State territory,[758] suggest that the obligation breached is not decisive for determining what is diplomatic protection. For instance, the 1955 *Aerial Incident Case* concerned the shooting

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[751] *Armed Activities* (n342) [338].

[752] See Thirlway (n216) 1554;cf.*infra*.n1028.

[753] *Supra*.n739.

[754] Similar comparison: Amerasinghe (n14) 370-371, discussing Fitzmaurice, *LP* (n69) 86-87; Garcia-Amador, 'Report' (n2) [115]-[116]. While distinct from diplomatic protection (DADP, 23), in functional protection, organisations claim for breach of their rights and for officials' personal damage: see Amerasinghe (n14) 370, discussing Fitzmaurice, *LP* (n69) 86-87, in turn discussing *Reparations* (n69) 181-182;184; also Bollecker-Stern (n231) 98. The breach must be identical for each because (a) organisations are not "fictionally" injured through their officials (see Fitzmaurice, *LP* (n69) 86); and (b) organisations are owed no obligations regarding treatment of nationals (see ibid.87;86, quoting *Reparations* (n69) 182; also 180; Amerasinghe (n14) 370-371; Bollecker-Stern (n231) 96;111; Garcia-Amador, 'Problems' (n142) 442). Generally on separating State/individual damage: Fitzmaurice, *LP* (n69) 86-87;25 (fn.3);670-671; Amerasinghe (n14) 164;371; *infra*.Chs.IV(III)(B);VI(V)(B); VII(II).

[755] Cf.Thirlway (n216) 1554-1555; *supra*.nn333-336;750; *infra*.n905.

[756] See Amerasinghe (n14) 164 ('right...violated which has for its object…carrying on of [State] functions' but claim potentially also 'purport[ing] to recover damages for…*personal loss* suffered by...diplomat, an alien');308 ('state's interest...not purely…protecting...national...maintaining its own functions or dignity, which *predominate*' (emphases added));370-371; also DADP, 75-76; *supra*.nn747;751-752.

[757] Cf.*supra*.nn740-742.

[758] See DADP, 81 (referencing *Aerial Incident*); Dugard, 'SecondRep' (n634) [19]; also Meron (n322) 97.

down of an Israeli-registered civilian aircraft.[759] The UK and US claimed against Bulgaria for damage to their nationals' person and property on board and consequent thereto,[760] the US expressly 'espous[ing]' its nationals' claims.[761] Israel held Bulgaria responsible for 'loss of life and property and all other damage',[762] claiming compensation representing 'the financial loss incurred by the persons *whose cause is being adopted by it*'.[763] In the 1988 *Aerial Incident* case, regarding a flight's alleged shooting down by US authorities,[764] Iran claimed reparation for those aboard, the airline, and itself,[765] considering it 'ha[d] the right to espouse [the victims'] claims'.[766] These are apparently, at least partly, typical diplomatic protection claims,[767] yet most States alleged, at least *inter alia*, violation of the obligation not to use force,[768] which is not, as such, for individual protection.[769] Moreover, Israel's arguments for the inapplicability of the local remedies rule – that there was 'unity of the aircraft with every person and everything on board',[770]

[759] See DADP, 81; Wittich (n73) 153-157; Meron (n322) 92-94.

[760] *Aerial Pleadings* (n107) 36 (UK App.[8](a)); 23 (US App.[3]); 29 (Ann.3).

[761] ibid.170 (Mem.US); also 167 ('on whose behalf...claims…presented').

[762] ibid.116 (Mem.Israel, sub.I).

[763] ibid.(sub.II(a) (emphasis added)); Wittich *infra*.n767; Amerasinghe (n14) 157;166.

[764] See *Aerial Incident of 3 July 1988 (Iran v USA)* ICJ.Pleadings, vol.I., 11[2] (Mem.Iran).

[765] ibid.289-291 [5.21].

[766] ibid.304 [5.41]. Also Amerasinghe (n323) 297; Dugard, 'ThirdRep' (n716) [79].

[767] See Wittich (n73) 154 (*i.a.*, Israel adopting nationals' cause inconsistent with later arguing not diplomatic protection); cf.Amerasinghe (n14) 166-167. For 'adopt[ing]…cause' being diplomatic protection: *Anglo-Iranian Oil (UK v Iran) (Prel.Obj.)* [1952] ICJ.Rep. 93, 102.

[768] *Aerial Pleadings* (n107) 358ff, [66]ff (Mem.UK);84-85, [61]-[62] (Mem.Israel) ('force…subject to…elementary obligations of humanity'); *Iran/USA* (n764) 12 [3];155ff (Pt.III). Cf.*Aerial Pleadings* (n107) 213 (Mem.US) ('international murder').

[769] Dörr and Randelzhofer, 'Article 2(4)' in Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, 2012). 213 ('indisputably only protects...States'). Cf.Wittich (n73) 156 (*Aerial Incident* 'concerned...proper treatment of nationals abroad').

[770] *Aerial Pleadings* (n107) 531, quoted Amerasinghe (n14) 158; generally 149;157-159;166-167; Wittich (n73) 154; generally 153-157; Thirlway (n216) 619; Meron (n322) 93-94.

its State rights were injured,[771] and the individuals had no 'connection' with Bulgaria[772] – do not undermine that aspects of diplomatic protection were present.[773] Indeed, "connection" arguments presuppose that a given claim *is* diplomatic protection, with the absence of such connections providing an exception to local remedies requirements.[774] The DADP outline that claims concerning persons 'on board an aircraft that is shot down while in overflight of another State's territory' are excused from local remedies for this reason.[775]

Cases involving ships include,[776] for instance, the *Costa Rica Packet*, where damages were awarded to the owners, captain and crew of a vessel wrongly arrested given the flag State's exclusive jurisdiction,[777] the arbitrator noting States' 'right ... of protecting and defending [their] nationals abroad ... subjected to ... injuries committed to their prejudice'.[778] In the *I'm Alone Case*, the Commissioners recommended damages, *inter alia*, 'for the benefit of the captain and members of the crew' after a ship was

[771] *Aerial Pleadings* (n107) 527;530-531, discussed Amerasinghe (n14) 149;157-159;166-167; Thirlway (n216) 619; Meron (n322) 96; Wittich (n73) 155-156.

[772] *Aerial Pleadings* (n107) 532; also ILC, '50th' (n380) 7 (Brownlie); Meron (n322) 96; Aréchaga (n69) 583; Crawford, 'Revisited' (n457) 166.

[773] *Supra*.n767. Suggesting 'mixed': Dugard, 'SecondRep' (n634) [19]; Wittich (n73) 157; *infra*.n943. Cf.*Aerial Pleadings* (n107) 531.

[774] DADP, Art.15(c), 80-83; Meron (n322) 96; sources *supra*.nn727;732; *infra*.nn1041-1042.

[775] DADP, 81; also Meron (n322) 98.

[776] Under the DADP, flag-States may claim 'on behalf of...crew members, irrespective of…nationality, when…injured in connection with an injury to the vessel': DADP, Art.18; generally 91-94; *Saiga* (n657) [106], discussed DADP, 92-93; Dugard, 'Fifth Report' [2004] 2(1) ILCYB 43 [52]-[56]; similarly *Virginia.G* (n657) [127]; *Arctic.Sun. (Merits)* (n410) [172]; also Whiteman (n649) 95. Nationality apart, 'there is…a close resemblance between this…and diplomatic protection', and the two may overlap: DADP, 91; also 93-94; generally Dugard, 'FifthRep on Diplomatic Protection' (n776) [44]-[56],[62],[67]; ILC, '54th' (n727) 6 (Gaja); ILA, 'Toronto' (n667) [159].

[777] *Costa Rica Packet (UK v Netherlands)* (1897) 5 Moore's 4948, 4953-4954.

[778] ibid.4952. Cf.Chappez (n688) 45.

sunk,[779] the claim brought under a provision for 'claim[s] *by a British vessel* for compensation on the grounds that *it has suffered loss or injury*'.[780] In *Wimbledon*, Germany had to 'compensate [France], acting on behalf of the [national] ... which sustained the loss',[781] for damage caused by its unlawfully disallowing a ship Kiel Canal access.[782] In *Saiga,* ITLOS held wrongful certain exercises of jurisdiction and hot pursuit, and uses of force,[783] awarding reparation 'for damage or other loss suffered by the *Saiga*, including all persons involved or interested in its operation'.[784] While ITLOS considered the claim 'direct',[785] it observed that even if certain claims 'did not arise from direct violations of the [State's] rights', 'no jurisdictional connection existed', rendering local remedies in any event irrelevant.[786] Panama expressly brought the *Virginia G* case as diplomatic protection,[787] claiming compensation for similar alleged injury.[788] Having found unjustified measures of enforcement and failure to notify the flag-State,[789] compensation was awarded for certain of the ship's losses,[790] ITLOS finding the State's

[779] *"I'm Alone" (US/Canada)* (1933/1935) III UNRIAA 1609, 1618; also discussed Jessup (n2) 120;162; Whiteman (n649) 150-157; Amerasinghe (n14) 165-166; DADP, 92.

[780] Art.IV, reproduced *I'm Alone* (n779) 1612 (emphasis added) and see 1616; Whiteman (n649) 151.

[781] *SS 'Wimbledon'* [1923] PCIJ.Rep. SerA.No.1, 30.

[782] ibid.30-33. See *ARSIWA,* 270; Jessup (n2) 120.

[783] *Saiga* (n657) [128],[131]-[132],[136],[147]-[152],[159]. Case discussed Wittich (n73) 170-177; also Brown (n109) 206-208.

[784] *Saiga* (n657) [172], also [175],[168]. See Dugard, 'FifthRep' (n776) [54] (ITLOS 'also saw [*Saiga*] as...diplomatic protection') [56]; also DADP, 93; Brown (n109) 208.

[785] *Saiga* (n657) [98]. Cf.*supra*.n658.

[786] ibid.[99]-[100]. See Dugard, 'FifthRep' (n776) [55].

[787] *Virginia.G* (n657) [119]. Cf.*Norstar* (n657) [251].

[788] See *Virginia.G* (n657) [48](h),[54](15).

[789] ibid.[270]-[271],[328].

[790] ibid.[446].

injury 'preponderant'.[791] Finally, Malta brought the *Duzgit Integrity* case as diplomatic protection,[792] the Tribunal finding unlawful exercises of jurisdiction,[793] and compensation due.[794] These cases concerned, *inter alia*, violations of rules concerning the use of force[795] and jurisdiction,[796] not commonly conceived as for individual protection,[797] as well as navigation,[798] not always so regarded.[799] Yet they were nonetheless for individual injury,[800] and apparently regarded, at least in part, as diplomatic protection.[801]

(iii) Conclusion

The practice has been examined in some detail, because it is important, for the arguments made in this and later Chapters, that, contrary to the view noted above,[802] diplomatic protection and 'direct' claims cannot be distinguished based on the obligation breached. Rules for individual protection can found 'direct' claims, just as claims that are diplomatic protection – at least in part – can be based on rules for State protection.

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[791] ibid.[157].

[792] *Duzgit* (n657) [146]-[147].

[793] ibid.[254]-[261].

[794] Calculation forthcoming: ibid.[333].

[795] See Jessup (n2) 162 (*I'm Alone* (n779)); *supra*.n783.

[796] *Supra*.nn777;783;793, also *supra*.n789.

[797] *Supra*.n769; *Immunities* (n39) [57] ('jurisdiction...flows from' sovereignty); *Virginia.G* (n657) [157] (State rights concerning jurisdiction).

[798] *Supra*.nn782;783.

[799] *Virginia.G* (n657) [157] ('freedom of navigation' State right); similarly *Oppenheim's* (n73) 614; McCorquodale (n1) 285; cf.*Saiga* (n657) [53] (Sep.Op.Wolfrum) (State/individual rights 'interwoven'), discussed Wittich (n73) 175. Generally *supra*.nn657-658.

[800] See *supra*.nn778;780;784;788.

[801] See *supra*.nn779;781;786;787;791;792.

[802] *Supra*.nn685ff.

C. Diplomatic protection does depend on the entity suffering factual injury

The correct distinction between diplomatic protection and 'direct' claims requires that the term 'injury' in the DADP definition be taken to refer to *factual* injury, i.e. damage.[803] As Chapter I outlined, reparable damage under international law results from breach of an international obligation.[804] Such damage can be caused to both States and individuals.[805] Thus, the PCIJ outlined in *Chórzow* that 'the reparation of a wrong may consist in an indemnity corresponding to the *damage which the nationals of the injured State have suffered* as a result of the act which is contrary to international law.'[806] It therefore accepted, first, that breaches of international law can cause *individual* damage.[807] Second, and significantly, while individuals were later accorded rights under international law,[808] at the time, the rights breached were acknowledged to be the State's.[809] Individual damage can accordingly result even where the rights breached are *not* the individual's – i.e. where the individual is not *legally* injured.[810] Rather, which

[803] *Supra*.n649; *infra*.nn814-818;832-833;836;851; similarly Sohn/Baxter (n58) Art.14 (defining 'injury');46; cf.Amerasinghe (n323) 177.

[804] *Supra*.nn80-81;Ch.I(II)(C).

[805] *Supra*.nn107;110;139-142; Garcia-Amador, 'SixthRep' (n105) [30]-[31],[176]. Also *Brierly's* (n324) 256; Fitzmaurice, *LP* (n69) 25-26;670; Borchard (n319) 352.

[806] *Chórzow (Merits)* (n80) 27-28 (emphasis added), discussed authorities *supra*.n325; *infra*.nn807;1789.

[807] Peters (n1) 170;357; also Wittich (n73) 131;150 ('no identity'); Aréchaga (n69) 574-575;578; Fitzmaurice, *LP* (n69) 670-671; Garcia-Amador, 'SixthRep' (n105) [11], also [30]-[31],[34]-[40],[176]; generally *supra*.nn107;110;138-141.

[808] *Supra*.n675.

[809] *Chórzow (Merits)* (n80) 27. See Peters (n1) 170-171; Parlett (n1) 70; *supra*.Pt.(A); cf. discussion Thirlway (n216) 1553-1554.

[810] *Infra*.n812. Cf.Peters (n1) 170-171. On individual 'legal injury': Nollkaemper (n6) 98-99.

entity suffers damage generally depends on who has experienced the relevant loss.[811] However, the PCIJ went on in the same case to suggest that:

> Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. *The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State*; it can only afford a convenient scale for the calculation of the reparation due to the State.[812]

The State would thus – contrary to the argument made here – be claiming for *its own* damage when exercising diplomatic protection.[813]

Nonetheless, the nature of the individual's 'injury' as *damage* was recognised in early codifications of diplomatic protection,[814] case law,[815] and academic commentary.[816] Indeed, it is generally accepted that diplomatic protection is exercised vis-à-vis 'personal injury and ... injuries in respect of property',[817] the relevant violations being:

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[811] Wittich (n73) 129 (on direct/indirect injury, discussed *supra*.n644); also Garcia-Amador, 'Report' (n2) [96],[127] ('immediate victim of…injury'); Garcia-Amador, 'Problems' (n142) 486 ('person who...directly suffered…damage'); McGregor and others, *McGregor on Damages* (19th edn, 2014) [2-001]; Aréchaga (n69) 577, citing *Spanish Zone* (n667) 730; generally *supra*.n107. Cf.*supra*.nn323-325;756; *infra*.nn815;828ff;Ch.VII.

[812] *Chórzow (Merits)* (n80) 28, discussed authorities *supra*.nn325;807; *infra*.n1789.

[813] Authorities *supra*.nn323-325; *infra*.nn1442;1790; cf. discussion Kalshoven, 'Expert Opinion' in Fujita, Suzuki and Nagano (eds), *War and the Rights of Individuals* (1999) 45; Fitzmaurice, *LP* (n69) 670-671.

[814] See codifications discussed Garcia-Amador, 'Report' (n2) 177-180;192 and reproduced Ann.1;3 (see Art.1); 5;9; Dugard, 'FirstRep' (n322) 215. Cf.Meron (n322) 97.

[815] *ELSI* (n304) [52] ('matter which colours and pervades...claim...alleged *damage* to [nationals]' (emphasis added)), quoted Dugard, 'SecondRep' (n634) [21]; Wittich (n73) 161; also *Barcelona Traction* (n69) [28],[35] ('whether [shareholders'] *losses*...consequence of...violation[s]' (emphasis added)); *Chórzow (Merits)* (n80) quoted *supra*.n812; *Reparations* (n69) 207 (Diss.Op.Badawi Pasha) ('State...claims reparation for...damage suffered by [national]'); also *Aerial Pleadings* (n107) 526 (Israel).

[816] E.g., Aréchaga (n69) 574; *Brierly's* (n324) 256; Garcia-Amador, 'Report' (n2) [17]; Thirlway (n216) 1551; *Oppenheim's* (n73) 847 (fn.2); Douglas (n367) 166; Borchard (n319) 349; Bollecker-Stern (n231) 106; Brownlie, *System* (n76) 236;240; also *infra*.nn832-833;836; Kalshoven (n813) 45 ('diplomatic protection presupposes…damage or injury…actually…suffered by...[State's] nationals'; 'damage...indispensable basis for...exercise');46.

[817] Amerasinghe (n323) 37. Similarly: *Brierly's* (n324) 258 ('foreigner (alien) suffers injury in person or property'); Aréchaga (n69) 573; Garcia-Amador, 'Problems' (n142) 462; Crawford, *GP* (n2) 568;

> in respect of the person of the alien, such as arrests, physical injury, torture or improper imprisonment, or ... involv[ing] the property of the alien, when, for example, the acts cause physical damage to property or in the case of improper deprivation of property.[818]

Such personal and property injury results in *individual* damage.[819] This must be so vis-à-vis injury to the person,[820] with 'personal injury' costs as such – including 'loss of earnings and earning capacity, medical expenses and the like',[821] and 'non-material losses, such as the loss of loved ones and pain and suffering'[822] – suffered by individuals, not the State.[823] This is so even if, as Chapter VII elucidates, States might suffer their own damage as a consequence of such losses.[824] Moreover, although States may be legitimately concerned with the effect of damage to nationals' property on their economies,[825] 'international law does not really treat such assets as being actually the

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codifications reproduced Garcia-Amador, 'Report' (n2) Ann.1;8;9; also Dugard, 'FirstRep' (n322) 215; Garcia-Amador, 'SixthRep' (n105) [34],46; similarly Dugard, 'SecondRep' (n634) [39]; ILC, '52nd' (n340) 35-36 (original DADP, Art.1);cf.119 (Lukashuk); ILC, '50th' (n380) 19 (Sepúlveda).

[818] Amerasinghe (n323) 37; also Garcia-Amador, 'SixthRep' (n105) [31],[34]ff,[119]ff.

[819] See Amerasinghe (n14) 53; *ARSIWA*, 221-225; Garcia-Amador, 'SixthRep' (n105) [30]-[31],[34]; generally Barker (n138) 604-608; Brown (n109) 199-208; *supra*.n644.

[820] Amerasinghe (n14) 53; also Borchard (n319) 362-363. Cf.Wyler/Papaux (n158) 628.

[821] *ARSIWA*, 223.

[822] Crawford, *GP* (n2) 517; also *ARSIWA*, 223; Barker (n138) 604-605.

[823] See Amerasinghe (n14) 53; Garcia-Amador, 'SixthRep' (n105) [11],[30]-[31],[34]-[40],[176]; Brown (n109) 199-208; *ARSIWA*, 223-225; Crawford, *GP* (n2) 517; Sohn/Baxter (n58) 46; *supra*.n754.

[824] See authorities *infra*.n909; generally *infra*.nn909ff;1784;1867ff; e.g., *ARSIWA*, 221; Brown (n109) 200;206-208; Borchard (n319) 362; Sohn/Baxter (n58) 46. Cf.Barker (n138) 604.

[825] See Amerasinghe (n14) 53; Bollecker-Stern (n231) 100 (quoting Vattel (n324) 164, see also 109;174); also 104-105; Amerasinghe (n323) 12; Arangio-Ruiz (n142) (fn.110) (quoting Reuter); Bennouna (n325) [17]; Gaja, 'Injuries' (n340); Wyler/Papaux (n158) 628; e.g. *Military and Paramilitary Activities (Nicaragua v USA)* ICJ.Pleadings, vol.V, 306 (Mem.Compensation); *Passage through the Great Belt (Finland v Denmark)* ICJ.Pleadings, 7 (App.[23]). Further *infra*.nn1877ff.

property of the national state'.[826] Consequently, damage to property as such is suffered by the individual owner.[827]

Where a national's property or person is at issue, the existence of *State* damage is instead actually recognised through the 'fiction' of diplomatic protection,[828] namely '[t]he theory ... that injuries either to private persons or to their property, committed contrary to international law, are injuries against the state whose national the individual is'.[829] For the reasons noted above,[830] there is no "fiction" in maintaining that the State is *legally* injured when its rights are breached in circumstances affecting its nationals.[831] What is 'fictional' is to assume that it suffers the resulting damage;[832] as Bennouna observes, 'the fiction resides' in keeping State and individual damage separate, yet 'recognizing that … the damage suffered by an individual ... [is] used to calculate the [State's damage] (which remains fictitious)'.[833] Indeed, the State is, through diplomatic protection, able to claim

[826] Amerasinghe (n14) 53.

[827] See *ARSIWA*, 221;223;225ff (differentiating State/individual property damage); Borchard (n319) 362-363; also Bollecker-Stern (n231) 105, citing *Barcelona Traction* (n69) 46; also 114-122;177; similarly Aréchaga (n69) 578; also Graefrath (n107) 48-49; Vattel (n324) 109-110;174; Brown (n109) 199-205.

[828] Generally on this 'fiction': Bollecker-Stern (n231) 95-101; Vermeer-Künzli, 'Fiction' (n217); *supra*.nn323-325; *infra*.n1883.

[829] Whiteman (n649) 82; also Higgins, *Problems* (n298) 51; Borchard (n319) 353-354. Famously: *Brierly's* (n324) 256 ('exaggeration to say...whenever a national is injured...their state as a whole is necessarily injured too'), earlier edition cited DADP, 25; Dugard, 'DP' (n319) 1052.

[830] *Supra*.nn670-678.

[831] ILC, '50th' (n380) 7;9 (Brownlie/Simma); ILC, '52nd' (n340) 66 (Simma) ('nothing fictitious about...diplomatic protection'); Wittich (n73) 131-132; Douglas (n367) 166-167; Douglas (n301) 14; also *Brownlie's* (n77) 607 ('relation...cannot be simply dismissed' as fiction; 'state...legal interest represented by…citizens'); Brierly, *infra*.n946; cf.Vermeer-Künzli, 'Fiction' (n217) 39;58; Peters (n1) 390;393; Pellet (n559) 36-37; ILC, '53rd' (n326) 131 (Pellet); Garcia-Amador, 'SixthRep' (n105) [41].

[832] ILC, '50th' (n380) 16 (Hafner) ('[individual] damage...assumed...caused to…State as if [nationals'] property...or perhaps the nationals themselves…[State] property'); ILC, '52nd' (n340) 49 (Pellet) ('fictional damage');50; also Peters (n1) 393 ('citizen...as part or "chattel" of…State'); Higgins, *Problems* (n298) 51-52; cf.ILC, '52nd' (n340) 59 (Candioti); discussion Douglas (n301) 14.

[833] Bennouna (n325) [23] (having quoted *Chórzow (Merits)* (n80) 28), cf.[21].

reparation (for damage) for itself.[834] However, as confirmed by the compensation normally reflecting the individual's damage,[835] the relevant damage is really experienced by the individual and only "fictionally" by the State.[836] While a State cannot, as explained below, convert a diplomatic protection claim into a "direct" one by altering the relief sought[837] – the reparation requested is, for this reason, suggestive.[838]

The individual's injury being factual in diplomatic protection is reinforced by the rule requiring that, before States can claim 'in respect of [their] injury',[839] individuals must exhaust local remedies.[840] Implicitly, this means exhaustion in that no reparation has been obtained.[841] Thus, the PCIJ described diplomatic protection as 'a State ... protect[ing] its subjects, when injured by acts contrary to international law committed by another State, *from whom they have been unable to obtain satisfaction*'.[842] In *ELSI*, the ICJ held it 'sufficient if the essence of the claim has been ... pursued as far as permitted

[834] *Supra*.nn129;323-325; *infra*.nn1442;1739; also Crawford, *GP* (n2) 76-77.

[835] *Supra*.nn325;812;833; Aréchaga (n69) 573-575; Bollecker-Stern (n231) 97.

[836] Bennouna (n325) [23]; Amerasinghe (n14) 53; DADP, 97 ('logic of *Mavrommatis*...undermined by [this] practice'); similarly Dugard, 'FirstRep' (n322) [65]; *Brierly's* (n324) 256; Pellet (n559) 56; ILC, '50th' (n380) 9 (Bennouna); Wittich (n73) 129, quoted *supra*.n649; also Peters (n1) 395; Sohn/Baxter (n58) 51; Jessup (n2) 9; *Reparations* (n69) 207 (Diss.Op.Badawi Pasha). Further: DADP, 23 ('designed to secure reparation for [national's] injury'); similarly *US v Germany (Admin.Dec.No.V)* (1924) VII UNRIAA 119 (US-German.Cl.Comm.) 153; Garcia-Amador, 'Problems' (n142) 462;467.

[837] Authorities *infra*.nn963-966.

[838] Authorities *supra*.n638, particularly Meron; Wittich (n73) 170; also DADP, 76.

[839] DADP, Art.14(1), generally 70-74.

[840] Similarly Amerasinghe (n14) 53;165, *infra*.n850; also Thirlway (n216) 618-619; cf.Wittich (n73) 136 (criticising); *Heathrow* (n656) 60-62, discussed and similarly criticised Wittich (n73) 169-170; *Duzgit* (n657), *supra*.n658. Generally on local remedies demonstrating 'fiction': Dugard, 'FirstRep' (n322) [19]; Pellet (n559) 54; also Amerasinghe (n14) 53.

[841] See Donner, *The Regulation of Nationality in International Law* (2nd edn, 1994) 19 ('without satisfaction'); *Diaz v Guatemala (Admissibility)* (1909) 3 AJIL 737 (CACJ) 743 ('whether...efforts to obtain reparation have failed'), cited Borchard (n319) 14; Nollkaemper (n6) 247; *infra*.nn847-850.

[842] *Mavrommatis* (n313) 12 (emphasis added); Crawford, *GP* (n2) 580.

by local law and procedures, and *without success*'.[843] Importantly, there was no 'require[ment] that a claim be presented to the municipal courts in a form, and with arguments, suited to an international tribunal, applying different law to different parties'.[844] As 'different law' thus applies, local remedies cannot necessarily be pursued for the same *breach* (i.e. *legal* injury) as the international claim.[845] Rather, the wrongdoing State is allowed 'an opportunity to *redress* [the violation] by its own means',[846] namely, to remedy the individual's *damage* (i.e. *factual* injury).[847] Because '[a] State discharges the responsibility incumbent upon it for breach of an international obligation by … giving reparation for the injury caused',[848] it follows that, at least vis-à-vis purely diplomatic protection claims:[849]

> where local remedies are exhausted and adequate redress is obtained by the injured alien, the delinquent state's responsibility is *completely discharged* and all claims arising from the injury are extinguished. There is no room for a claim of damages for the international injury to the alien's state or for an apology based on the fact that the alien's state also suffered injury.[850]

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[843] *ELSI* (n304) [59] (emphasis added), quoted DADP, 73; Crawford, *GP* (n2) 583.

[844] *ELSI* (n304) [59]; also DADP, 72, quoting *Ambatielos Claim (Greece/UK)* (1956) XII UNRIAA 83, 120; cf.Amerasinghe (n14) 196.

[845] Crawford, *GP* (n2) 582-583; Shany (n4) 138; Crawford, 'Revisited' (n457) 162-163; Nollkaemper (n6) 260; Thirlway (n216) 619-620;1555-1556; *Heathrow* (n656) 60, discussed Wittich (n73) 169. Cf.*Interhandel* (n356) 28. Generally *supra*.Chs.I(II)(A);II(I)(C);II(III)(C).

[846] *Interhandel* (n356) 27, quoted DADP, 71 (emphasis added); Crawford, *GP* (n2) 580; also Bennouna (n325) [10]; Wittich (n73) 132; DADP, Art.15(a) (remedies must 'provide effective redress'); also 78-79; Amerasinghe (n14) 59-61;74; Aréchaga (n69) 585;589. Further Meron (n322) 90 (*Interhandel*: individual/State claims 'same object'); similarly Thirlway (n216) 616.

[847] See Crawford, *GP* (n2) 583 (only issue whether remedy obtained); Nollkaemper (n6) 260-261; also ILC, '52nd' (n340) 72 (Tomka); *Bissangou v DRC* (2006) AHRLR 80 [55] ('opportunity to compensate...for [individual's] prejudice'); also *ELSI* (n304) [56]. Cf.Shany (n4) 30 (need 'good...match between…substantive contents of national and international law and…remedies').

[848] Aréchaga (n69) 564.

[849] Not so in a 'mixed' claim (*supra*.nn332ff) involving additional State injury: Aréchaga (n69) 591 ('if...composite...state may still...claim for direct injury'); Borchard (n319) 353 ('affronts to…nation...survive restitution or compensation to…individual'), quote *infra*.n850; Garcia-Amador, 'SixthRep' (n105) [176].

[850] Amerasinghe (n14) 165 (emphasis added, though used vis-à-vis argument *supra*.n688); similarly 53 ('satisfaction of...alien's grievance at…national level...wipe[s] out [State's] injury');103;397; Borchard (n319) 353 ('if...no element of national insult'); ILC, 'Diplomatic Protection' [1997] 2(2) ILCYB 60 [177]

Individual damage is thus of the essence of a diplomatic protection claim.[851]

D. Conclusion

In sum, neither the entity to which an obligation is owed nor a given obligation's content can determine whether a claim for breach thereof is diplomatic protection.[852] Violation of obligations for individual benefit[853] may be *more likely* to give rise to diplomatic protection, but this is because individual *damage* is more likely to result.[854] Diplomatic protection claims can nonetheless arise, as shown, from breach of other obligations, just as 'direct' claims can concern obligations for individual protection.[855] Indeed, while originally focused on aliens in another State, diplomatic protection is not so limited:[856]

> If nationals are subjected to injury or loss by another state, then, whether the harm occurs in the territory of a state, or on the high seas or in outer space, the state of nationality may present a claim on the international plane.[857]

(diplomatic protection for 'injury...not...redressed through local remedies'), similar quotation ILA, 'Toronto' (n667) [26]; also Thirlway (n216) 618; Meron (n322) 88;90 (*supra*.n846); 92, quoting *Interhandel* (n356) 31 (Decl.Basdevant); similarly Wittich (n73) 149; *Waste.Mgmt. (Award)* (n297) 66 (Diss.Op.Highet). Cf.Nollkaemper (n6) 250-251.

[851] Kalshoven *supra*.n816; Barboza (n71) 8 (fn.6) ('damage...a condition of responsibility by…primary norm'); also Rivier (n168) 747-748.

[852] Cf.*supra*.Pts.I(A)-(B); Wittich (n73) 173 and 165-166 (arguing *Saiga* (n657) [98] and *Air Services* (n183) [31] concerned aliens' treatment).

[853] See Wittich (n73) 177 (to whom 'provision allocates…benefits of…right'); also Parlett (n1) 350; Nollkaemper (n6) 104-106; *supra*.Pt.I(B).

[854] See Wittich (n73) 130 (if State 'primary beneficiary of…right violated' then 'immediate object of…injury'); also Amerasinghe (n14) 163-165; Riphagen (n688) [96]; generally *supra*.nn644;685-688;811; *infra*.Ch.VII(II)(A); cf.Parlett (n1) 362-363; *Virginia.G* (n657) (Sep.Op.Cot/Kelly), [16],[22],[24],[27] (using 'rights'/'injury' interchangeably); discussion *Eritrea* (n271) [210]-[212],[214],[216].

[855] *Supra*.Pts.I(A)-(B).

[856] Meron (n322) 97; DADP, 81; cf.Fitzmaurice, *LP* (n69) 86.

[857] *Brownlie's* (n77) 607; also *supra*.n856.

Rather, 'direct' and diplomatic protection claims can be distinguished as follows. A claim for State injury, legal and/or factual (the latter including material and/or moral damage),[858] with no "fictional" damage,[859] is direct, because it is not '*for an injury caused* ... to a natural or legal person', but for State injury alone.[860] Regardless of the underlying obligation, when breach is alleged to have caused damage (i.e. factual injury) to a national's *person* or *property*,[861] 'as a private individual',[862] and the claim is solely for,[863] or based on,[864] that damage, the claim is diplomatic protection.[865] It is for breach of obligations owed to the *State*, but for *individual* damage, done to the State only "fictionally".[866] In the 'mixed' claims in between, the State suffers material and/or moral damage in addition to that done to individuals.[867] Procedurally-speaking, the DADP

[858] See Wittich (n73) 130; generally *supra*.Ch.I(II)(C).

[859] *Supra*.nn828-833;836; similarly Aréchaga (n69) 582; see Brownlie, *System* (n76) 236-240. Further *infra*.Pt.III(B) and authorities.

[860] DADP, Art.1. Similarly Sohn/Baxter (n58) 45-49.

[861] See *supra*.nn319;817ff.

[862] DADP, 76.

[863] ibid. Art.1; *supra*.n318.

[864] ibid.75-76, Art.14(3), *supra*.n646 and discussion *infra*.Pt.III(B)(i)-(ii).

[865] Similarly ibid.76; cf.Thirlway (n216) 618; *supra*.n851.

[866] *Supra*.n859. Difficult situations could concern individual interests affected without obvious factual damage, e.g., *Biwater* (n683) [465]-[467] ('economic damage' unnecessary for expropriation), to which Paparinskis pointed me; also Crawford, 'FourthRep' (n122) [33]; *Eckle v Germany* (1982) 68 ILR 48 (ECtHR) [66] ('violation conceivable even in…absence of prejudice'). Such cases might nonetheless involve individual (moral) damage: see discussion *ARSIWA*, 31; Crawford, 'FourthRep' (n122) [33](b); and *Biwater* (n683) [465] ('non-compensatory remed[ies]'),[781];cf. nominal damages: McGregor/others (n811) [12-001]-[12-003]. Moreover, what matters is whether individual factual injury is *claimed*. Cf.*supra*.nn638;713; example discussed Paparinskis, 'Countermeasures' (n5) 314-315; *Plama* (n369) [132]; *infra*.Pt.(III)(B)(ii).

[867] See *supra*.nn332ff;646;849; *infra*.Pt.III(B)(i); Fitzmaurice, 'FourthRep' (n16) [161]; cf.Thirlway (n216) 1554.

suggest that what matters is on which part of such 'mixed' claims the suit is 'preponderantly' based.[868]

II. Article 48 claims for breach of *erga omnes (partes)* obligations

To conclude on the distinction between diplomatic protection and other interstate claims, this section briefly addresses Article 48 claims. Chapters I and II outlined that States claim under Article 42 for violation of obligations owed to them, and, usually, for damage,[869] including when exercising diplomatic protection (albeit that the damage is then "fictional").[870] The same is true where States claim to be 'specially affected' by breach of *erga omnes (partes)* obligations because their nationals are victims.[871]

By contrast, although States claim under Article 48 for breach of obligations *erga omnes* (*partes*) owed to them,[872] they do not even "fictionally" claim for their own damage, or their own reparation.[873] Rather, they claim 'in the interest of' the relevant 'beneficiaries'.[874] Nonetheless, where that beneficiary is an individual, even if the damage

[868] *Supra*.n646. Cf.*infra*.Pt.III(B)(i),(D).

[869] *Supra*.n185; generally *supra*.Ch.I(II)(D);Ch.II(II).

[870] *Supra*.nn828ff.

[871] *Supra*.nn344-345.

[872] *ARSIWA*, Art.48, 277-278; *supra*.Ch.I(II)(D); *supra*.nn188-207.

[873] *Supra*.nn213-214; also Vermeer-Künzli, 'Interest' (n183) 558-559; Gaja, 'Injuries' (n340); Gaja, 'Compliance' (n190) 961.

[874] *ARSIWA*, Art.48(2)(b); generally 209;279; *supra*.n214; Vermeer-Künzli, 'Interest' (n183) 557-559;577; Gaja, 'Position' (n455) 12; Gaja, 'Affected' (n340) 380;382; Gaja, 'Compliance' (n190) 958;961; Gaja, 'Injuries' (n340); *Cyprus/Turkey (Compensation)* (n95) [45]-[46], discussed *supra*.n95; also Lauterpacht (n231) 299-300.

remains the individual's alone,[875] any interstate claim is diplomatic protection-like, being brought for individual damage.[876]

Article 48(3) of the ARSIWA outlines that nationality and exhaustion of local remedies requirements also apply to claims brought under Article 48.[877] However, as Gaja outlines, this 'is only partly appropriate',[878] for States may bring Article 48 claims concerning non-nationals.[879] However, while some suggest that such claims are also not subject to the local remedies rule,[880] there is no reason to not apply the requirement to Article 48 claims vis-à-vis, for instance, human rights.[881] Indeed, local remedy exhaustion is required for interstate claims under many human rights treaties,[882] even though they embody *erga omnes partes* obligations.[883] Claims for breach of obligations *erga omnes (partes)* will, insofar as they are based on individual damage, therefore be treated similarly to diplomatic protection claims in this respect.[884]

[875] See *ARSIWA*, 209;279; Gaja, 'Position' (n455) 12-13.

[876] *Cyprus/Turkey (Compensation)* (n95) [45]. See *supra*.nn344-345;703-704.

[877] *ARSIWA*, Art.48(3), 280. Cf.sources *infra*.n880.

[878] Gaja, 'Compliance' (n190) 963. Cf.Milano, 'Diplomatic Protection and Human Rights before the International Court of Justice' (2004) 35 Neth.YBIL 85, 105-108.

[879] Gaja, 'Compliance' (n190) 963; Vermeer-Künzli, 'Interest' (n183) 557; *supra*.nn341-343; Kato (n340) 202-204.

[880] See DADP, 87; Crawford, *GP* (n2) 587;597; Vermeer-Künzli, 'Interest' (n183) 555;579.

[881] Gaja, 'Compliance' (n190) 963; *Armed Activities* (n342) 347-348 (Sep.Op.Simma); DARIO, 86; Amerasinghe (n14) 303-308;cf.66-68.

[882] *Supra*.n451; e.g., *Cyprus v Turkey (Judgment)* ECHR 2001-IV 1 [82]-[102].

[883] *Supra*.nn415-420.

[884] Similarly Amerasinghe (n14) 308.

III. The application of admissibility rules based on the nature of the claim

Based on the foregoing, the admissibility rules identified at the outset are enlivened where a claim is brought for damage to a national's person or property, arising from breach of an international obligation owed, at least *inter alia*, to the State.[885] The distinction is complex,[886] however, adopting the correct analytical framework makes addressing controversial circumstances more straightforward. This will be demonstrated by outlining, vis-à-vis the admissibility rules considered in this Chapter, its application to three situations in which the distinction has proved, or has the potential to be, problematic:[887]

(1) Claims said to be 'direct' because of allegations of breach (Part III(A));

(2) Claims said to be 'direct' despite individual involvement (Part III(B));[888] and

(3) Measures said to be less than diplomatic protection (Part III(C)).

A. Allegations of breach

States have sometimes suggested that claims are not diplomatic protection because obligations owed to them have been violated: the US argued, in *ELSI*, that local remedy exhaustion was unnecessary because it was claiming for treaty breach,[889] and Switzerland

[885] *Supra*.Pts.I(A)-(D);II.

[886] Wittich (n73) 132;152-153; DADP, 74; *supra*.nn634-638;646;Pts.I(A)-(D).

[887] See authorities *supra*.nn634-635; *infra*.Pts.III(A)-(C); similarly Paparinskis, 'Countermeasures' (n5) 314-315; DADP, 74-76.

[888] Cf.*supra*.n327; *infra*.n904.

[889] *ELSI* (n304) [51], discussed Wittich (n73) 135;160-162; DADP, 75; Amerasinghe (n14) 152-153.

did likewise vis-à-vis alleged breach of its rights in *Interhandel*.[890] However, if every interstate claim is brought for breach of obligations owed to the State,[891] this must be immaterial in distinguishing diplomatic protection and "direct" claims.[892] The ICJ thus rightly rejected the US argument in *ELSI*, observing that the national's damage 'pervade[d]' its claim.[893] Switzerland's national was likewise not relieved of the need to exhaust local remedies in *Interhandel*, discussed further below.[894] Given that, as Chapter I established, breach alone does not equate to moral damage to the State,[895] these were cases in which no *State damage* was alleged at all, except that done "fictionally" through the nationals.[896]

B. 'Direct' claims despite individual involvement

The second category concerns situations in which State damage is present. In some 'direct' cases, the *only* damage alleged is to the State,[897] including to its territory,[898]

[890] *Interhandel* (n356) 28, discussed Wittich (n73) 143-147; Amerasinghe (n14) 149;151-152.

[891] Generally *supra*.Pt.I(A);Ch.I(II)(D).

[892] See Amerasinghe (n14) 152;155;158;162;164; Wittich (n73) 151;156;165; also Borchard (n319) 353-354; generally *supra*.Pt.I(A), particularly *supra*.nn671-673.

[893] *ELSI* (n304) [52], discussed Amerasinghe (n14) 152-153; Amerasinghe (n323) 175; Wittich (n73) 135;161; Thirlway (n216) 617-618.

[894] *Interhandel* (n356) 28-29, discussed Amerasinghe (n14) 152; Amerasinghe (n323) 175;178-179; Fitzmaurice, *LP* (n69) 688-689; cf.DADP, 74 (*supra*.n672); Wittich (n73) 151-152. See *infra*.nn979ff.

[895] *Supra*.nn161-167.

[896] Cf.*supra*.nn672;828ff.

[897] Similarly Brownlie, *System* (n76) 31-32 ('direct injury' claims possible), disagreeing with, *i.a.*, Parry, 'Of Treaties' in Feuerstein and Parry (eds), *Multum non Multa* (1980) 238 (no 'exclusively' State compensation claims); also Amerasinghe (n14) 146-151; Lauterpacht (n231) 687.

[898] See *Oppenheim's* (n73) 511-512; Brown (n109) 199; Brownlie, *System* (n76) 29; Bennouna (n325) [17]; Graefrath (n107) 47; *ARSIWA*, 174-175 (distress); *Aerial Incident of 7 October 1952 (USA v USSR)* ICJ.Pleadings, 15 (App.US).

or its property.[899] However, such 'exclusively' State injury[900] is likely to be rare,[901] as States 'act through and are comprised of individuals'.[902] The question is how to distinguish 'direct' and diplomatic protection claims when both State and individual damage is present.[903]

As the following section outlines, there are three circumstances in which an interstate claim might remain 'direct' notwithstanding the presence of individual injury:

(1) State damage has resulted from circumstances in which individuals are 'involved',[904] but the claim either:

(a) concerns only the former;[905] or

(b) is 'mixed';[906] or

(2) the State claims for breach alone.[907]

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[899] See Borchard (n319) 352;362; Whiteman (n649) 80-81; Garcia-Amador, 'Report' (n2) [41]; *ARSIWA*, 221 ('diplomatic premises…personnel'/'aircraft…ships'); Murphy/Kidane/Snider (n266) 34; Brown (n109) 199; *Oppenheim's* (n73) 511 ('naval vessels'); similarly Amerasinghe (n14) 159; Meron (n322) 86;87 (fn.3), referencing *Corfu Channel* discussed *infra*.nn910-914; e.g., *Treatment in Hungary of Aircraft and Crew (USA v Hungary; USA v USSR)* ICJ.Pleadings, 18-19;37-38;51;58-59 (Apps.US); *Aerial Incident of 10 March 1953 (USA v Czechoslovakia)* ICJ.Pleadings, 25 (App.US); *US/USSR 1952* (n898), 26; vis-à-vis immunities: *Immunities* (n39) [35],[118]-[120],[139]; *'ARA Libertad' (Argentina v Ghana) (Prov.Measures)* [2012] ITLOS.Rep. 332 [1],[40],[93]-[95].

[900] Fitzmaurice, *LP* (n69) 687; Parry quoted *supra*.n897.

[901] See *supra*.nn313;640; similarly Whiteman (n649) 94; Meron (n322) 86 (underlying 'almost every international claim...interests of individuals'); Sohn/Baxter (n58) 50.

[902] Lauterpacht (n231) 34; also McCorquodale (n1) 283; *ARSIWA*, 94; Crawford, *GP* (n2) 113; *Oppenheim's* (n73) 540; *Air Services* (n183) 431; *supra*.nn73-77.

[903] Cf.DADP, 74; also Jessup (n2) 120; generally *supra*.nn634-646;886.

[904] Amerasinghe (n14) 146; *Liechtenstein's Pleadings* (n329), Obs.Liechtenstein [6.37]; cf.*supra*.n327; Brownlie, *System* (n76) 236-238;240.

[905] See *infra*.Pt.III(B)(i) and Ch.VII(II)(C). Generally, on claiming State damage alone where individual damage present: *Rainbow Warrior* (n733) 256-259. New Zealand had no 'formal standing to present a claim on behalf of non-national interests…damaged as part of a wider incident': *Oppenheim's* (n73) 513 (fn.7); also *Rainbow Warrior* (n733) 259; ILC, '50th' (n380) 19 (Brownlie). It nonetheless received an apology/compensation for costs: *Rainbow Warrior* (n733) 259;267;271.

[906] Generally *supra*.nn332ff;646;849.

(i) 'Direct' and 'mixed' claims

As Chapter VII elaborates further, damage that is properly regarded as State damage can be a consequence of circumstances in which individuals suffer damage.[908] Material State damage might, for instance, result from individuals' personal injury.[909] *Corfu Channel*, for example, concerned damage to State warships and associated injury to British navy personnel.[910] However, while claims for personal injury are usually diplomatic protection,[911] the UK actually claimed for 'the cost of pensions and other grants made by it to victims or their dependants, and for costs of administration, medical treatment, etc'.[912] The claim, commonly considered 'direct',[913] was therefore for State costs, not individual injury *per se*.[914] While *Corfu Channel* concerned State officials,[915] State losses are similar where private individuals are concerned.[916]

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[907] See *infra*.Pt(B)(ii) and authorities; *supra*.nn708ff.

[908] See *infra*.Ch.VII(II)(C); *infra*.nn909ff and authorities.

[909] The following is particularly informed by Bollecker-Stern (n231) 101ff, particularly 101 (public social insurance may remove fiction); Arangio-Ruiz (n142) (fn110) (quoting Reuter) (taxation/healthcare); Sohn/Baxter (n58) 46; also *ARSIWA*, 221; similarly *Nicaragua's Pleadings* (n825) 306; Gaja, 'Injuries' (n340) and discussion/authorities *infra*.nn1784;1870ff. Generally Whiteman (n649) 275.

[910] *Corfu Channel (UK v Albania) (Merits)* [1949] ICJ.Rep. 4, 10-11.

[911] *Supra*.nn817ff.

[912] *Corfu Channel (UK v Albania) (Compensation)* [1949] ICJ.Rep. 244., 249; also *Corfu Channel (UK v Albania)* ICJ.Pleadings, 25;52; *ARSIWA*, 221; Arangio-Ruiz (n142) [57]; Barker (n138) 604; Brown (n109) 200.

[913] See Brownlie, *System* (n76) 32; DADP, 76; Barker (n138) 604; Meron (n322) 87.

[914] See *ARSIWA*, 221; DADP, 100; and see Art.1. Cf.Meron (n322) 86. Generally Sohn/Baxter (n58) 46.

[915] *Supra*.n910.

[916] See *supra*.n909 and, e.g., *Eritrea* (n271) [290] (post-expulsion),[307] (payments/'social services'),[308] ('expenses...incurred'); *Ethiopia* (n428) [143] ('public expenditure'),[471] (IDP care),[156],[159] (civilians' medical treatment);Ch.XI(O) (civilian assistance/reconstruction); *Aerial Pleadings* (n107) 112 ('direct loss' including 'accelerated pensions payable'); *Aerial Incident of 7 November 1954 (US v USSR)* ICJ.Pleadings, 28; *Texas v American Tobacco* 14 F.Supp.2d 956 (1997) 968; *Seventh Instalment* (n437) [78]-[83]; cf.*Hunt v Severs* [1994] 2 AC 350, 361 (State-funded hospital costs not recoverable), referenced McGregor/others (n811) [9-111]. Generally on third-party compensation: ibid.[9-146]ff; Unberath,

Likewise, while claims for personal property damage are normally diplomatic protection,[917] Chapter VII outlines that material damage to *the State* might result from such losses.[918] To take an example particularly pertinent for present purposes, if a State guarantees its nationals' investments and compensates any losses they suffer,[919] the State might claim for its *own* ensuing material damage.[920] The *travaux préparatoires* to ICSID's Article 27, one of the admissibilty rules of present concern, suggests that such claims were not perceived as diplomatic protection.[921] Chapter VII outlines further examples of this idea operating in practice.[922] The important point here is that, where the State alleges only such material damage to itself, even if consequent on individual injury, the claim is 'direct'.[923] Where, however, a State alleges such damage together with individuals' actual personal or property damage, the claim is 'mixed',[924] with potentially important consequences for the local remedies rule.[925]

Transferred Loss (2003), particularly 35ff; *Eritrea* (n271) [46], *supra*.n565; Murphy/Kidane/Snider (n266) 226-227.

[917] *Supra*.nn817ff.

[918] *Infra*.nn919-921;1877ff.

[919] See Garcia-Amador, 'Problems' (n142) 472-473; Bollecker-Stern (n231) 101-103; generally *Restatement* (n107) §713, 226-227 (OPIC; proposed MIGA).

[920] Garcia-Amador, 'Problems' (n142) 473 (State claiming '"in its *own* name and behalf", because...asserting interests or rights...acquired from…national'); generally 472-473; further *infra*.nn950;1633;Ch.VII(II)(C); Bollecker-Stern (n231) 101-103.

[921] See ICSID (n536) 61;63;65;275;348;503 ('successor of…private national');528;959; generally *infra*.nn968;1545;1633.

[922] *Infra*.Ch.VII(II)(C).

[923] *Supra*.nn909;913;921. Similarly Sohn/Baxter (n58) 46;49.

[924] See *supra*.nn332ff;646;817ff;849; e.g., *infra*.nn956;1664, discussing *Bosnian Genocide* (n697) 64; *Croatian Genocide* (n698) [20]; *Nicaragua's Pleadings* (n825) Chs.5-6. Further: *US/Hungary* (n899) 38;59; *US/Czechoslovakia* (n899) 25; *US/USSR 1952* (n898) 26; *Aerial Incident of 10 August 1999 (Pakistan v India) (Jurisdiction)* [2000] ICJ.Rep. 12 [8]; cf.Brownlie, *System* (n76) 236-240.

[925] *Infra*.Pt.(D)(i).

The foregoing concerned *material* State damage consequent on that to citizens, but *moral* damage may also result.[926] For instance, as Chapter I observed, when individual State officials are affected by breach, their injury may cause the State moral damage.[927] Thus, in *Arrest Warrants*, regarding a Foreign Affairs Minister's immunity,[928] the ICJ observed that local remedies were inapplicable as Congo was 'not acting in the context of protection of one of its nationals' by invoking his '*personal* rights'.[929] In fact, the case was "direct" because the only claim concerned the individual representing the State,[930] and was made for the State's moral damage,[931] not personal damage.[932] By contrast, where such claims are combined with claims for damage to persons and property, as in *Tehran Hostages* and *Armed Activities*, they are 'mixed'.[933]

Violations vis-à-vis ships and aircraft are also, as Chapter I noted, commonly regarded as causing the State moral damage.[934] Rather than employing the rights analysis

[926] Similarly Wyler/Papaux (n158) 628; also Sohn/Baxter (n58) 47-49; Higgins, *Problems* (n298) 52.

[927] *Supra*.n163; see Sohn/Baxter (n58) 48.

[928] See *Arrest Warrants* (n653) [11]-[12],[17].

[929] ibid.[40] (emphasis added); also Amerasinghe (n14) 149;151;167-168; Amerasinghe (n323) 174-175;180-181; Crawford, 'Revisited' (n457) 138.

[930] See Thirlway (n216) 1552; similarly *Armed Activities* (n342) [330]; Amerasinghe (n14) 80;161;308; also DADP, 28;69. Cf.ibid.74-75, considering 'mixed'. Generally on officials' 'representative character': Jessup (n2) 119; cited Amerasinghe (n323) 177; also Lauterpacht (n231) 136; *supra*.nn76-77 (attribution); cf.McCorquodale (n1) 294.

[931] Congo sought declaratory relief as satisfaction for 'moral injury': *Arrest Warrants* (n653) 8.

[932] Cf.*supra*.n740; Amerasinghe (n14) 164 (*supra*.n756);cf.168 (*Arrest Warrants* focuses on 'the "essence" of…right violated'); Thirlway (n216) 1551-1552.

[933] *Supra*.nn740-757;332ff;646;817ff;849. Similarly Sohn/Baxter (n58) 48;163.

[934] *Supra*.n163; Wittich (n73) 156 (shooting aircraft/ships); generally 155-157;cf.155 (querying aircraft registration equation with flag);168-169;185; similarly Amerasinghe (n14) 167; Meron (n322) 84; Barboza (n71) 18 (fn.43); Garcia-Amador, 'SixthRep' (n105) [48]; *Aerial Pleadings* (n107) 33 (App.US); also ILC,

criticised above,[935] the tribunals in the various UNCLOS cases concerned with whether claims were 'direct' or diplomatic protection would have done better to acknowledge that the claims were actually 'mixed' because the States' allegations included moral damage claims.[936] Indeed, this is evident from declarations providing, in *Saiga*, 'reparation' for 'the claims of Saint Vincent and the Grenadines for compensation for violation of its rights'.[937] Not being for material damage, the only form of 'reparation' that this could be is satisfaction for moral damage.[938] Declarations likewise provided satisfaction in *Virginia G*,[939] *Arctic Sunrise*,[940] and *Duzgit Integrity*[941] – i.e., every UNCLOS case thus far decided and concerned with the distinction.[942] Similar observations apply to the proceedings noted above concerning aircraft, in which State moral (and sometimes also material) damage was alleged.[943] Violations of sovereignty also undoubtedly cause moral

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'53rd' (n326) 149 (Hafner); cf.*Heathrow* (n656) 53;60 ('air services...State prerogative'); *Liechtenstein's Pleadings* (n329), Obs.Leichtenstein [6.38]-[6.43].

[935] See *supra*.nn657ff.

[936] Similarly Fitzmaurice, 'FourthRep' (n16) [161]; Fitzmaurice, *LP* (n69) 687. Some have been considered 'mixed', but rarely because of moral damage (cf.Wittich (n73) 155-157 vis-à-vis *Aerial Incident*): e.g., on *Saiga* (n657): Wittich (n73) 172-173; Dugard, *supra*.n784; *Saiga* (n657) 107-108;110-111 (Sep.Op.Wolfrum);129-130 (Sep.Op.Rao); on *Virginia.G* (n657): *supra*.n791; on *Norstar* (n657): (Dec.Cot) [8];(Sep.Op.Wolfrum/Attard) [48]-[50];(Diss.Op.Treves) [19]-[20]; on *Arctic.Sun. (Merits)* (n410) [373] (explicit satisfaction request); on *Duzgit* (n657) [154]-[156]. Further: *I'm Alone* (n779) 1618 (apology and damages 'material amend'); see Whiteman (n649) 154; also Jessup (n2) 120. Cf.Aréchaga (n69) 571. Based on 'injury to…flag' (Amerasinghe (n14) 165), this was apparently 'satisfaction': Crawford, *GP* (n2) 528-529; also Barboza (n71) 18 (fn.43); Arangio-Ruiz (n142) [15]; Sohn/Baxter (n58) 48.

[937] *Saiga* (n657) [176]; also Amerasinghe (n323) 297.

[938] *Supra*.n159.

[939] *Virginia.G* (n657) [447]-[448].

[940] *Arctic.Sun. (Merits)* (n410) [380].

[941] *Duzgit* (n657) [332].

[942] *Supra*.nn658;783-794.

[943] See Dugard, 'SecondRep' (n634) [19] ('mixed'); also Wittich (n73) 157; Amerasinghe (n14) 166-167; *supra*.nn759-775. For moral damage: Wittich (n73) 155-157; fn.112, discussing *Aerial Pleadings* (n107) 246;248 (Mem.US), also quoted *Nicaragua's Pleadings* (n825) 259-260. For material damage: *supra*.n765.

damage,[944] explaining why those cases concerned with various States' environments, discussed above, should be regarded as 'mixed'.[945]

More generally, Borchard argued that States exercising diplomatic protection are 'presumed to avenge and seek compensation for the injury to [their] national welfare and dignity, an injury quite independent of that sustained by [the] citizen'.[946] As Chapter I outlined, injury to a State's 'dignity' amounts to moral damage, repaired through satisfaction.[947] While breach does not cause such damage *per se*,[948] it may where 'the particular acts complained of are so flagrant as obviously to be intended as an affront'.[949] Thus, as Garcia-Amador convincingly argues:

> where an injury is caused to the person or property of an alien, the consequence of the wrongful act or omission may, owing to their gravity or to their frequency or because they show a manifestly hostile attitude towards the foreigner, extend beyond the specific, personal injury. When such is the case a distinction can be drawn between two different categories of interests, the purely private and exclusive interest of the alien and the 'general interest' of the State ... .[950]

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[944] *Supra*.n163.

[945] See *supra*.nn727;716ff.

[946] Borchard (n319) 352; cf.Brierly, 'The Theory of Implied State Complicity in International Claims' (1928) 9 BYBIL 42, 48 ('injurious results…not necessarily…confined to…individual'), discussed Garcia-Amador, 'Report' (n2) [101]-[102]; Dugard, 'FirstRep' (n322) [63]; ILC, '50th' (n380) 12 (Addo, referencing different publication); also Vattel (n324) 148.

[947] *Supra*.n166. Cf.Bollecker-Stern (n231) 97.

[948] *Supra*.nn161-166. Cf.Wyler/Papaux (n158) 628 (State moral damage from nationals' harm, '[h]owever...reparation offered to…national represents...acceptable satisfaction'); Kerbrat (n142) 581.

[949] Borchard (n319) 363; also 353. Similarly Sohn/Baxter (n58) 47-49; also O'Keefe, 'Proportionality' in Crawford/others, *Responsibility* (n6) 1163.

[950] Garcia-Amador, 'Problems' (n142) 474; similarly, quoting ibid.422: Dugard, 'FirstRep' (n322) [72] (fn.125); also Garcia-Amador, 'Report' (n2) [112] (difficulty distinguishing individual/State interest); Jessup (n2) 98;120. Cf.Higgins, *Problems* (n298) 52 ('[State's] natural general interest in seeing…citizens…properly treated could be met by…individual being allowed to bring…international claim').

Dugard similarly contends that certain human rights breaches 'engage the interests of the national State', including 'where the violations are systematic and demonstrate a policy ... to discriminate against all nationals'.[951] Thus, while damage is solely fictional where 'the State intervenes to protect an isolated individual or small group of individuals', in other cases States are 'in fact injured as the conduct ... constitutes an affront',[952] a descriptor of *moral* damage.[953] The State then 'act[s] in its own name and on its own behalf, since it [is] asserting an interest of a rather general or collective character.'[954]

This understanding of moral damage helps to appreciate one reason why cases such as the *Genocide* and *CERD* cases discussed above[955] were 'mixed', with the States alleging mass injury to their respective populations.[956] It would, moreover, appear to be the only basis on which *Avena*, concerned with persistent alleged violations concerning multiple nationals,[957] could properly be regarded as 'mixed',[958] not, as the ICJ suggested,

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[951] Dugard, 'FirstRep' (n322) [19], referencing *i.a.*, Brierly, *supra*.n946; similarly ILC, '52nd' (n340) 37 (Dugard); Gaja, 'Injuries' (n340); Paulsson, *Denial of Justice in International Law* (2005) 213; also Crawford, *System* (n190) 332.

[952] Dugard, 'FirstRep' (n322) [72], summarising Garcia-Amador, 'Problems' (n142) 422; similarly ibid.473-474, discussed *supra*.nn920;950; *infra*.n1662.

[953] *Supra*.n165; Wyler/Papaux (n158) 629 ('moral injury' 'where...State itself is actually targeted...nationals are used merely as a means by which to harm it'; 'gravity of the injury...the distinctive criterion'; discrimination); Wittich (n73) 133 (discussing Chappez (n688) 44 including 'injury to [State's] prestige' through 'flagrant violation of...rules concerning…treatment of aliens');156 (violation's gravity/severity may warrant moral damages);185. Cf.Garcia-Amador, 'SixthRep' (n105) [73].

[954] Garcia-Amador, 'Problems' (n142) 474; also Dugard, *supra*.n951; Cucos (n559) 189. Cf.Sohn/Baxter (n58) 47 ("direct" claims where 'injuries to nationals…inflicted on so wide a scale that they evince…general disregard for international obligations', giving rise to 'an indemnity…not related directly to…injuries suffered by…nationals'; States 'make a blanket claim'); *supra*.n326.

[955] *Supra*.nn697-706.

[956] *Bosnian Genocide* (n697) 64 ('persons and property…economy and environment'); also 72 (State 'expenditures'); *Croatian Genocide* (n698) [20] ('persons and property…economy and environment'); *Georgia/Russia* (n386) 79 ('all injuries'); cf.Mem.Georgia [11.21]; *supra*.n954; discussion *infra*.n1664.

[957] *Avena* (n152) [12] (54 nationals; 'pattern…of violations'),[13] ('regular…continuing violations').

[958] *Supra*.n431. Cf.Roberts, 'Hybrid' (n7) 42.

the fact that Mexico's 'rights' were at issue,[959] which they would be in any diplomatic protection suit.[960]

In sum "direct" claims, concerning State damage, may result from individual damage. Where the relevant individual damage *also* forms part of the claim, one must consider the application of admissibility rules in 'mixed' cases, addressed below.[961] First, however, the next section considers whether claims can be considered 'direct' when the State purports to claim only for breach, despite individual damage being present.[962]

(ii) Claims for breach alone

As the test suggested above focuses on damage, it is tempting to also focus on reparation, concluding that claims cannot be diplomatic protection if only declaratory relief is sought.[963] That, however, is not the accepted approach,[964] for 'otherwise it would be too easy to evade the local remedy rule by promoting declaratory judgments which could ... acquire force of *res judicata* with respect to international proceedings for

[959] Cf.*supra*.n659.

[960] Similarly *Avena* (n152) 89-90 (Sep.Op.Parra-Aranguren); also *supra*.Pt.I(A) and authorities; *supra*.nn830-831;891-892.

[961] *Infra*.Pt.D

[962] See *infra*.Pt.(ii);*infra*.n965.

[963] See Dugard, 'SecondRep' (n634) [27],[29]; DADP, 76; also Amerasinghe (n323) 169; Amerasinghe (n14) 265-267; Thirlway (n216) 615; Meron (n322) 86.

[964] See DADP, Art.14(3), 76, following *Interhandel*/*ELSI*, *supra*.nn893-894; Aréchaga (n69) 582; also Amerasinghe (n323) 179 ('avoid giving…claimant's formulation…too much weight'); Meron (n322) 87; Amerasinghe (n14) 152. Potentially problematic counter-example: *Silesia* (n308) 20, discussed Amerasinghe (n323) 169. However, the PCIJ did not address local remedies, but *litispendance*: *Silesia* (n308) 19-21; *infra*.nn1445-1446.

reparation'.[965] The seeking of declaratory relief alone cannot thus render claims 'direct'.[966]

Nonetheless, there is a recognised distinction between diplomatic protection and the seeking, by treaty parties, of declarations regarding interpretation.[967] Indeed, the *travaux préparatoires* to ICSID's Article 27 demonstrates that, despite removing diplomatic protection, the possibility of interstate interpretative claims was presumed.[968] Later practice has affirmed this.[969] There is, however, a fine line between interpretation (not diplomatic protection) and application (potentially diplomatic protection).[970] The

[965] Aréchaga (n69) 582; similarly Dugard, 'SecondRep' (n634) [29]-[30]; ILC, '53rd' (n326) 144 (Gaja); Meron (n322) 88-89; Wittich (n73) 146-147, discussing *Interhandel* (n356) 29; Thirlway (n216) 615-618.

[966] Indeed, vis-à-vis allegedly contrary authorities (DADP, 76), *Applicability of the Obligation to Arbitrate (Adv.Op.)* [1988] ICJ.Rep. 12 [41] does not support (see Amerasinghe (n14) 37;255; cf.Thirlway (n216) 615; Wittich (n73) 157-159); *Air Services* (n183) is 'mixed': *supra*.n943.

[967] See authorities *supra*.n371; Paparinskis, 'Countermeasures' (n5) 313-315; Paparinskis/Howley (n367) 219-220; Kaufmann-Kohler (n19) 321-322; Roberts, 'Power and Persuasion in Investment Treaty Interpretation' (2010) 104 AJIL 179, 218-220. Similarly authorities *supra*.n713.

[968] ICSID (n536) 63;66 ('abstract questions of interpretation');274;350;438-441;527-528;576-577;906; Paparinskis, 'Countermeasures' (n5) 313-314; Schreuer, *ICSID* (n301) 420-422; also Roberts, 'Hybrid' (n7) 15;59.

[969] See *Pac Rim Cayman v El Salvador (Resp.Rep.Jurisdiction)* ICSID Case-ARB/09/12 [171]-[172]; *Pac Rim Cayman v El Salvador (Claimant's Rejoinder Jurisdiction)* ICSID Case-ARB/09/12 [207]-[208]; *Pac Rim Cayman v El Salvador (Non-Disputing.Sub.Costa Rica)* ICSID Case-ARB/09/12 [5]; *infra*.n974. Similarly Paparinskis/Howley (n367) 214-215;219-220 (Mauritius Convention, Art.5(2)); *supra*.n710; Paparinskis, 'Countermeasures' (n5) 313. Cf.concerns regarding States' interpretative discussions during individual-State proceedings: Roberts, 'Power' (n967) 180; Roberts, 'Hybrid' (n7) 9;53; Paparinskis/Howley (n367) 225 and authorities (fn.123); see *Pope & Talbot v Canada (Damages)* UNCITRAL (31.May.2002) [47]-[65]; *Methanex v US (Award)* UNCITRAL (3.Aug.2005) Pt.IV(C) [17]-[27]; *infra*.Ch.V(II)(C)(vii). Generally on treaty parties' interpretative powers: Roberts, 'Power' (n967) 198-202;215-224; Paparinskis/Howley (n367) 207;209-212;222-223; Roberts, 'Hybrid' (n7) 18;22;28;52ff; Kaufmann-Kohler (n19) 314-317; Paparinskis, 'Analogies' (n14) 88-90; Potestà, 'Role' (n353) 267-268;272-273; also ICSID (n536) 275;350;438-441.

[970] Paparinskis/Howley (n367) 220;222;204, referencing Berman, 'International Treaties and British Statutes' (2005) 26 Stat.L.Rev. 1, 10; similarly Gourgourinis, 'The Distinction Between Interpretation and Application of Norms in International Adjudication' (2011) 2 JIDS 31, 31; generally 43-48; Harrison, 'The Life and Death of BITs' (2012) 13 JWIT 928, 949; also Tzanakopoulos (n34) 134-135; cf.Roberts, 'Hybrid' (n7) 6. On 'interpretation'/'application' compromissory clauses: *supra*.nn353;383.

latter usually presupposes the former,[971] and interpretation can undoubtedly influence a dispute's outcome.[972]

It is often suggested that the distinction lies between 'abstract' and detailed factual submissions.[973] The *Aguas del Tunari* Tribunal was clear, for instance, in requesting information from the national State, that given ICSID's Article 27, it only wished to receive 'information supporting interpretative positions of general application rather than ones related to a specific case'.[974] However, comparing the *Ambatielos* and *Interhandel* cases suggests a more accurate distinction.[975] In the former, even if the underlying dispute concerned a diplomatic protection claim,[976] the ICJ only had jurisdiction to determine whether that claim had to be submitted to arbitration.[977] No local remedy exhaustion was therefore necessary at that stage.[978] By contrast, Switzerland had, in *Interhandel*, alleged that the US must return its nationals' assets.[979] While framed in declaratory terms,[980] and albeit coupled with a similar interpretative question,[981] the difference is that, as Chapter I

[971] See Gourgourinis (n970) 46-47; Roberts, 'Hybrid' (n7) 18;52; Roberts, 'Power' (n967) 179;189.

[972] Paparinskis/Howley (n367) 204;220; also ICSID (n536) 281; *infra*.n1017.

[973] Paparinskis/Howley (n367) 219-220;222; similarly Kaufmann-Kohler (n19) 321-322;324-325; also Roberts, 'Power' (n967) 219-220; ICSID (n536) 66; authorities *supra*.n371; *supra*.969; *infra*.n974;1743; cf.Roberts, 'Hybrid' (n7) 8-9;54-59.

[974] *Aguas* (n476) [258]; also Kaufmann-Kohler (n19) 316.

[975] As done in Wittich (n73) 151-152; Amerasinghe (n323) 167; Amerasinghe (n14) 255-256. Further *supra*.n713.

[976] See *Ambatielos Claim* (n844) 103.

[977] *Ambatielos* (n713) 12;14-16.

[978] ibid.23, discussed Wittich (n73) 151. Cf.*Ambatielos Claim* (n844) 103;118-123.

[979] *Interhandel* (n356) 9;28. See Wittich (n73) 145.

[980] *Interhandel* (n356) 9.

[981] See ibid.9-10;13; discussion Wittich (n73) 151-152.

outlined, any restitution obligation arises from breach causing damage.[982] Switzerland had thus necessarily invoked responsibility for its nationals' damage.[983] Given that reparation obligations flow 'automatically' from breach,[984] it may be concluded that if the finding of breach sought would suffice to establish that reparation is due for nationals' personal or property damage,[985] then it is immaterial whether it is claimed.[986]

Particular difficulty nonetheless arises vis-à-vis what Roberts terms 'declaratory relief' claims, which arise out of (usually significant-scale) damage to individuals, but where the State neither claims compensation nor identifies the individuals affected.[987] As Chapters VI and VII elucidate, claims may be regarded as diplomatic protection (in part) where, as in 'class actions' under domestic law, reparation is claimed on behalf of a class of persons, even if not every individual is identified.[988] However, where no such reparation is claimed, the principles outlined above suggest that whether a claim is *really* one for breach alone depends on whether reparation would be due for individual damage if the allegations were proved.[989] In the *Cross-Border Trucking* case discussed by

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[982] *Supra*.Ch.I(II)(C). Cf.Wittich (n73) 151-152.

[983] See *Interhandel* (n356) 18;24-25;28-29; Amerasinghe (n323) 167 (no local remedies where 'not relate[d] to material compensation…restitution');169 (distinguishing 'cases…merely declaring…violation of international law…and [those] in which…remedial right is asserted'); Amerasinghe (n14) 256;266; also Thirlway (n216) 616; Dugard, 'SecondRep' (n634) [29]; Meron (n322) 90;92. Cf.Amerasinghe (n14) 163.

[984] *Supra*.n120; similarly *supra*.n965.

[985] Similarly Paparinskis, 'Countermeasures' (n5) 315 (non-diplomatic protection where 'no material damage'; concerns 'obligations to cease…non-repetition [which] automatically follow from…breach'). See *supra*.nn803;817-827;965.

[986] Similarly Dugard, 'SecondRep' (n634) [29],[30] (claim not determinative); *supra*.nn965-966. Cf.*Avena* (n152) 82 (Sep.Op.Vereshchetin).

[987] Roberts, 'Hybrid' (n7) 67; generally 9-10;66-68.

[988] See similarly ibid.67; also 9 ('resembling representative and class actions'); Berman (n18) 72; and see *infra*.Chs.VI(V)(B);VII(II)(B);nn1549-1551;1693-1703;1708;1718;1734;1812ff and authorities therein. Cf.*Cyprus/Turkey (Compensation)* (n95) 302-304 (Diss.Op.Karakaş); Paparinskis/Howley (n367) 221.

[989] Authorities *supra*.nn975-986; similarly text and authorities *supra*.n713.

Roberts, for instance, Mexico – while alleging NAFTA violations by the US – had not claimed reparation, nor identified *any* individuals actually affected by breach.[990] It is consequently difficult to characterise the claim as diplomatic protection.[991] The situation is perhaps similar to when the ECtHR, which distinguishes diplomatic protection from interstate claims concerned with 'general issues',[992] considers allegations of breach due to legislation's mere existence, without elaboration on its application 'in concreto'.[993] Without any 'identifiable individual victim',[994] such claims are not diplomatic protection.[995]

By contrast, other ECtHR cases concern an 'administrative practice': 'an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected not to amount to merely isolated incidents or exceptions but to a pattern or system' that is subject to 'official tolerance'.[996] Local remedies need not be exhausted where States have 'the aim of preventing [the] continuation or recurrence' of a practice, without seeking 'a decision on each of the cases forward as proof or illustrations'

[990] *Cross-Border* (n373) [283],[292], discussed Roberts, 'Hybrid' (n7) 9;67; further *infra*.nn1734;1743.

[991] Similarly *Cyprus/Turkey (Compensation)* (n95) 303-304 (Diss.Op.Karakaş); text and authorities *supra*.nn713-714.

[992] *Supra*.nn703-704.

[993] *Ireland/UK* (n384) [240], discussed Schabas (n557) 727; also Zwaak (revisor), 'The Procedure Before the European Court of Human Rights' in van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn, 2006) 128 (local remedies inapplicable where 'State brings up…legislation or administrative practice of another State without…being related to…concrete persons').

[994] Schabas (n557) 727. Similarly *Nicaragua v Costa Rica*, Pet.1/06, Rep.11/07 (IACHR, 8.Mar.2007). [195] (interstate claims concerning 'not only situations…affect[ing] individual or identifiable victims but also generalized situations of widespread or systematic violation of human rights'),[196]; Rivier (n168) 747-748; *infra*.n1743.

[995] Paparinskis, 'Countermeasures' (n5) 314-315; also Schabas (n557) 766; Amerasinghe (n14) 342-343 (no local remedies); Douglas (n367) 189. Cf.Wittich (n73) 142.

[996] *Georgia v Russia (I)*, App.13255/07 (ECtHR, 3.Jul.2014) [123]-[124], citing *i.a. Ireland/UK* (n384) [159]; *Cyprus/Turkey (Judgment)* (n882) [99],[115]; generally Schabas (n557) 728; Zwaak (n993) 128-129; Amerasinghe (n14) 343; Wittich (n73) 178.

thereof.[997] Nonetheless, breach vis-à-vis at least certain individuals is elaborated,[998] and reparation would be due for their injury under international law,[999] even if not claimed.[1000] These cases are still, therefore, diplomatic protection, at least in part.[1001] As shown below, the lack of local remedies requirement in such cases is explicable on other grounds.[1002]

C. Non-invocation of responsibility

A final category concerns situations in which the admissibility rules considered here are arguably inapplicable, not because the claim is 'direct', but because the State's actions are not otherwise diplomatic protection. Thus, in various ICSID cases, parties have argued that State actions were not prohibited diplomatic protection,[1003] with Article 27 itself recognising that 'informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute' are allowed.[1004] Thus, while a 'formal' assertion that given measures violate a national's rights was considered diplomatic protection,[1005]

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[997] *Georgia/Russia(I)* (n996) [125], citing *Ireland/UK* (n384) [159]; also Schabas (n557) 728; Zwaak *supra*.n993.

[998] E.g., *Ireland/UK* (n384) [165]-[185], generally [93]-[143]. Cf.*Cyprus/Turkey (Compensation)* (n95) 303-304 (Diss.Op.Karakaş).

[999] *Supra*.n984.

[1000] E.g. *Ireland/UK* (n384) [245]-[246]. Cf.*supra*.n986.

[1001] *Supra*.nn984-986.

[1002] *Infra*.nn1030ff.

[1003] See *infra*.nn1005-1009.

[1004] ICSID, Art.27; also ICSID (n536) 764-767;1031-1032; Schreuer, *ICSID* (n301) 427-428.

[1005] See *Tokios (Order)* (n540) [21] ('formal diplomatic interventions'),[19]-[22]. Cf.*Banro* (n540) [18] (unclear); *PacRim Rejoinder* (n969) [203]. Further: Peru's apparent argument that US considering revoking ATPA benefits due to action vis-à-vis investor violated Art.27: *Duke Energy v Peru (Jurisdiction)* ICSID Case-ARB/03/28 (1.Feb.2006) [15]-[18], discussed *Pac Rim Cayman v El Salvador (Claimant.Post-Hearing.Sub.Jurisdiction)* ICSID Case-ARB/09/12 [58] (fn.94); see ATPA, s.3202(c). Cf.*ARSIWA*, 256 (countermeasures as invoking responsibility); Paparinskis, 'Countermeasures' (n5) 279-280;306-309; *EC-Measures Affecting Trade in Commercial Vessels (EC-Korea)-Panel.Rep.* WT/DS301/R (22.Apr.2005) [7.197].

other actions were not, including having officials present at hearings,[1006] making informal exchanges,[1007] making submissions on interpretation,[1008] and, in *Pac Rim*, engaging in interstate consultations regarding denial of benefits.[1009] The CCJ likewise considered that a State's intervention in a case did not constitute diplomatic protection.[1010]

Such cases are explicable by recalling that diplomatic protection claims are an invocation of State responsibility,[1011] 'to secure the performance of the obligations of cessation and reparation'.[1012] Accordingly, as Article 27 indeed recognises,[1013] certain actions not constituting invocation of responsibility, 'such as informal requests for corrective action', are not diplomatic protection.[1014] Nor are other actions that, even if more official, do not constitute a claim for breach.[1015] No responsibility is, for instance, invoked in cases concerning interpretation where no breach is alleged.[1016] Moreover, while a State's intervention may, as the CCJ recognised, support its national's claim, the

[1006] *Kılıç v Turkmenistan (Award)* ICSID Case-ARB/10/1 (2.Jul.2013) [1.2.39]-[1.2.41].

[1007] *Autopista* (n539) [73] ('no…formal protest'),[139] ('facilitate…settlement'); Schreuer, *ICSID* (n301) 428.

[1008] See authorities *supra*.n969.

[1009] *Pac Rim Cayman v El Salvador (Jurisdiction)* ICSID Case-ARB 09/12 (1.Jun.2012) [4.87]-[4.89]; see [4.27]-[4.29],[4.45]-[4.47].

[1010] *Myrie/Barbados* (n534) [26]. Cf.*infra*.n1017.

[1011] See DADP, 27; *supra*.n318. Similarly *PacRim* (n1009) [4.87]. Cf.Crawford, *GP* (n2) 566;572.

[1012] *ARSIWA*, 254.

[1013] *Supra*.n1004.

[1014] DADP, 27; also *ARSIWA*, 256 (referencing ICSID, Art.27); Crawford, 'ThirdRep' (n144) [105]; ICSID (n536) 765; Paparinskis/Howley (n367) 219.

[1015] Cf.*PacRim Rejoinder* (n969) [204] and *infra*.n1016. Cf. authorities *infra*.n1018.

[1016] See Potestà, 'Role' (n353) 254, discussing *Ecuador/US* (*supra*.n710). Further: interstate actions discussed Charlotin, Aznar and Peterson, 'Long-Confidential Benhamou v. Uruguay Award Is Unearthed' *IA.Rep.* (2.Apr.2018). Generally authorities *supra*.nn83-85 (invocation);317;967ff.

State 'must accept the case as it is at the time of intervention'.[1017] For its part, the *Pac Rim* Tribunal considered that denial of benefit consultations envisaged by CAFTA were not an invocation of responsibility for breach within the DADP's definition.[1018] Whether a claim is diplomatic protection therefore depends, first, on whether it involves an invocation of responsibility at all, and, second, whether it is for damage to a national caused by the breach.

D. Conclusion on the applicability of admissibility rules

Having outlined in some detail the kinds of claims that may be characterised as diplomatic protection, 'mixed', and 'direct', conclusions may be reached regarding the applicability of the admissibility rules considered in this Chapter.

(i) Local remedies

As to the application, first, of the local remedies rule:

(1) In a diplomatic protection claim, responsibility is invoked but the only damage alleged is to an individual, and local remedies must be exhausted.[1019]

[1017] *Myrie/Barbados* (n534) [26]. Generally on intervention: Paparinskis/Howley (n367) 211-212 and authorities; cf.concerns about interventions being diplomatic protection: ibid.216-217;219-220;222 and authorities; Roberts, 'Power' (n967) 219-220; Kaufmann-Kohler (n19) 309;314;320-322;324; cf.ibid.314-315; Paparinskis/Howley (n367) 204-205; Douglas (n367) 170; *Corn Products* (n14) [173] (State undermining national).

[1018] *PacRim* (n1009) [4.88]-[4.89]; similarly *PacRim (Resp.Rep.)* (n969) [171]-[172]. The decision was hypothetical, and Claimant's contention that certain consultations might involve diplomatic protection is plausible: see *PacRim Rejoinder* (n969) [205]-[208]; also authorities *supra*.n1017. Cf.*PacRim (Non-Disp.Part.Sub.CR)* (n969) [5] (consultations 'aimed at elucidating Treaty interpretation and application').

[1019] *Supra*.Pts.I;III(A).

(2) Where the claim is 'direct' – either because only State damage is alleged (consequent on individual damage or otherwise), or because no damage is alleged, expressly or otherwise, the local remedies rule is inapplicable.[1020]

(3) Where the case combines both individual and State damage, the latter being either material or moral (in turn potentially resulting from violations regarding particular individuals, such as State officials, or affecting many individuals), the case is 'mixed'.[1021]

The DADP's approach, vis-à-vis the third category, is to require local remedy exhaustion where claims are 'preponderantly' brought for individual injury.[1022] However, as has been remarked, particularly vis-à-vis claims concerning ships,[1023] few cases suggest that individual damage would be considered so "preponderant" in truly 'mixed' claims.[1024] Indeed, in almost all of the 'mixed' cases considered above, including those concerning ships, the environment, human rights, consular notification, and immunities, tribunals have not required exhaustion of local remedies.[1025]

[1020] *Supra*.Pt.III(B).

[1021] *Supra*.Pt.III(B)(i).

[1022] *Supra*.n646.

[1023] *Norstar* (n657) (Dec.Cot) [5];(Sep.Op.Wolfrum/Attard) [50];(Diss.Op.Treves) [20]; *Virginia.G* (n657) 169 (Sep.Op.Cot/Kelly);367 (Diss.Op.Servulo Correia); similarly Wittich (n73) 156-157 (moral damage); 170; cf.162.

[1024] But see, regarding 'mixed' cases as diplomatic protection: *Avena* (n152) 82 (Sep.Op.Vereshchetin) ('preponderantly…diplomatic protection');91 (Sep.Op.Parra-Aranguren);95-97 (Sep.Op.Tomka); *Saiga* (n657) 110-111 (Sep.Op.Wolfrum);130 (Sep.Op.Rao); *Virginia.G* (n657) 168-169 (Sep.Op.Cot/Kelly);215-216 (Joint.Diss.Op);284 (Diss.Op.Ndiaye); 353-356 (Diss.Op.Jesus); 364-369 (Diss.Op.Servulo Correia); also *Norstar* (n657) (Dec.Cot) [4]-[9];(Diss.Op.Treves) [20]; Amerasinghe (n14) 165-166 (*I'm Alone*);166-167 (*Aerial Incident*). Similarly Sohn/Baxter (n58) 50.

[1025] See discussion *supra*.Pts.I(A);(B)(i)-(ii).

However, first, at least some 'mixed' cases, suggest otherwise. Thus, the ICJ in *Armed Activities* refused to hear the diplomatic protection part of a broader claim involving State damage for failure to exhaust local remedies.[1026] It did not require the *State* to exhaust local remedies, as '[S]tates are not subject to the jurisdiction of foreign courts',[1027] but did apparently consider that the two claims were insufficiently connected to warrant their being brought together without meeting the requirements of diplomatic protection.[1028]

Moreover, the foregoing has demonstrated how States' moral damage results from serious or widespread violations vis-à-vis their nationals.[1029] Nonetheless, neither the ECtHR nor IACHR apparently accepts that alleged injury to numerous nationals alone suffices to render local remedies irrelevant.[1030] They require, respectively, an 'administrative practice',[1031] and a 'generalized practice of acts … which are shown to be officially tolerated'.[1032] Local remedies are inapplicable, vis-à-vis the latter, 'because it is reasonable to presume that no adequate or effective remedies exist to remedy a generalized situation'.[1033] The ECtHR's approach is probably best explained on the same

[1026] *Armed Activities* (n342) [333]; Thirlway (n216) 1554. Cf.*infra*.n1050.

[1027] Aréchaga (n69) 582; also Meron (n322) 85, discussed Amerasinghe (n14) 160; Schabas (n557) 766.

[1028] See Thirlway (n216) 1554 (diplomatic protection cannot always 'ride on…back of…direct claim'), referencing *Armed Activities* (n342) [333]; Wittich (n73) 162 ('divisibility of…claims'); also 152;cf.170; *supra*.n336.

[1029] *Supra*.nn946ff.

[1030] See *Cyprus/Turkey (Judgment)* (n882) [90]-[91] and [20],[28],[34],[49] (large numbers of alleged victims); *Nicaragua/CR* (n994) [256],[257]-[306] and [49] (certain individuals/'Nicaraguan migrant population'); *supra*.nn996-1001.

[1031] *Supra*.n996; *Cyprus/Turkey (Judgment)* (n882) [99].

[1032] *Nicaragua/CR* (n994) [257].

[1033] ibid.[257]; also Amerasinghe (n14) 327.

basis.[1034] The 'mixed' claim in *Avena*[1035] should likewise be regarded as based on an absence of effective remedies,[1036] which was indeed Mexico's argument against the rule's application.[1037] As the DADP recognise, a lack of effective remedies constitutes an *exception* to the local remedies rule,[1038] suggesting that the existence of material/moral State damage in these cases did not itself render local remedies inapplicable.

Second, and relatedly, even if the local remedies rule might apply to certain 'mixed' claims, most cases will be covered by an exception:[1039] in addition to cases concerning an absence of remedies already considered,[1040] the DADP recognise an exception where the individuals affected have 'no relevant connection' with the responsible State.[1041] Many 'mixed' cases not requiring exhaustion are explicable on this basis.[1042] It is therefore unlikely – though not impossible – that local remedies will need

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[1034] See Amerasinghe (n14) 342-344;213-214; also Crawford, *GP* (n2) 587; *Cyprus/Turkey (Judgment)* (n882) [99]; *Georgia/Russia(I)* (n996) [125],cf.[126] ('effectiveness and accessibility of domestic remedies...*additional evidence* of whether...practice exists' (emphasis added)); Zwaak (n993) 130-132. Cf.Wittich (n73) 178-179 (non-exhaustion 'pragmatic'; 'no…victim'; 'availability…effectiveness'); Sohn/Baxter (n58) 47 ('not necessarily…ineffectual' in wide-scale claims); *Application of CERD (Qatar v UAE) (Prov.Measures)* ICJ Order (23.Jul.2018) <http://www.icj-cij.org> [42].

[1035] *Supra*.nn957-960.

[1036] See *Avena* (n152) 96-97 (Sep.Op.Tomka);108-109 (Sep.Op.Sepulveda); cf.82-83 (Sep.Op.Vereshchetin).

[1037] ibid.[39]. Similarly Thirlway (n216) 1556 (*LaGrand*).

[1038] DADP, Art.15(a) ('no reasonably available local remedies to provide effective redress');77-79; also Aréchaga (n69) 588-590; Amerasinghe (n323) 151-157; Amerasinghe (n14) 189-192;203-210;325-339. Cf.*supra*.nn727;732;774-775.

[1039] Generally on exceptions: DADP, Art.15, 74-86; Amerasinghe (n323) 149-161;181-187; Amerasinghe (n14) 168-178;189-192;203-214;325-345; *supra*.nn729;732;774-775 .

[1040] *Supra*.nn1033-1038.

[1041] DADP, Art.15(c),80-83; Amerasinghe (n323) 181-187; Amerasinghe (n14) 168-178; Meron (n322) 94-100.

[1042] See discussion *supra*.nn727;732;774-775; Aréchaga (n69) 583 ('person injured…[*i.a.*] by…space object, or…fishing vessel damaged on…high seas…not supposed to exhaust remedies'). On ships and aircraft: *supra*.n786 (*Saiga*); Amerasinghe (n14) 165-166 (*I'm Alone* (n779));168; *supra*.n772.

to be exhausted in cases properly described as 'mixed'.[1043] However, undertaking the analysis above is essential to determining why this is so in particular factual circumstances.[1044]

(ii) Articles 27 and 222(c)

As to Article 27 of ICSID and Article 222(c) of CARICOM, the case law concerning these instruments discussed above draws a distinction, for their application, between diplomatic protection and other interstate claims.[1045] However, it would appear sufficient, for the application of these rules, that the claim be *in part* one of diplomatic protection.[1046] The purpose of the rules in Articles 27 and 222(c) is, as Chapter III outlined, to avoid respondent States facing both diplomatic protection and individual claims.[1047] 'Mixed' claims consist, by definition, of diplomatic protection and 'direct' claims brought together.[1048] To allow such claims concurrently with individual claims would violate these rules' purpose.[1049] Thus, the *Italy/Cuba* Tribunal suggested that a rule akin to Article 27 would have applied had both individuals and the State claimed, notwithstanding that Italy claimed also for its own moral damage.[1050] Accordingly, the only time these rules will be inapplicable is where a purely 'direct' claim is brought.

[1043] Similarly *supra*.nn1033-1042.

[1044] Cf.Wittich (n73) 136;142.

[1045] *Supra*.nn969;974;1005-1010.

[1046] Similarly Paparinskis, 'Countermeasures' (n5) 313-314.

[1047] *Supra*.nn535-536.

[1048] *Supra*.nn332ff.

[1049] *Supra*.nn1046-1047. Cf.*supra*.nn946ff;963-966;1022-1044.

[1050] *Italy/Cuba* (n365) [34],[65]; see *supra*.n365; *infra*.nn1616ff;1721; generally Potestà, 'Italy/Cuba' (n363) 342; Roberts, 'Hybrid' (n7) 40.

IV. Conclusion

This Chapter has outlined how to distinguish diplomatic protection, 'mixed' and 'direct' claims. Having done so, it has demonstrated that none of the admissibility rules considered in this Chapter – the local remedies requirement, and those contained in Article 27 of ICSID and Article 222(c) of CARICOM – apply to 'direct' claims properly so-called, but that they do apply to diplomatic protection claims. It is therefore vis-à-vis these claims that the conduct of either a State or individual can enliven the operation of these rules to preclude the other's claim. The ICSID and CARICOM rules are equally applicable to 'mixed' claims, but the local remedies rule is unlikely to be applied in such circumstances.

CHAPTER FIVE: WAIVER

Chapter IV addressed the application of admissibility rules that can operate to preclude a State or individual claim owing to conduct of the other, depending expressly on the type of interstate claim brought. This Chapter is the first of three addressing rules relevant to admissibility, as well as breach and reparation, that likewise might operate to preclude overlapping individual-interstate claims, but depend instead on claims being in some sense the 'same'.[1051] These Chapters address: (1) waiver; (2) *res judicata* and treaty provisions with similar effect; and (3) double recovery.[1052] Drawing on the analysis developed in Chapter IV, these Chapters consider how different kinds of overlapping injury in interstate and individual claims are relevant to these rules' application.

This Chapter considers purported waiver by a State or individual of claims belonging to the other. Chapter III outlined that:

> (1) waiver of a claim renders it inadmissible; and
>
> (2) both States and individuals can, at least within certain limits, waive their rights to bring claims under international law; but
>
> (3) they cannot waive rights, including rights to claim, belonging to another.[1053]

Notwithstanding that the overlapping claims introduced in Chapter II appear, *prima facie*, to belong to States and individuals respectively,[1054] this Chapter establishes that both

[1051] *Supra*.n617.

[1052] Cf.authorities *supra*.nn462-463;465.

[1053] *Supra*.nn467-483.

[1054] *Supra*.Ch.II;*supra*.nn467-483; similarly Parlett (n1) 93;311-312.

States and individuals have in practice purported to waive the claims of the other.[1055] Individual waivers are commonly relevant where interstate claims depend on individual injury, raising questions regarding how far individuals can influence claims concerning them.[1056] As to interstate waivers, the Introduction outlined generally why a State might become involved in disputes concerning its nationals.[1057] More particularly, interstate waivers are commonly employed where States and their nationals have been affected by alleged violations of international law causing extensive damage, such as in a post-conflict or post-nationalisation environment.[1058] Understandably, States may wish to settle claims thereby arising on a global, lump-sum, basis: such settlements may be easier to reach, allowing peace to be realised;[1059] it may be infeasible to attempt to process claims numbering in the tens or hundreds of thousands;[1060] and payment to the State may be the only fair way to distribute limited reparations funds.[1061] The question, addressed in

[1055] *Infra*.Pts.I-II.

[1056] *Infra*.Pt.I. Similarly Borchard (n319) 372.

[1057] *Supra*.nn14-20.

[1058] Generally Gattini, 'Trojan' (n421) 541; Tomuschat (n105) 988-989; *Oppenheim's* (n73) 537-538; Vallat, *International Law and the Practitioner* (1966) 41; Aréchaga (n69) 575; *infra*.nn1118-1121;1124-1126;Ch.VII(II)(B); cf.Murphy/Kidane/Snider (n266) 45.

[1059] Tomuschat (n105) 988 (*i.a.* 'individualization of the settlement of consequences of…armed conflict would block…re-establishment of peace'); *Jurisdictional Immunities (Germany v Italy: Greece Intervening)* ICJ.Pleadings <www.icj-cij.org> Rep.Germany [46]; Gattini, 'To What Extent Are Immunity and Non-Justiciability Major Hurdles to Individuals' Claims for War Damages?' (2003) 1 JICJ 348, 364-365; Lillich and Weston, *International Claims: Their Settlement By Lump Sum Agreements*, vol.I (1975) 13; Dolzer (n660) 300-301;340; Peters (n1) 487; *X1 v Nishimatsu Construction* Case-2004(Ju) No.1658 (ILDC.1812 (JP-2007)) (SC.Japan, 27.Apr.2007)§II[2]; *Dames and Moore v Regan* (1981) 453 US 654 (USSC) 683; *In re World War II Era Japanese Forced Labor Litigation* (2000) 14 F.Supp.2d 939 (DC.N.D.Cal.) 946; also *Ethiopia* (n428) [315]; Vallat (n1058) 43; Murphy/Kidane/Snider (n266) 35;43; Benvenisti (n300) 1087-1088;1090;1095; *infra*.n1820. Cf.Caron (n270) 284-285.

[1060] See Tomuschat (n105) 988; *Decision 8 (Relief to War Victims)* (2007) XXVI UNRIAA 21 (EECC) [5]; also *Immunities Pleadings* (n1059), Rep.Germany [53]; Benvenisti (n300) 1087-1088; *Oppenheim's* (n73) 538; Vallat (n1058) 42. Cf.Caron (n270) 282-287;290; Houtte/Delmartino/Yi (n266) 43-45; Murphy/Kidane/Snider (n266) 40-50.

[1061] Tomuschat (n105) 988-989; Benvenisti (n300) 1088;1090; also Houtte/Delmartino/Yi (n266) 305; *Ethiopia* (n428) [22]; *Forced Labor* (n1059) 946-947; Peters (n1) 212; also Roberts, 'Hybrid' (n7) 49. Generally Cheng (n73) 48; Dolzer (n660) 314-316;320;340; Hofman and Riemann, 'ILA Committee on Compensation for Victims of War: Background Report' (2004) 37.

this Chapter, is whether States can continue to engage in such settlements in the face of individual claims mechanisms.[1062]

This Chapter begins by considering the effect of individual waivers on interstate claims, before examining whether a State can prevent its nationals, through waiver, from bringing international claims. In both cases, the practice confirms that those claims belong to the respective entities: an individual cannot waive a State's claims, and nor is an interstate waiver of nationals' claims properly a waiver.[1063] However, an individual waiver can affect the existence of breach or damage on which an interstate claim depends,[1064] while an interstate waiver may effectively preclude certain individual claims.[1065] States may preclude other individual claims by altering claims mechanisms.[1066]

I. Individual waivers of interstate claims

The effect of individual waivers on interstate claims has historically arisen in various situations. Perhaps the most well-known concern the use of 'Calvo' clauses in contracts between States and aliens, in which the latter purport to waive international remedies, including diplomatic protection by their national State.[1067] It is generally

[1062] Similarly authorities *supra*.nn462;482; *infra*.Pt.II(C)(vii).

[1063] *Infra*.Pts.I-II, particularly *infra*.nn1069;1204-1208;1219-1221.

[1064] *Infra*.Pt.I.

[1065] *Infra*.Pt.II(B).

[1066] *Infra*.Pt.II(C)(vii).

[1067] Dugard, 'ThirdRep' (n716) [119],[122]; Juillard (n478) [5]; Amerasinghe (n323) 192-193; Garcia-Amador, 'Report' (n2) [178]; generally Borchard (n319) 792-810; Parlett (n1) 79.

accepted, however, that such clauses cannot preclude States from exercising diplomatic protection.[1068] The individual simply 'has no right ... to waive a right that belongs to the State'.[1069] More recently, the *Duzgit Integrity* Tribunal considered the effect of a settlement agreement reached between the respondent State and 'the main private entity' involved in a dispute,[1070] in which the latter waived any further claims and reparation.[1071] The Tribunal affirmed that the settlement 'ha[d] no bearing on [the State of nationality's] entitlement to bring claims' under UNCLOS,[1072] claims which were, in part, diplomatic protection.[1073] This confirms, as Chapter IV highlighted, that diplomatic protection claims are brought for breach of interstate obligations.[1074] Individuals cannot waive such interstate obligations, even if they benefit from their application.[1075]

[1068] See Amerasinghe (n323) 201-202;205-206;209-210; Parlett (n1) 80; Juillard (n478) [9]; Borchard (n319) 797-798;799;809-810; cf.800-808 (inconsistent cases); Dugard, 'ThirdRep' (n716), particularly [139],[146]-[149]; Weis, *Nationality and Statelessness in International Law* (2nd edn, 1979) 38; Douglas (n301) 26-27;366; Crawford, 'Revisited' (n457) 168; also Shany (n4) 40-42.

[1069] DADP, 73, also 74; also Borchard (n319) 372;798-799;810; *Restatement* (n107) §713(g); Feichtner (n468) [13]; Juillard (n478) [9],[26]; Amerasinghe (n323) 202;206;209; Weis (n1068) 34;38; Crawford, *GP* (n2) 565; Tams, 'Waiver' (n466) 1039; Peters (n1) 393-394. See *Dredging* (n19) [11],[15],[22],[24]; *Mexican Union Railway* (1930) 5 ILR 207 (UK-Mex.Cl.Comm.) 209-210; *Woodruff* (1903) IX UNRIAA 213 (US-Ven.Cl.Comm) 222; *Martini* (1903) X UNRIAA 644 (Italy-Ven.Cl.Comm.) 663; *Rudloff* (1903) IX UNRIAA 244 (US-Ven.Cl.Comm.) 247-248; *AES v Argentina (Jurisdiction)* (2005) 12 ICSID.Rep. 308 [98]. Discussing case law: references *infra*.n1086. Cf.Garcia-Amador, 'Report' (n2) [182].

[1070] *Duzgit* (n657) [155].

[1071] ibid.[180],[118], also [265].

[1072] ibid.[181].

[1073] ibid.[146]-[147]; also [181] ('claims settled…distinct from [State's]'). Similarly *Schneider (Walter Bau) v Thailand (Award)* UNCITRAL (1.Jul.2009) [8.8],[8.17],[12.23],[13.1](b)-(d).

[1074] *Supra*.Ch.IV(I)(A).

[1075] See Fitzmaurice, 'FourthRep' (n16) [160]; *ADM* (n232) [174] (treaty 'obligations…cannot be waived'); *SGS v Philippines (Jurisdiction)* (2004) 8 ICSID.Rep. 518 [154]; generally Spiermann (n58) 199-200;cf.206; McNair, *Opinions* (n666) 60-61;63; McNair, *The Law of Treaties: British Practice and Opinions* (1938) 333-334. Cf.Paparinskis, 'Analogies' (n14) 104; Peters (n1) 326-328.

Individual waivers can nonetheless affect interstate claims.[1076] To understand these potential effects, we must recall, as Chapter I outlined, that *breach* is essential for responsibility to be invoked, while *damage* is necessary for obligations of reparation to arise.[1077] An individual's actions may affect the existence of *breach* in two ways.

First, a primary obligation may incorporate space for individual conduct to affect its implementation.[1078] Individuals may waive, for instance, and within limits, certain human rights relating to a fair trial and court access.[1079] However, this is really a question of consent rather than waiver,[1080] and is best regarded as built into the primary obligation itself.[1081] Moreover, because substantive human rights standards reflect a public purpose, they cannot always be waived by individuals without an assurance that the purpose will not be undermined.[1082]

[1076] Accepting individual waiver: Sohn/Baxter (n58) Art.24; *Restatement* (n107) §713(g); ALI, *Restatement of the Law: The Foreign Relations Law of the United States* (2nd edn, 1965) 605; Vallat (n1058) 32 (fn.1); also Borchard (n319) 799.

[1077] *Supra*.Ch.I(II)(B)-(D).

[1078] See *ARSIWA*, 165; Crawford, 'Second Report on State Responsibility' [1999] 2(1) ILCYB 1 [241]-[242]; Paparinskis, 'New' (n8) 629-630.

[1079] E.g. *Meftah v France* ECHR 2002-VII [46]-[47]; *Estevill v Spain*, UN.Doc.CCPR/C/77/D/1004/2001 (25.Mar.2003) [6.2]; *Perterer v Austria*, UN.Doc.CCPR/C/81/D/1015/2001 (20.Jul.2004) [9.3]; *Hermi v Italy* (2008) 46 EHRR 46 [73],[102]-[103]; *Kimel/Argentina* (n480) [22],[26]; Merrills (n480) 180-185; *ARSIWA*, 165; Crawford, 'SecondRep' (n1078) [242].

[1080] See *ARSIWA*, 165; Crawford, 'SecondRep' (n1078) [242]-[243]; Paparinskis, 'New' (n8) 629-630; Paparinskis, 'Analogies' (n14) 100.

[1081] Paparinskis, 'New' (n8) 630; Crawford, 'SecondRep' (n1078) [241]-[242]; Paparinskis, 'Analogies' (n14) 100; also Spiermann (n58) 181.

[1082] Merrills (n480) 178-179; generally 178-185; Parlett (n1) 93;311-312; e.g., *Neumeister* (1974) 57 ILR 180 (ECtHR) [33]; *Oršuš v Croatia*, App.15766/03 (ECtHR, 16.Mar.2010) [178]-[179] (discrimination); *Deweer v Belgium* [1980] ECHR 1 [49]; *supra*.n480. Similarly *MNSS v Montenegro (Award)* ICSID Case-ARB(AF)/12/8 (4.May.2016) [163]-[164].

Second, as Chapter IV highlighted, diplomatic protection claims often presuppose certain individual *domestic* law rights, including those concerning property or contract,[1083] rights that *are* usually within that individual's control.[1084] Thus, while denying that Calvo clauses impacted the State's ability to exercise diplomatic protection,[1085] tribunals did often accept that such clauses would preclude interstate *contract* claims.[1086] Similarly, the interstate *Serbian Loans* case concerned the modalities of payment under certain agreements between French nationals and the respondent State.[1087] The latter invoked the individuals' acceptance of a particular method of payment as estoppel,[1088] and the PCIJ did not deny that estoppel could have operated 'to establish a loss of right' under the contracts, though not in the circumstances.[1089] At least

[1083] Authorities *supra*.nn663-664; generally Douglas (n301) 370ff.

[1084] E.g., Peters (n1) 325; *Lemire* (n476) (Diss.Op.Voss) [33]; Aréchaga (n69) 591; Crawford, 'Revisited' (n457) 167-168; authorities *supra*.n663; *infra*.nn1086;1098; Sohn/Baxter (n58) 51; also *Geschäftshaus-GmbH v Schweizerische Rückversicherungs* (1930) 5 ILR 378 (Reichsgericht) 378 (State to '*advise*…creditors…to waive…right to repayment' (emphasis added)). Cf.Garcia-Amador, 'Report' (n2) [182]; DADP, 74 (Calvo clause's acceptability if individual rights); Jessup (n2) 111; Parlett (n1) 93;111.

[1085] *Supra*.nn1068-1073.

[1086] See, discussing various cases addressed herein: Borchard (n319) 800-810, also referencing Ralston, *International Arbitral Law and Procedure* (1910), see 34-44; Dugard, 'ThirdRep' (n716) [146]-[149]; Amerasinghe (n323) 194-195;201-205; Shany (n4) 40-42;147; Aréchaga (n69) 591-592. E.g., *Dredging* (n19) [14]-[15],[20],[22]-[25]; *Woodruff* (n1069) 222 ('source of…rights and duties');223; *Orinoco Steamship* (1903) IX UNRIAA 180 (US-Ven.Cl.Comm.) 199-200; *Day and Garrison* (1885) 4 Moore's 3548 (US-Ven.Cl.Comm.) 3562-3564; *Flannagan* (1885) 4 Moore's 3564 (US-Ven.Cl.Comm.) 3565-3566; *North and South American Construction v Chile* (1892) 3 Moore's 2318 (US-Chile.Cl.Comm.) 2320; *Tehuantepec Ship Canal* (1873) 3 Moore's 3132 (US-Mex.Cl.Comm.) 3132-3133; *Turnbull* (1903) IX UNRIAA 261 (US-Ven.Cl.Comm.) 305. Cf.*Rudloff* (n1069) 249-250;254-255; *Martini* (n1069) 663-664; *Azurix (Jurisdiction)* (n604) [84]-[85]; *SGS/Philippines* (n1075) [149]-[154]; *Aguaytia Energy v Peru (Award)* ICSID Case-ARB/06/13 (28.Nov.2008) [69]-[70]; *MNSS/Montenegro* (n1082) [159],[308]. Further: Sohn/Baxter (n58) Art.22(5); *Restatement* (n107) §713(g); contractual choice-of-forum cases: Juillard (n478) [25],[22], citing *Azurix (Jurisdiction)* (n604) [83]; also *SGS/Philippines* (n1075) [154]-[155],[169],[176]; *Occidental* (n564) [51]-[63]; *Aguas* (n476) [119]; *Malicorp v Egypt (Award)* ICSID Case-ARB/08/18 (31.Jan.2011) [103]; Crawford, 'Revisited' (n457) 167-168; Douglas (n301) 367-371;378ff; Douglas (n367) 242ff; Peters (n1) 394; generally 293-301;324-327;334-336; authorities *supra*.n475. Cf.*AES/Argentina* (n1069) [97]-[99]; *SGS v Paraguay (Jurisdiction)* ICSID Case-ARB/07/29 (12.Feb.2010) [177]-[185].

[1087] *Payment of Various Serbian Loans* [1929] PCIJ.Rep. SerA.No20, 6, discussed vis-à-vis estoppel in Whiteman (n649) 188.

[1088] *Serbian Loans* (n1087) 38.

[1089] ibid.39.

where the interstate dispute was 'fundamentally identical' to that between the State and the individual nationals,[1090] and 'exclusively concerned with relations between [them] … within the domain of municipal law',[1091] the PCIJ thus envisaged individual actions affecting an interstate diplomatic protection claim.[1092] There is no difficulty with this conclusion insofar as it implies that an individual's waiver of domestic rights can preclude interstate claims which, as Chapter IV discussed, rely on those rights.[1093] As Weis argues:

> the right of protection and the right of the individual are on different planes: the former is a right under international law, the latter a right under municipal law. The effect of renunciation of a claim depends on the nature of the right of the national. If this may be renounced according to municipal law, as, for instance, a claim for damages under civil law, no diplomatic action can be taken after the national's renunciation. This, however, is not because the renunciation is binding upon the State, but because, in view of renunciation, the right whose infringement has been complained of has been destroyed or extinguished and there is thus no longer any violation of a right which would warrant diplomatic action – provided, of course, that the renunciation was made in full freedom without any pressure … .[1094]

An individual's waiver of domestic rights may, in certain circumstances, therefore prevent breach under international law from being established.[1095]

An individual's waiver can also affect the existence of *damage*, and the consequent interstate reparation due.[1096] Albeit in the context of individual claims, the

[1090] ibid.18.

[1091] ibid. See Tomka/Howley/Proulx (n664) 34, with authorities; Parlett (n1) 66-67.

[1092] See *Serbian Loans* (n1087) 17 (diplomatic protection); also Whiteman (n649) 188.

[1093] See *infra*.nn1094-1098; *supra*.nn663-664; also Vallat (n1058) 32 (fn.1).

[1094] Weis (n1068) 38. On forced settlement: *Desert Line Projects v Yemen (Award)* ICSID Case-ARB/05/17 (6.Feb.2008) [148]-[195], discussed Kjos (n544) 289-290; *Howard* (1931) 6 ILR 233 (UK-Mex.Cl.Comm.).

[1095] See *Del Genovese* (1903) IX UNRIAA 236 (US-Ven.Cl.Comm.) 238-239 (no breach given waiver), cited Borchard (n319) 808; also *Martini* (n1069) 661 (contractual claim 'satisfied'); *Orinoco* (n1086) 199; *Re Governments of Norway and US* (1959) 28 ILR 611 (US.Ct.Cl.) 617;621 (contractual settlement binding).

Toto Tribunal's holding demonstrates the point: a contractual waiver was ineffective to preclude treaty claims, but where both concerned 'the same damage', 'compensation that a Claimant has waived under the Contract cannot be recovered under the Treaty'.[1097] Similarly, individuals renouncing contractual losses has precluded later interstate reparation claims,[1098] while individual waivers of reparation for personal injury have likewise barred interstate claims insofar as they are based on the same damage.[1099] Indeed, the *Duzgit Integrity* Tribunal acknowledged that the waiver discussed above – while not affecting the State's ability to claim[1100] – could impact the quantum of reparation ultimately awarded.[1101] In another early case concerned with treatment of a vessel, the owners had waived all claims 'before any court or tribunal' arising out of the ship's detention, including vis-à-vis damage caused.[1102] The Tribunal held that 'the only

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[1096] See *Restatement (Second)* (n1076) §203, 605 (where individual 'freely accepted whatever reparation…deem[ed] satisfactory…no remaining obligation to make reparation on which…state…can base…claim'); also Garcia-Amador, 'SixthRep' (n105) 48 (draft Art.19(3);53); *Eureko/Poland* (n476) [174]-[175]; Whiteman (n649) 179-180;187; also Merrills (n480) 179. On individual settlements: *Desert Line* (n1094) [179]; *Toto Costruzioni v Lebanon (Award)* ICSID Case-ARB/07/12 (30.May.2012) [84]-[85]. Cf.Borchard (n319) 370; individual waivers not precluding later treaty claims: *La Houve* (1927) 8 TAM 100 (Franco-German MAT) 103; *Marqua* (1921) 1 TAM 104 (Franco-German MAT), 104-105 (both cited Whiteman (n649) 179 (fn.425)); *Roy* (n472) 422-423; *Wollemborg* (1956) 24 ILR 654 (Italian-US.Conc.Comm.) 662-663. Similarly *supra*.nn848-851.

[1097] *Toto (Award)* (n1096) [85].

[1098] *Norway/US* (n1095) 617;621; *Campbell (UK v Portugal)* (1931) 7 ILR 261, 262-263 (concession); *de Chambo* (1915) Shoenrich's Rep. 45 (Spanish-Nicaraguan.Cl.Comm.), as discussed Whiteman (n649) 187; also *French Claims Against Peru* (1922) 16 AJIL 480 (PCA), 481-482, discussed Whiteman (n649) 193; similarly *Turnbull* (n1086) 305 (no damages without competent court breach decision).

[1099] *Jencken (UK/Spain)* (1870-1871) 62 BFSP 985, 1004 (State 'not…justified in pressing…claim' for damages where 'voluntarily waived'), discussed Weis (n1068) 38; Whiteman (n649) 184-185; Borchard (n319) 372. *Magee (UK/Guatemala)* (1874) 65 BFSP 875 is cited in opposition: see ibid.889;897-901;908;911-912;921 (compensation despite individual renunciation), discussed Whiteman (n649) 184; Borchard (n319) 372. But *Magee* concerned a Vice-Consul, the claim reflecting 'grave…indignity to…nation': *Magee* (n1099) 901; also 920. Compensation thus apparently satisfied *State* moral damage: see *supra*.nn927-933; *infra*.n1117. Cf.*Jarr/Hurst v Mexico* (1868) 3 Moore's 2707 (US-Mex.Cl.Comm.) 2707-2708;2713, discussed Borchard (n319) 372 ('private waiver…bar[ring]…international reclamation'). But a US official had agreed: *Jarr/Hurst* (n1099) 2707-2708; Borchard (n319) 800.

[1100] *Supra*.nn1070-1073.

[1101] *Duzgit* (n657) [183]; also [33] (Diss.Op.Kateka).

right' that the State was 'supporting [was] that of its national' and it could 'rely on no legal ground other than those which would have been open to its national'; consequently it dismissed the claim concerning detention.[1103] Considered controversial for apparently allowing an individual waiver to preclude an interstate claim,[1104] the case is better viewed, despite the misleading "rights" terminology,[1105] as confirming that a waiver of *damage* operates to preclude an interstate claim for reparation based on those same facts.[1106]

Individual waivers do not therefore actually *waive* States' claims:[1107] individuals cannot waive such rights to claim belonging to another.[1108] Rather, an individual "waiver" may constitute conduct that would preclude *breach* from being established, whether because consent is incorporated in the primary obligation,[1109] or because waiver of domestic rights undermines the claim.[1110] In other cases, an individual's waiver of *damage* precludes an interstate claim for reparation for that damage.[1111] As Chapter IV argued, it is diplomatic protection and human rights claims that depend on alleged

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[1102] *The Tattler* (1920) VI UNRIAA 48, 49. Case discussed: Weis (n1068) 37-38; Brownlie, *Principles of Public International Law* (4th edn, 1990) 506; Whiteman (n649) 182-184; Aréchaga (n69) 591.

[1103] *Tattler* (n1102) 49.

[1104] *Brownlie (4th)* (n1102) 506 (fn.76) (*Tattler* 'in error'); cf.*Restatement (Second)* (n1076) 607.

[1105] Cf.*supra*.n660.

[1106] Similarly *Restatement (Second)* (n1076) 607; Weis (n1068) 38, quoted *supra*.n1094 (vis-à-vis *Tattler*); also *supra*.nn848-851;1096.

[1107] *Supra*.nn1069ff.

[1108] *Supra*.nn483;1069;1075.

[1109] *Supra*.nn1078ff.

[1110] *Supra*.nn1083ff.

[1111] *Supra*.nn1096ff.

individual damage,[1112] and which may therefore be impacted by such waiver.[1113] Indeed, under Article 48(2)(b) of the ARSIWA, States claiming reparation for breach of *erga omnes (partes)* obligations, including in human rights claims,[1114] may only do so 'in the interest of' the relevant beneficiary.[1115] It is difficult to see how a State could continue to claim such reparation renounced by an individual beneficiary.[1116] However, insofar as the State has its own "direct" claim for material or moral damage, the claim subsists.[1117]

II. Interstate waiver of individual claims

The foregoing has considered practice concerning individual waivers impacting interstate claims. More prevalent is the converse practice, whereby States purport to waive or settle the claims of individual nationals.[1118] For instance, the *Immunities Case* concerned, *inter alia*, the 1947 Peace Treaty between Italy and the Allied Powers, Article 77 of which provides that 'Italy waives on its own behalf *and on behalf of Italian nationals* all claims against Germany and German nationals outstanding on May 8, 1945' including 'all claims for loss or damage arising during the war.'[1119] Under further supplementary treaties Germany paid sums to Italy, in 'final settlement' of certain

[1112] *Supra*.Ch.IV(I)(C),(II).

[1113] See *supra*.nn1094;1096 -1106.

[1114] *Supra*.nn415-420.

[1115] *Supra*.n874.

[1116] Cf.*Cyprus/Turkey (Compensation)* (n95) (Sep.Op.Albuquerque/Vučinić) [10], *infra*.n1343. On waivers' relevance to reparation: *Neumeister* (n1082) [33]; *Eckle/Germany* (n866) [66].

[1117] Aréchaga (n69) 591; *Restatement (Second)* (n1076) 606, discussing *Magee*, *supra*.n1099; Sohn/Baxter (n58) 207; *supra*.nn849-850. Generally *supra*.Ch.IV(I)(C)-(D),(III)(B)(i).

[1118] See Tams, 'Waiver' (n466) 1037;1039; *Oppenheim's* (n73) 538; Crawford, *GP* (n2) 571–572; Lillich/Weston (n1059) 108-109; Vallat (n1058) 32;44-45; Feichtner (n468) [14].

[1119] Art.77(4), cited *Immunities* (n39) [22] (emphasis added).

claims,[1120] while other 'outstanding claims' of Italy and its nationals were 'settled'.[1121] The ICJ did not determine the effect of such waivers under international law, despite acknowledging that the issue was not 'unimportant'.[1122] However, as Chapter VII highlights, it did express apparent approval of using lump-sum agreements to settle war claims.[1123]

The treaties in the *Immunities Case* are not anomalous. States often conclude treaties in which they purport, in varying language, to waive not only their own claims, but also those of their nationals.[1124] An express waiver on behalf of both the State and nationals is particularly common in peace treaties like that considered in *Immunities*,[1125] but also in treaties settling, on a lump-sum basis, other significant economic claims.[1126] There is further, extensive, practice in which other language is employed with apparent

[1120] ibid.[24].

[1121] ibid.[25]. Treating both as waiver: *infra*.n1127.

[1122] ibid.[108].

[1123] ibid.[102], discussed *infra*.nn1852ff.

[1124] Generally Tams, 'Waiver' (n466) 1039; Crawford, *GP* (n2) 571-572; Feichtner (n468) [14]; Lillich/Weston (n1059) 108-109; Peters (n1) 214. Cf.Lillich/Weston (n1059) App.B, Belgium-Germany, Art.3 (nationals' claims excluded).

[1125] E.g., post-WWII: Japan PT, Arts.14(b);19; Austria PT, Arts.23(3);24; Hungary PT, Arts.30(4);32(1); Finland PT, Art.29; Romania PT, Arts.28(4);30; Bulgaria PT, Arts.26(4);28; Burma PT, Arts.V;VIII; US-Austria, Art.III(1); Japan-Czechoslovakia, Art.4; UK-Austria, Art.8; Canada-Japan, Art.2; Greece-Japan, Art.2; US-Japan (Awa.Maru), Art.I; US-Japan (Amami Islands), Art.IV; Lillich and Weston, *International Claims: Their Settlement By Lump Sum Agreements*, vol.II (1975): (42) Greece-Rumania, Arts.3(2),(3); (49) Indonesia-Japan, Arts.4(2);5(1); also (73) UK-Japan, Art.3; post-WWI: Treaty of Versailles, Art.137, also Art.244(Ann.III(8)-(9)); Hague Agreement, Art.III; Rapallo Agreement, Arts.1-2. Generally Tomuschat (n105) 988; Nollkaemper (n6) 31; Crawford, *GP* (n2) 571; Caron (n270) 282; Dolzer (n660) 311-312;319;322;326; Feichtner (n468) [14].

[1126] E.g., Lillich/Weston (n1125): (6) UK-Yugoslavia, Arts.3(a),(b) (nationalisation); US-Iceland, Art.4 (occupation); similarly US-Germany Settlement, Art.II; UK/France/US/Italy/Germany, Art.I(c); Thailand-Japan Settlement, Art.III.

intent to effect a similar result.[1127] Thus, States have 'renounc[ed]' reparations claims in their own and nationals' names,[1128] rendered settled individual claims in various spheres 'void',[1129] or 'expired',[1130] and provided that such claims are otherwise unable to be asserted.[1131] In other agreements, the responsible State is released from,[1132] held free from,[1133] 'exonerated of',[1134] or 'relieved of',[1135] responsibility towards the receiving State and its nationals, with many treaties referring to settlement with 'liberating effect'.[1136] Many lump-sum settlements contain words to the effect that compensation is paid in 'full and final settlement'[1137] or 'full settlement and discharge'[1138] of the claims of

[1127] E.g., treating settlement provisions as waiver: *Immunities Pleadings* (n1059) Mem.Germany [11]; Rep.Germany [30]-[31]; Rej.Italy [3.18].

[1128] See Lillich/Weston (n1125): (1) UAR-Italy, Arts.3;8. Similarly: Treaty of Paris, Art.VII ('relinquish'), discussed Phillipson, *Termination of War and Treaties of Peace* (1916) 331; Murphy/Kidane/Snider (n266) 32.

[1129] See Lillich/Weston (n1125): (5) Switzerland-Yugoslavia, Art.3.

[1130] See ibid.: (48) Bulgaria-USSR, Art.2; (50) Hungary-USSR, Art.2.

[1131] E.g., ibid.: (5) Switzerland-Yugoslavia, Art.3 ('any claims whatsoever'); (14) Switzerland-Hungary, Art.3; (24) Denmark-Poland, Art.2; (28) Yugoslavia-Italy, Art.12; (37) Czechoslovakia-Yugoslavia, Art.5; (106) Netherlands-Hungary, Art.3(2)(a); also (102) Hungary-Austria, Art.4 (claims transferred); similarly (22) Belgium/Luxembourg-Czechoslovakia, Art.3; Weston, Lillich and Bederman, *International Claims: Their Settlement By Lump Sum Agreements, 1975-1995* (1999): (42) Switzerland-Zaire, Art.7.

[1132] Lillich/Weston (n1125): (6) UK-Yugoslavia, Art.2(b); (24) Denmark-Poland, Art.2; (56) France-Rumania, Arts.2-3; (61) Greece-Yugoslavia, Art.2; (77) Netherlands-Bulgaria, Art.3(1); Weston/Lillich/Bederman (n1131): (47) Italy-Morocco, Art.3.

[1133] Lillich/Weston (n1125): (12) France-Czechoslovakia, Art.3; (21) Canada-Italy, Art.1; Weston/Lillich/Bederman (n1131): (29) Austria-Czechoslovakia, Art.5.

[1134] Lillich/Weston (n1125): (58) Finland-USSR, Art.1; similarly (22) Belgium/Luxembourg-Czechoslovakia, Art.3.

[1135] ibid.: (47) Brazil-Italy [5].

[1136] E.g., ibid.: (19) Switzerland-Rumania, Art.3; (31) Belgium/Luxembourg-Hungary, Art.6; (35) Norway-Bulgaria, Art.3; (41) Turkey-Yugoslavia, Art.3.

[1137] E.g., ibid.: (46) Sweden-Japan, Art.4; (66) Norway-USSR, Art.3; (109) Canada-Bulgaria, Art.1; (112) Netherlands-Indonesia, Art.3(1); similarly (76) Japan-US; (126) Austria-Poland, Art.1; Weston/Lillich/Bederman (n1131): (40) US-China, Art.2(a); (49) UK-Mauritius, Art.1.

[1138] E.g., Lillich/Weston (n1125): (4) US-Yugoslavia, Art.1(a); similarly (6) Great Britain-Yugoslavia, Art.2(a); (44) Spain-Japan [3]; (57) Great Britain-UAR, Art.4(5); Weston/Lillich/Bederman (n1131): (34)

both the State and nationals, or provide more generally that nationals' claims, and/or liabilities thereby arising, are settled,[1139] satisfied,[1140] discharged,[1141] cancelled,[1142] or extinguished.[1143]

Although some suggest that States may waive their nationals' claims in the exercise of personal sovereign jurisdiction,[1144] this assertion deserves some analysis. In particular, the effective scope of such waivers must be examined to establish how far States endeavour to, and succeed in, precluding their nationals' claims, for interstate waivers could potentially encapsulate one or more of different types of claim:

(1) diplomatic protection claims;

(2) claims under municipal law before domestic courts; and

(3) nationals' claims under international law.[1145]

Each is considered in turn to determine whether interstate waivers cover such claims.

US-Egypt, Art.1(1); also (12) Italy-Romania, Arts.1;4 ('global…definitive settlement'/'discharging effect'); (43) Canada-Cuba, Art.3 ('discharge…completely settled'); (67) US-Vietnam, Art.3(1).

[1139] E.g., Lillich/Weston (n1125): (3) France-Poland, Art.4; (53) Netherlands-Yugoslavia, Art.2; (68) Denmark-Rumania, Arts.1;4; Weston/Lillich/Bederman (n1131): (17) Austria-Italy, Art.2(1).

[1140] Lillich/Weston (n1125): (39) Yugoslavia-Hungary, Art.1(1).

[1141] ibid.: (13) France-Hungary, Art.4; (97) Netherlands-Czechoslovakia, Art.4(1); (111) Greece-Rumania, Art.2; Weston/Lillich/Bederman (n1131): (37) France-Guinea, §1(3);2(2); (44) Canada-China, Art.4.

[1142] Weston/Lillich/Bederman (n1131): (27) US-Peru, Art.4.

[1143] Italy PT, Art.76(2); Lillich/Weston (n1125): (84) Austria-Bulgaria, Art.2; (98) Greece-Bulgaria, Art.2; (101) Hungary-Austria, Art.2; Weston/Lillich/Bederman (n1131): (15) Denmark-Hungary, Art.3; (16) Canada-Romania, Art.4(1); (52) Finland-GDR, Art.6.

[1144] Feichtner (n468) [14] and authorities *infra*.Pt.(B), particularly *infra*.n1183.

[1145] Similarly Gattini, 'Trojan' (n421) 539 (fn.102); Gattini, 'Hurdles' (n1059) 364;366; Dolzer (n660) 303 (need to distinguish private/State; national/international claims);305-306; Nollkaemper (n6) 31; also Caron (n270) 282; Crawford, *GP* (n2) 571; Peters (n1) 204-208;216-220.

A. Preclusion of diplomatic protection claims

As Chapters II and IV outlined, diplomatic protection claims are those in which a State claims for its national's damage consequent on breach of international law.[1146] Because a State exercising diplomatic protection is espousing its national's cause,[1147] a waiver of nationals' claims could potentially be read as referring to diplomatic protection.[1148] However, as Chapter IV outlined, even if brought for individual *damage*,[1149] the premise of diplomatic protection is that the State 'assert[s] its own rights'.[1150] The claim is the State's, and waivable by it.[1151]

Consequently, as the Tokyo District Court rightly concluded in interpreting the waiver clause in the post-WWII Peace Treaty with Japan, a waiver of the State's own claims incorporates diplomatic protection claims, and a waiver of its nationals' claims must envisage something else.[1152] Indeed, certain agreements treat States' diplomatic protection claims as distinct from nationals' claims,[1153] and, where tribunals have found

[1146] *Supra*.n318; generally *supra*.Ch.IV(I)(A)-(C).

[1147] *Supra*.nn543;725;761;766-767.

[1148] As Japan argued: *Shimoda* (n268) 640.

[1149] *Supra*.Ch.IV(I)(C).

[1150] *Mavrommatis* (n313) 12, quoted *supra*.n322, with other authorities.

[1151] Tams, 'Waiver' (n466) 1039; Crawford, *GP* (n2) 565; Garcia-Amador, 'Report' (n2) [174]-[175]; also *Avena* (n152) [44]; Sohn/Baxter (n58) Art.25, 209-211; *Park v Mitsubishi* Da-22549, ILDC.1909 (KR.2012) (SC.Korea, 24.May.2012) [60]; *Kandyrine v France* Recueil Lebon.303678, ILDC.2734 (FR.2011) (Cons.d'Etat, 23.Dec.2011) [23]; *supra*.nn1068-1073. Cf.*Oppenheim's* (n73) 527; DADP, Art.19(a). For individual involvement in settlements: *Red Crusader* (1962) 35 ILR 485 (Denmark-UK.Comm.) 500; Whiteman (n649) 180-181.

[1152] *Shimoda* (n268) 640. Treating diplomatic protection as potentially included within interstate waiver: e.g. US-UK Interpretation, 368-370; US-Norway, Art.III(B)(4); Weston/Lillich/Bederman (n1131): (55) US-Ethiopia, Art.5(3).

[1153] See Lillich/Weston (n1125): (22) Belgium/Luxembourg-Czechoslovakia, Art.3 ('undertakes…not to support…espouse'); similarly (61) Greece-Yugoslavia, Art.3; (77) Netherlands-Bulgaria, Art.3(4); (98)

that treaty language constituted a waiver of diplomatic protection, this language generally concerns *State* action, not a waiver of nationals' claims.[1154]

A waiver of diplomatic protection may, practically speaking, relieve individuals of any means of obtaining recourse for a violation of international law.[1155] However, this is no reason to read a waiver of nationals' claims as referring to diplomatic protection. Indeed, States may waive many rights, such as those concerning officials' immunity,[1156] in circumstances that might have serious consequences for those individuals.[1157] The question is what States *do* intend by waiver clauses referring specifically to nationals' claims.

B. Preclusion of claims before the parties' courts

This section demonstrates that States almost certainly intend to preclude the institution or continuance of claims under municipal law before their own domestic courts or other authorities.[1158] Some agreements make this express, precluding claims in the

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Greece-Bulgaria, Art.2; Weston/Lillich/Bederman (n1131): (55) US-Ethiopia, Art.5(3); (64) US-Germany, Art.2(6); Lillich/Weston (n1059): App.B, Belgium/Luxembourg-Bulgaria, Art.5; Belgium-Morocco, Art.8; Belgium-Tunisia, Art.6; US-UK Settlement, 434-438.

[1154] *German Assets in Switzerland* (1957) 24 ILR 542 (BVerfG) 546 (State's non-objection to liquidations diplomatic protection waiver); similarly *Akiyama v State* (1963) 32 ILR 233 (Tokyo.DC), 235; cf.*Kandyrine/France* (n1151) [23]; also Gattini, 'Trojan' (n421) 539.

[1155] Crawford, *GP* (n2) 565; also Borchard (n319) 370; Vallat (n1058) 39;45; Whiteman (n649) 186-187; Houtte/Delmartino/Yi (n266) 304; Sohn/Baxter (n58) 202-203;209-210; *Dames* (n1059) 679-680; *Decision No.V* (n836) 152; *Russian Indemnity (Award)* (11.Nov.1912) (PCA) <https://pcacases.com/web/sendAttach/643> 4;15-16; ICSID (n536) 496.

[1156] See *Arrest Warrants* (n653) [61]; VCDR, Art.32.

[1157] Fitzmaurice, 'FourthRep' (n16) [159]; e.g., *Doe v US* (1988) 121 ILR 567 (USCA.2nd.Cir.) 572-573.

[1158] Generally *infra*.nn1159ff and, e.g., Lillich/Weston (n1059) 6; Nollkaemper (n6) 31, with references; Caron (n270) 282; McNair, *Treaties* (n1075) 336; McNair, *Legal Effects of War* (4th edn, 1966) 417-418; Gattini, 'Trojan' (n421) 539; Vallat (n1058) 38-39;45; Gattini, 'Compensation to Victims' in Cassese (ed), *The Oxford Companion to International Criminal Justice* (2009) 277. On certain cases discussed in this and

State receiving funds for its nationals' injury,[1159] in the compensating State,[1160] or both.[1161] More generally, waiver clauses of nationals' claims have unfailingly been held to encompass claims before municipal courts.[1162] Thus, the Tokyo District Court considered that it was:

> natural to interpret the term "claims of Japanese nationals" waived by Article 19 (*a*) [of the Japanese Peace Treaty] as including the claims of Japanese nationals against the Allied Powers and their nationals under the municipal laws of Japan and of the Allied Powers.[1163]

In addition to the Japanese courts, waiver clauses have similarly been held to bar domestic law claims by courts in the UK,[1164] Germany,[1165] Austria,[1166] Italy,[1167] the US,[1168] and Singapore.[1169]

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next section: Tams, 'Waiver' (n466) 1039; *Oppenheim's* (n73) 538-539; Crawford, *GP* (n2) 571-572; ICRC, 'Practice Relating to Rule 150: Reparation', *Customary IHL Database* <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule150>; McNair, *War (4th)* (n1158) 418; Houtte/Delmartino/Yi (n266) 23-24; Peters (n1) 204-206;215; Hofman/Riemann (n1061) 19-27.

[1159] Lillich/Weston (n1125): (10) Switzerland-Czechoslovakia, Art.2 ('no longer…raise claims in Switzerland').

[1160] ibid.: (122) FRG-Italy, Art.3(2) (Italian petitions transferred to Germany).

[1161] ibid.: (51) Czechoslovakia-Poland, Art.8(1) ('entitled to refuse to consider [settled] claims'); US-France, Art.V.

[1162] See cases *infra*.nn1163ff; also Weston/Lillich/Bederman (n1131): (4) FRG-Italy, Exch.Lett. [1(a)], discussed *Immunities Pleadings* (n1059), Counter-Mem.Italy [5.56].

[1163] *Shimoda* (n268) 641. Further: *Horimoto v Japan* (1954) 32 ILR 161 (Tokyo.HC) 164, *infra*.n1204; *Nishimatsu* (n1059)§II[2]-[3]; Dolzer (n660) 312-313.

[1164] *The Bellaman and Agostino Bertani* (1948) 16 ILR 560 (EWHC) 560-561;564.

[1165] *German External Debts Agreement* (1955) 22 ILR 611 (BGH) 613-614;cf.614 ('precise legal effect' undecided); *Austrian Citizen's Entitlement to Compensation* (1960) 32 ILR 153 (BGH) 157; *Shareholders of ZAG v A Bank* (1965) 45 ILR 436 (Berlin.CA) 438-445; *Restitution of Household Effects Belonging to Jews Deported from Hungary* (1965) 44 ILR 301 (Berlin.CA) 307-308;315-316 (right's 'complete extinction'); *Aktiengesellschaft C v Firma S&L* (1930) 5 ILR 22 (Reichsgericht) 23; *Immunities Pleadings* (n1059), Rep.Germany [25].

[1166] *Austrian State Treaty* (1961) 40 ILR 184 (SC.Austria) 184-185; *S v Austria* 1Ob149/02, ILDC.1618 (AT-2002) (30.Sept.2002) (SC.Austria) [1.7],[2] (Russian law).

[1167] *Ditta Pomante v Germany* (1960) 40 ILR 64 (L'Aquila Civ.Ct.) 71-73; also *External Debts* (n1165) 613; *Immunities Pleadings* (n1059), Rep.Germany [25].

To understand how such preclusion might be brought about, one must appreciate the two potential bases of jurisdiction States may possess under international law to thus affect their nationals' claims. First, States exercise jurisdiction over their territory.[1170] This encapsulates the capacity to control which claims are brought before their courts.[1171] Indeed, States commonly, for instance, recognise State immunity as precluding claims against States being brought before national courts.[1172] Both a waiving State and that benefiting from a waiver may prevent claims proceeding before their own judicial organs by, for example, using legislative or executive power to preclude,[1173] terminate,[1174] or suspend[1175] claims. However, as the Iran-US Claims Tribunal ('IUSCT') observed:

> Termination of municipal litigation ... cannot be mistaken for, or identified with, a waiver of any claims. The claims continue to exist, although the nationals no longer have at their disposal any

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[1168] *Ozanic v USA (The Petar)* (1949) 16 ILR 176 (USCA.2nd.Cir.) 179 (waiver enlivened immunity); *Neri v US* (1951) 20 ILR 223 (USCA.2ndCir) 224-225; *Pauly v US* (1961) 32 ILR 585 (US.Ct.Cl.) 587-588; *Hwang Geum Joo v Japan* (2003) 332 F.3d 679 (USCA) 684-685, also *Hwang Geum Joo v Japan* (2005) 413 F.3d 45 (USCA) 50-53, citing *Forced Labor* (n1059) 944-948; similarly *Hee Nam You v Japan* (2015) U.S.Dist.LEXIS 149104 (DC.N.D.Cal.) (tort claims 'extinguished'); cf.*Haas v Humphrey* (1957) 24 ILR 316 (USCA) 318; also *Tag v Rogers* (1959) 28 ILR 467 (USCADC) 470 (property interests 'extinguished'). Generally, e.g., Hofman/Riemann (n1061) 23-27.

[1169] Albeit *obiter dicta*: *Public Trustee v Chartered Bank India* (1956) 23 ILR 687 (Singapore) 699 ('by implication, adverse to…claim').

[1170] Generally *Oppenheim's* (n73) §137.

[1171] E.g., *Dames* (n1059) 684-685; Gattini, 'Trojan' (n421) 539 (fn.102) (waiver 'procedural bar'); *infra*.n1178;1305. On domestic limitations: *infra*.nn1178;1408ff.

[1172] *Dames* (n1059) 684-685; Vallat (n1058) 39 (immunity prevents claims 'in practice'); Caron (n270) 283; *Shimoda* (n268) 638-640; Nollkaemper (n6) 22.

[1173] E.g., E.O.13477 (31.Oct.2008), ss.1(a)(i);(b)(i); E.O.12283 (19.Jan.1981), cited *Persinger v Iran* (1982) 72 ILR 132 (USCADC) 135, ss.1-101(a),(b); also *External Debts* (n1165) 613-614; similarly *ZAG-Shareholders* (n1165) 438; *Ditta* (n1167) 70-71; *Whitley v Aitchison* (1958) 26 ILR 196 (Cour.Cass.) 198; *infra*.nn1177;1184;1204-1205;1302-1303;1315.

[1174] E.g., E.O.13477., ss.1(a)(ii);(b)(ii); E.O.12283., s.1-101(1)(c); *Persinger/Iran* (n1173) 150 ('extinguished…claims'). Cf.*infra*.n1176.

[1175] See *Dames* (n1059) 684 (effect of E.O.12294, barring US-court claims for IUSCT); similarly Crawford, *GP* (n2) 571-572; *infra*.nn1301-1302. For suspension/termination distinction: *Iran v United States (Cases A/15 (IV);A/24)* (1998) 34 Iran-USCTR 105 [92]-[99].

> domestic court procedures to pursue their claims. Closing the road to municipal courts cannot, in itself, amount to a waiver.[1176]

The Japanese Supreme Court likewise concluded that a waiver of individuals' claims 'does not mean to effectively extinguish claims but … to have the competency of these claims in litigations lost'.[1177] Such an exercise of jurisdiction as a means for controlling nationals' claims is thus not, strictly, a waiver, even if it might have the same desired effect.[1178]

Indeed, given limits on States' jurisdictional competence, the Japanese Supreme Court was understandably hesitant about the effectiveness of a waiver where the State was not in control of the relevant territory at the time.[1179] Moreover, one agreement explained a requirement that a State free another from claims by its nationals as merely requiring that State to 'take all the measures *in its power* to ensure' that the other would not be 'held liable for any charge or obligation' except as contained in the settlement.[1180] The existence of jurisidictional limitations suggests that, insofar as a waiver clause's

[1176] *Iran/US (A15/24)* (n1175) [85]; cf.*infra*.n1305. Generally Caron (n270) 282-283; Nollkaemper (n6) 31.

[1177] *Nishimatsu* (n1059) §II[2](3). Cf.*Household Effects* (n1165) 315-316.

[1178] Similarly *supra*.n1176; *infra*.nn1302-1303. Cf.*Lectures on International Law and the United Nations* (1957) 193 (Cardozo), on agreements for States to settle own nationals' claims: 'We did not say…claims were waived or cancelled, because it seemed…questionable whether the Executive…could constitutionally cut off…right of a…national to sue…like taking private property without just compensation'. Nonetheless, US courts interpreted as impeding claims: ibid.193-194, referencing *Etlimar v US* (1952) 19 ILR 454 (US.Ct.Cl.). Other treaties did use such terminology: *supra*.nn1124ff; generally *supra*.n1168. On constitutional issues: *infra*.nn1408ff.

[1179] *Nishimatsu* (n1059) §II[3](2)-(3). Further: McNair, *Treaties* (n1075) 336; *infra*.n1190.

[1180] Lillich/Weston (n1125): (12) France-Czechoslovakia, Ann.1 (emphasis added); similarly (22) Belgium/Luxembourg-Czechoslovakia, Prot.-Annex, Ad.Art.3; also *Diverted Cargoes (Greece v UK)* (1955) 22 ILR 820, 822.

effect is merely to control access to domestic courts, it cannot be a universal waiver of claims.[1181]

The second basis on which States might affect nationals' claims is, as foreshadowed above,[1182] through exercising the personal jurisdiction a State has over its citizens, even outside its territory.[1183] A State may thus 'under its municipal law', either 'forbid the submission of a claim by its national or nationalize the claim'.[1184] As to the first, certain States prohibit their nationals from bringing claims – usually following an interstate lump-sum agreement – not only before their own courts, but in any forum.[1185] As to the second, States might extinguish the private rights of their nationals underlying a given claim insofar as they are established in its own domestic law,[1186] such as rights to property and other personal rights, wherever located.[1187] While not apparently the intent

[1181] Similarly *Hans-Adam/Cologne* (n449) 13 (German court jurisdiction barred, 'not…foreign or international'); *supra*.nn1175-1178.

[1182] *Supra*.n1144.

[1183] *Austrian Citizen's* (n1165) 156; *ZAG-Shareholders* (n1165) 439; see *Oppenheim's* (n73) §138.

[1184] Sohn/Baxter (n58) 211.

[1185] E.g., E.O.13477, s.1(a)(i); cf.s.1(b)(i),(iii) (vis-à-vis foreign nationals); E.O.12283, s.1-101(a); cf.s.101-1(b); also *Iran/US (A15/24)* (n1175) [143],[145].

[1186] See McNair, *Legal Effects of War* (3rd edn, 1948) 395-396 (State 'can bind itself by treaty to affect…rights of its nationals, both proprietary and personal, in whatever way a State can affect…persons and things subject to its sovereignty'); 391, citing *The Blonde* [1922] 1 AC 313, 335 (waiver effected property transfer); similarly McNair, *Treaties* (n1075) 335-336; Henkin, *Foreign Affairs and the United States Constitution* (2nd edn, 1996) 300 (settlements 'wipe out…underlying private debt, terminating…recourse under domestic law'), cited *Asociacion de Reclamantes v Mexico* (1984) 84 ILR 87 (USCADC) 93 (treaty 'extinguished' 'property claims'); Gattini, 'Trojan' (n421) 539 (fn.102); *supra*.n1143; *infra*.nn1214;1393. Cf.Paparinskis, 'New' (n8) 645.

[1187] McNair, *War* (n1186) 392-393; also *Shimoda* (n268) 641; *Germany v Milde* (2009) 92 RDI 618 (ILDC.1224) (Italian.Cour.Cass) [8] (property rights); similarly *De Guglielmi v Germany* (2010) 46 RDIP&P 1006; ILDC.1784 (CFI.Italy) [4.1] (waiver non-tortious); *Immunities (Counterclaims)* (n482) 369-370 (Diss.Op.Cancado); *Oppenheim's* (n73) 915 (fn.8) (extra-territorial nationalisation).

behind all waiver clauses,[1188] many lump-sum settlement agreements thus envisage, for example, that individuals' title to property will be transferred to the settling State.[1189]

However, again, to characterise such actions as effecting a *waiver* of nationals' claims is problematic, given that a State's exercise of personal jurisdiction is limited by the territorial rights of other States.[1190] Anti-suit injunctions – prohibitions on bringing claims in another forum – are, for instance, not always given effect by courts located elsewhere, including international tribunals.[1191] A State might, under its rules of private international law, likewise refuse to recognise the efficacy of measures taken by another State – even where it has waived the right to object to them – if, for example, an attempt is made to affect property rights outside the territory where the property is situated.[1192] Accordingly, another State might recognise the existence of a claim under its own law that the national was, through a waiver clause, purportedly prevented from pursuing.[1193]

[1188] See Yoshida-Stikker Protocol, quoted ICRC, 'Rule.150' (n1158), s.B(I) (Japan not considering Netherlands 'expropriated…private claims of its nationals' making them 'non-existent'). Similarly US DoS, *Conference for the Conclusion and Signature of the Treaty of Peace with Japan* (1951) 197 (no expropriation; legal 'limitations'), volume cited Dolzer (n660) 302 (fn.15). Further: Vallat (n1058) 38-39;45.

[1189] E.g., Lillich/Weston (n1125): (8) UK-Czechoslovakia, Art.5(c); (88) Belgium/Luxembourg-Poland, Art.8; (106) Netherlands-Hungary, Art.3(2)(b); Weston/Lillich/Bederman (n1131): (35) France-Brazil [9]; (34) US-Egypt, Art.6(3);5(2) (State subrogated); Lillich/Weston (n1059), App.B, Belgium/Luxembourg-Bulgaria, Art.5; Belgium-Morocco, Art.8; Belgium-Tunisia, Art.6; Canada-Hungary, Art.6(3); Canada-Poland, Art.7. Generally Vallat (n1058) 46-47.

[1190] *Oppenheim's* (n73) §138; McNair, *Treaties* (n1075) 336; Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (1988) 129-132; Ruys (n94) 9. Also *ZAG-Shareholders* (n1165) 439; *supra*.n1181.

[1191] See *Phillip Alexander Securities v Bamberger* [1997] ILPr 73 [4]-[6] (English anti-suit injunction rejected Germany); *BCB/Belize* (n584) [112],[114]-[115]; *SGS v Pakistan (Jurisdiction)* (2003) 18 ICSID.Rev.-FILJ 307 [39],[186]-[189]; discussion Shany (n4) 18; Shany (n7) 160-161.

[1192] *Assignment of Confiscated Debt* (1957) 24 ILR 31 (BGH) 34. Similarly *Koh-i-Noor* (1958) 26 ILR 40 (SC.Austria) 41-42; *ZAG-Shareholders* (n1165) 439; also McNair, *Treaties* (n1075) 336-337; McNair, *War (4th)* (n1158) 428-438. Cf.McNair, *War* (n1186) 393; *Hans-Adam/Cologne* (n449) 16ff (foreign law deferral). See discussion Gattini, 'Trojan' (n421) 524-525.

[1193] See *Abel v Reich* (1960) 32 ILR 151 (Restitution.SC) 152-153 ('doubtful' Austrian waiver covered German-law claims); *ZAG-Shareholders* (n1165) 439 (State might not recognise); *Trampler v HC Zürich* (1925) 3 ILR 351 (Swiss.Fed.Trib.) (ineffective vis-à-vis Swiss jurisdiction), cited McNair, *War* (n1186)

States are evidently aware of these limitations on their capacity to effectively waive individual claims under other States' law, and are not necessarily content to rely on sovereign immunity.[1194] States sometimes therefore require the State receiving compensation to obtain waivers of claims from the affected individuals themselves,[1195] or make partaking in the lump-sum distribution conditional on the individual accepting the settlement terms.[1196] This was generally the approach taken, for instance, vis-à-vis recent compensation programmes for victims of Nazi persecution.[1197] In others, the State receiving funds 'guarantees' that the compensating State will not pay anything further.[1198] Certain interstate agreements contemplate that individuals may successfully bring further claims, with provision made for set-off of compensation,[1199] indemnification,[1200] referral

396; *Distomo Massacre* (n448) 564 (unclear 'how Greece can validly renounce individual claims'). Cf.*Austrian Citizen's* (n1165) 156-158; *Household Effects* (n1165) 307-308.

[1194] Cf.*supra*.nn299-300;1172. *Immunities* (n39) demonstrates that, even with waivers, immunity is not always recognised: *supra*.nn39;1127.

[1195] E.g., Lillich/Weston (n1125): (8) Great Britain-Czechoslovakia, Art.5(b) (where title unavailable); (88) Belgium/Luxembourg-Poland, Art.8; (106) Netherlands-Hungary, Art.3(3); Weston/Lillich/Bederman (n1131): (35) France-Brazil [4],[6],[9]; (49) UK-Mauritius, Art.4 ('best endeavours to procure'); (55) US-Ethiopia, Agreed.Min.; (69) US-FRG, Art.4(3); also (34) US-Egypt, Art.5(2) (State subrogated); Lillich/Weston (n1059) App.B: Belgium/Luxembourg-Bulgaria, Art.5; Belgium-Tunisia, Art.6; Canada-Hungary, Art.6(2); Canada-Rumania, Art.7; Canada-France [4]. See Vallat (n1058) 46; Caron (n270) 282.

[1196] E.g., Lillich/Weston (n1125): (20) France-Poland, Art.3; (54) France-Yugoslavia, Art.7; (82) Sweden-Yugoslavia, Art.5; Weston/Lillich/Bederman (n1131): (64) US-Germany, Art.3 (election). See Vallat (n1058) 46-47; Lillich/Weston (n1059) 6.

[1197] See Germany-US, Ann.A[14], Arts.1-2; Austria-US, Ann.A[9]. Cf.Germany-Netherlands, Arts.2;15; also Dolzer (n660) 324-328;334-335; Hess (n7) 145-146.

[1198] E.g., Lillich/Weston (n1125): (9) Sweden-Poland, Art.2; (45) Norway-Hungary, Art.4; similarly (16) Sweden-Hungary, Art.3; also *Lectures* (n1178) 193.

[1199] Lillich/Weston (n1125): (16) Sweden-Hungary, Art.3; Weston/Lillich/Bederman (n1131): (64) US-Germany, Arts.2(5)-(8).

[1200] Lillich/Weston (n1125): (55) Demark-Czechoslovakia, Art.4; Weston/Lillich/Bederman (n1131): (49) UK-Mauritius, Art.5(1).

to the State of nationality,[1201] and supply of information regarding claims in third-country fora.[1202] Such provisions appear to acknowledge that a State's waiver of nationals' claims may not be effective in all circumstances, raising doubts as to its nature as a true waiver.[1203] Indeed, the court in the *Horimoto Case* explained a waiver clause as being :

> related to the rights and obligations of States as subjects of international law, and more specifically the rights and obligations subsisting between Japan and the Allied Powers … (As is contended on behalf of the respondent, the private claims of nationals as individuals are not rights of the State in its own name, and cannot be waived by the State in a treaty.) Thus the net result of this article amounts to a pledge by Japan to the Allied Powers that she will acquiesce in the eventual denial by these Powers of claims of Japanese nationals against Allied nationals which might otherwise be enforceable under the municipal law of any of the Allied Powers or of Japan. Consequently, by virtue of these provisions, the Allied Powers are entitled as against Japan to deny, without being in breach of the rules of international law, claims of Japanese nationals against the Allied Powers or their nationals which, in the absence of these provisions, would have been recognised in their municipal law.[1204]

On this reasoning, an interstate waiver of nationals' claims operates under international law as a defence, vis-à-vis the waiving State, to the nullification of individuals' domestic law claims by the beneficiary State.[1205] The *effect* may be that individuals are precluded from bringing certain claims for breach of international law before those States' domestic courts.[1206] However, individuals might still be able to pursue claims under the municipal

[1201] Weston/Lillich/Bederman (n1131): (27) US-Peru, Art.7; (34) US-Egypt, Art.5(3); (40) US-China, Art.5; (45) UK-Czechoslovakia, Art.8(3); Lillich/Weston (n1059), App.B, US-Hungary, Art.6(3).

[1202] See Lillich/Weston (n1125): (4) US-Yugoslavia, Art.9(b); (10) Switzerland-Czechoslovakia, Art.9. Cf.Vallat (n1058) 39 ('unlikely').

[1203] See *Mantelli v Germany* (2008) 168 ILR 477 (Italian.Cour.Cass) 481 (holding State 'harmless' inexplicable if waiver deprived courts' jurisdiction).

[1204] *Horimoto* (n1163) 163-164.

[1205] Similarly Kelsen, 'Opinion Concerning the Claims of the Italian Owners of the Ship "Fausto"' (1986) 37 ÖZ 1, 14, cited *infra*.n1214.

[1206] *Supra*.Pt.(II)(B).

law of other States.[1207] It is therefore difficult to consider interstate waiver clauses as effectively *waiving* individuals' claims, even under domestic law.[1208]

C. Preclusion of individuals' international claims

The foregoing has established that interstate waivers of nationals' claims do not refer to diplomatic protection claims, which States are able to waive in their own right.[1209] They are, however, and even if not strictly a waiver, intended to prevent claims under municipal law.[1210] As Chapter II outlined, certain individual domestic court claims are invocations of State responsibility for violation of international law.[1211] Insofar as such individual claims are caught by an interstate waiver clause, they may indeed be precluded.

However, what effect – if any – does a waiver by a State of its nationals' claims have on those individuals' *international* claims?[1212] On the one hand, as a matter of treaty interpretation, if a State uses language whereby it purports to waive 'all claims' – or similar phrasing – a literal interpretation would demand that it be 'understood in the widest sense'.[1213] In addition, certain authorities suggest that a waiver completely and

[1207] *Supra*.nn1190-1203.

[1208] Similarly *supra*.nn1203-1204; Peters (n1) 215.

[1209] *Supra*.nn1151ff.

[1210] *Supra*.Pt.(II)(B).

[1211] *Supra*.nn292-312.

[1212] Cf.Dolzer (n660) 303-306; *supra*.nn228;1145.

[1213] *Ditta* (n1167) 71; similarly *ZAG-Shareholders* (n1165) 439; *Forced Labor* (n1059) 945 ('waiver…strikingly broad'); *Immunities Pleadings* (n1059), Rep.Germany [23]-[24]. Cf.*Sch v Germany* (1932) 6 ILR 62 (German.SC) 63 ('all claims' not including 'claims of private creditors').

directly extinguishes the individual's claim, regardless of its basis.[1214] On the other hand, these authorities were not directly concerned with individual claims under international law.[1215] Although scholars have asserted that States can waive their nationals' claims, this is apparently premised on those nationals having no rights distinct from the State.[1216] The previous section has established that such separate rights to claim might exist, beyond the national State's reach, albeit under a third State's municipal law.[1217] The question is whether such separate rights to claim similarly exist under international law.[1218]

Only a few decisions appear to have directly addressed the issue. In *Park*, the Korean Supreme Court considered that States cannot waive international claims belonging to individuals without their consent.[1219] The Tokyo District Court in *Shimoda* suggested, likewise, that a waiver clause would not affect nationals' international

[1214] See *Household Effects* (n1165) 309 (rights on 'any legal basis' waived); 315-316 (rights' 'complete extinction'); Hess (n7) 136. Considering waiver 'abolishes the rights…the basis of [relevant] claims': Kelsen (n1205) 14, cited Gattini, 'Trojan' (n421) 539 (fn.103); generally Waldock, 'Third Report on the Law of Treaties' [1964] 2 ILCYB 5, 24; *Immunities Pleadings* (n1059), Rep.Germany [21]. The PCIJ considered treaties could create individual rights enforceable dometically absent incorporating legislation: *Jurisdiction of the Courts of Danzig* [1928] PCIJ.Rep. SerB.No.15, 17-18, discussed Parlett (n1) 17-26; Peters (n1) 29-31. Treaties could conceivably similarly *extinguish* international rights, but cases focus on *domestic* law: e.g., *AdR/Mexico* (n1186) 93; *Household Effects* (n1165) 308; also Kelsen (n1205) 15; cf.*supra*.nn1143;1486. Cf.*Abel* (n1193) 152-153; Vallat (n1058) 38-39.

[1215] See *Household Effects* (n1165) 308; *Ditta* (n1167) 64;70-72; *ZAG-Shareholders* (n1165) 438; *Forced Labor* (n1059) 944. The headnote in *Austrian Citizen's* (n1165) references waiving claims 'vested by treaty or…municipal law' (155). However, the actual decision references 'private legal relations' (156); also Peters (n1) 204-207.

[1216] See Henkin (n1186) 299 ('individual and…debt…no independent existence'); McNair, *Treaties* (n1075) 336 (waiver prevents nationals' municipal actions, *State* international actions); *Restatement (Second)* (n1076) 608; also *Distomo Massacre* (n448) 565-566.

[1217] *Supra*.nn1181;1190 -1203;1208; see *infra*.n1218. Cf.Lillich/Weston (n1059) 6.

[1218] Cf.*Rudloff* (n1069) 248 (international claims 'outside the legislative jurisdiction of any one nation'). For waiver distinguishing domestic/international claims: *Gassner* (1954) 22 ILR 972 (UK-Italy.Conc.Comm.) 975.

[1219] *Park/Mitsubishi* (n1151) [60]; similarly *Yeo v Nippon Steel* Na-44947 (ILDC.2104 (KR.2013)) (HC.Korea, 10.Jul.2013) [4]. See Hepburn, 'South Korean Supreme Court Ruling' *IA.Rep.* (31.Oct.2018).

claims.[1220] It recognised, however, that treaty-based claims procedures for individuals were rare,[1221] and indeed, much of the practice concerning the effect of waiver clauses stems from before many of the individual procedural mechanisms discussed in Chapter II existed.[1222]

The focus in this thesis is on individuals' international claims brought pursuant to such mechanisms. It is possible that individuals possess claims under customary international law that cannot be waived:[1223] Italy argued, for instance, in *Immunities*, that its nationals' reparations claims for IHL violations were not 'at [its] disposal', and thus not waivable through interstate agreement.[1224] However, as Chapter II outlined, individuals invoke State responsibility under treaty-based mechanisms and before domestic courts.[1225] Claims pursuant to the former are, by and large, restricted to alleged violations of the relevant treaty, meaning that there is little scope for tribunals to consider claims under custom, and waiver thereof.[1226] As to domestic courts, certain municipal

[1220] *Shimoda* (n268) 641.

[1221] ibid.637-638;641-642.

[1222] Cf.ibid.637-638;641-642, pointing to earlier mechanisms (not concerning investment/human rights *supra*.Ch.II(I)(A)-(B)).

[1223] Generally, e.g., Peters (n1) 184-189;196-203;210-216; Nollkaemper (n6) 183-184; Benvenisti (n300) 1086-1096;1098-1101; Gattini, 'Hurdles' (n1059) 366-367.

[1224] *Immunities Pleadings* (n1059) Counter-Mem.Italy [5.48]; see *supra*.n1122 (not decided). Similarly de Preux, 'Article 91 - Responsibility' in Sandoz, Swinarski and Zimmerman (eds), *Commentary on the Additional Protocols* (ICRC, 1987) [3651] (States can settle war damages, not 'deny [victims] compensation'); Gattini, 'Compensation' (n1158) 276-277; Kalshoven (n813) 44. Cf.Tomuschat (n105) 988; Peters (n1) 204-210;213-216. Cf.*infra*.n1854.

[1225] *Supra*.Ch.II(I)(A)-(C).

[1226] *Supra*.Ch.II(I)(A)-(B); Reinder and Schreuer, 'Human Rights and International Investment Arbitration' in Dupuy, Petersmann and Francioni (eds), *Human Rights in International Investment Law and Arbitration* (2009) 82-85;88, particularly 83-84, discussing *Biloune v Ghana* (1989) 95 ILR 183 (UNCITRAL) 203 (no jurisdiction over alleged human rights violations 'as…independent cause of action'); Vermeer-Künzli, 'Concurrence' (n8) 275. Exceptionally, the EECC had human rights/IHL jurisdiction: *supra*.n427; cf.*infra*.n1505; Nollkaemper (n6) 106; Shany (n7) 102.

laws, such as the US Alien Tort Statute, do make an individual's claim dependent on international law having been violated,[1227] and questions concerning the impact of an interstate waiver on such claims could, in theory, arise.[1228] However, cases before domestic courts overwhelmingly determine the effects of waiver clauses on individual claims as a matter of domestic law.[1229] Whether or not individuals have unwaivable claims under international law, States retain the capacity to restrict access to their courts, as discussed above.[1230] Thus, the 2010 US-Iraq lump-sum settlement agreement aimed 'to settle and extinguish all U.S. national claims wherever asserted', under both domestic and international law.[1231] However, in return for payment, the US' undertaking was to preclude and terminate claims before its courts, and to substitute itself vis-à-vis claims 'presented directly to Iraq'.[1232] Notwithstanding the reference to international law, then, the agreement took an approach akin to that normally taken to preclude claims domestically, and – like other agreements – envisaged that claims might, despite being 'settle[d] and extinguish[ed]', nonetheless be brought elsewhere.[1233]

[1227] 28 USC §1350 (jurisdiction over torts, *i.a.*, 'in violation of…law of nations'); see *Sosa v Alvarez-Machain* 542 US 692 (2004) 724 (common law action for certain 'international law violations'), discussion Stephens, 'The Curious History of the Alien Tort Statute' (2014) 89 NDLR 1467, particularly 1495-1502;1505-1512; Tomuschat (n105) 990; Parlett (n1) 325-326; Nollkaemper (n6) 193; Weiss (n1) 811; Peters (n1) 479.

[1228] Cf.*infra*.n1229 (referencing *Hwang*).

[1229] See *supra*.Pt.II(B); e.g. *Hwang* (2005) (n1168) 681 (invoking ATS); 686-687 (immunity precludes). Concerning whether international law claims existed, but not vis-à-vis waiver: *ANRP v Germany*, App.45563/04 (ECtHR, 4.Sept.2007) 13-17, discussed *Immunities Pleadings* (n1059), Rep.Germany [40]; also cases Peters (n1) 204-207.

[1230] *Supra*.Pt.II(B).

[1231] US-Iraq, Art.II(1), referenced Roberts, 'Triangular' (n5) 413.

[1232] US-Iraq, Art.V.

[1233] Cf.*supra*.nn1190-1208.

More useful then, in examining States' approaches to waiving individuals' international claims, is to consider the impact of interstate waivers vis-à-vis claims brought pursuant to the treaty-based mechanisms discussed in Chapter II, an issue which has arisen in a number of historical examples.[1234] If States routinely attempt to waive their nationals' claims before *international* fora, this would suggest an entitlement to engage in waiver properly so-called, meaning these claims cannot belong to those individuals.[1235] However, as the following section demonstrates, notwithstanding some divergences, overall the practice suggests that States do not consider themselves able to *waive* such claims *per se*. However, they employ other mechanisms for controlling their pursuit.

(i) Post-WWI Mixed Arbitral Tribunals

The first examples from State practice relate to claims before the post-WWI MATs. Pursuant to Article 297(e) of the Treaty of Versailles:

> The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests … The claims made in this respect by such nationals shall be investigated, and the total of the compensation shall be determined by the Mixed Arbitral Tribunal provided for in Section VI or by an Arbitrator appointed by that Tribunal.[1236]

Similar mechanisms were established under other treaties.[1237] Importantly, MATs generally recognised claims under such provisions as brought by individuals, rather than by States exercising diplomatic protection.[1238]

[1234] See authorities *infra*.Pt.(C)(i)-(vii).

[1235] Because third-party rights are unwaivable: *supra*.nn482-483.

[1236] Treaty of Versailles, Art.297(e).

[1237] Treaty of St Germain-en-Laye, Art.249(e); Treaty of Trianon, Art.232(e); Treaty of Neuilly-sur-Seine, Art.177(e); Parlett (n1) 72; *Shimoda* (n268) 637; *supra*.nn266-268.

[1238] See Parlett (n1) 73, referencing *Sigwald Charles v Germany* (1926) 3 ILR 337; 6 TAM 888 (French-German MAT); *Lederer v Germany* (1924) 3 TAM 762 (Anglo-German MAT) 768; Wühler, 'Mixed

Nonetheless, with developments regarding the reparation régime consequent on Germany's inability to meet payments,[1239] various States endeavoured to alter the individual claims framework.[1240] Certain authors have asserted that States, in reaching settlements of individual claims, waived those claims, implying that they were not truly individual.[1241] However, as shown below, this appears to be too simplistic an interpretation of the practice. That practice is both complex and sometimes inconsistent, but can, it is suggested, best be understood according to three propositions: first, States generally (though not always) considered that individual claims could not be *waived*; second, States could nonetheless freely alter the procedural mechanisms under which claims were brought; and third, States could reach settlements regarding award payments.[1242]

Arbitral Tribunals' in Bernhardt (ed), *Encyclopedia of Public International Law* (1997) 433-434; *Morgenstern v Germany* (1926) 7 TAM 713 (Germano-Polish MAT) 722, cited Hess (n7) 135; *Shimoda* (n268) 637; Jessup (n2) 18; Peters (n1) 207; Lauterpacht (n231) 145-146; *supra*.n268; *infra*.n1361; also *Societe Petrol Block v Germany* (1928) 4 ILR 261 (Germano-Roumanian MAT) (individual claimant unaffected by national State retaining claimed property). The report notes (ibid.261) this is explicable by 'Tribunal attach[ing] decisive importance to…purely private nature of…claim', though noting view that claims were State-controlled, given States' 'right to dispose of…claim altogether in subsequent treaties without…consent of…interested parties', referencing Schmid, 'Anmerkung: Societe Petrol Block' (1929) I ZfaöRV 102; cf.Blühdorn, 'Le Fonctionnement et La Jurisprudence Des Tribunaux Arbitraux Mixtes Créés Par Les Traités de Paris' (1932) 41 Rdc 137, 144-145;174.

[1239] Generally Stephens, *Revisions of the Treaty of Versailles* (1939) Ch.X; *Greece v FRG* (1972) 47 ILR 418 (Ext.Debt.Trib.) 418-420; Dolzer (n660) 310; Wühler (n1238) 436; *Execution of German-Portuguese Arbitral Award* (1933) III UNRIAA 1371, 1378-1384.

[1240] See Wühler (n1238) 436; Isidro and Hess, 'The Mixed Arbitral Tribunals in the Peace Treaties of 1919–1922' 5/2018 MPI.Proc.Law Res.Pap.Ser., 13-14. On altering rights to seize German nationals' property: Stephens (n1239) 243-244. Cf. reasons for TST: Jakab, 'Trianon Peace Treaty (1920)' in *MPEPIL* (2015) [16]-[17].

[1241] Isidro/Hess (n1240) 13-14 (espousal), referencing Hess (n7) 135; similarly *supra*.n1238, particularly Schmid (n1238) 103 (settlements demonstrate claims were States').

[1242] See authorities *infra*.nn1243ff;1361; also Paparinskis, 'New' (n8) 645.

As to the first, in an Exchange of Notes between Japan and Germany regarding the settlement of claims under Article 297, Japan observed that, at least 'within the ambit of the existing provisions' of the Treaty of Versailles, an agreement 'cannot not be forced upon the nationals of either State'.[1243] The obtaining of a waiver by the individuals concerned, and the withdrawal of their own MAT claims, was therefore the preferable mechanism for settlement.[1244] Similarly, when the UK and Germany settled certain claims under the Treaty of Versailles, they acknowledged that an MAT might 'decid[e] that any item of a claim included in this "forfait" falls within the provision of Article 297' or other articles and might 'mak[e] an award in favour of any firm or person in respect of such item of their claims', providing for the return of settlement funds in such a case.[1245] For their part, Germany and Romania, 'mutually renounc[ing] all action before the [MAT]' clarified that this only applied to interstate claims.[1246] These States apparently considered themselves unable to waive individual MAT claims.

In the *Railways* case, concerned with a waiver of nationals' claims contained in a post-WWI reparations restructure treaty,[1247] the Tribunal held that the waiver had not resulted in loss of an individual's right of petition.[1248] An earlier League of Nations legal

[1243] Sequestration Removal Agreement ('SRA'), 33.

[1244] SRA, 35-37. Claimants usually presented claims: RoP, Art.3, reproduced Martens, vol.XVII, 714, cited Verzijl, *International Law in Historical Perspective*, vol.VIII (1976) 247.

[1245] UK-Germany [5].

[1246] Germany-Romania, Art.IV read with Fin.Prot.[4].

[1247] Hague Agreement, Art.III, cited *Zeltweg-Wolfsberg and Unterdrauburg-Woellan Railways* (1934) 7 ILR 484; LON OJ 1005 (Doc.C2111934VIII) (LoN Spec.Trib.) 484-485.

[1248] *Zeltweg-Wolfsberg* (n1247) 1005-1007, particularly 1006-1007 (no 'new right' but merely 'procedure to enable [individuals] to 'avail themselves of [contractual] rights'; claim therefore not 'under' treaty, not waived). For the petition right: Treaty of St.Germain-en-Laye, Art.320.

opinion on the same issue[1249] had emphasised that rights that were 'internationally guaranteed' and 'not exercised' by individuals '*qua* … national' were unwaivable by the individual's State of nationality.[1250] Moreover, a 'right to arbitration as such' could not 'be regarded as a claim'.[1251] While concerned with a peculiar claims mechanism, and therefore not directly applicable to other mechanisms, at least some of the reasoning appears relevant to individual MAT claims more generally,[1252] and the League Opinion even made reference to the States' closure of the MAT consequent on the waiver provision, querying why this was necessary if the claims had in fact disappeared.[1253]

Admittedly, there is some apparently contrary practice. Thus, Italy and Hungary agreed that, upon abolition of the Italian-Hungarian MAT, '[a]ctions pending' were 'deemed to be withdrawn',[1254] and 'settled' through lump-sum payment.[1255] This might, however, be explicable by Italy apparently having had the power, before that MAT, to withdraw its nationals' claims.[1256] More difficult is the Germano-Polish Agreement, in

[1249] Opinion referenced *Zeltweg-Wolfsberg* (n1247) 487 (ILR version).

[1250] Perm.Leg.Committee, Communications and Transit Organisation, 'Petition of the Radkersburg-Luettenberg Railway' (LON.Doc.CCT/CJ/28) (1934) [37], also [32] (provision also applicable to individual/own State disputes).

[1251] ibid.[47], also [39] (waiver vis-à-vis 'claims of…financial nature');cf.23-24 (Diss.Op.Soubbotitch).

[1252] Indeed, see ibid.24 (Diss.Op.Soubbotitch) (Art.320 like MAT mechanisms). On individuals claiming against own State: *Steiner and Gross v Poland* (1928) 4 ILR 291 (Upp.Silesia.AT) 292, discussed Parlett (n1) 75-76.

[1253] 'Petition' (n1250) [48];cf.24-25 (Diss.Op.Soubbotitch).

[1254] Hungary-Italy (1932), Art.1.

[1255] Hungary-Italy (1932), Art.2; also Prot.[(a)].

[1256] This assumption underlies Hungary-Italy (1927), Art.2 (agent withdraws); also Italy-Germany, Ann.3;Art.2 (agent 'discontinue[s]'). On agents' roles: Blühdorn (n1238) 144-145; Isidro/Hess (n1240) 12-13. Cf.*infra*.n1300.

which Poland recognised the Young Plan,[1257] and undertook 'a complete and final renunciation' of 'financial claims or claims relating to property … arising out of the war or the Treaty of Peace', including of 'its nationals'.[1258] A Protocol outlined that this included Polish nationals' Article 297 'claims already brought … and those which might be brought'.[1259] This purported waiver is surprising, given the Germano-Polish MAT's recognition that individual rights under Article 297 were 'direct[s] et indépendant[s]' and unaffected by provisions of the Treaty of Versailles concerning interstate relations.[1260] The States nonetheless acknowledged, in a later agreement regarding the MAT's closure, that claims would still be pending or '*sub judice*' at the date of termination.[1261] Akin to the point made in the League Opinion above, it is difficult to see how this was possible if all claims of the State and its nationals had actually been waived.[1262]

Taken as a whole, therefore, the practice suggests that States doubted their ability to *waive* individuals' MAT claims. States did, however, clearly envisage *other* means for controlling such claims. Japan and Germany, for instance, while denying that they could affect existing claims under the Treaty of Versailles,[1263] contemplated that a 'new treaty'

[1257] This reduced Germany's reparations: Stephens (n1239) 236; generally 233-247; sources *supra*.nn1239-1240.

[1258] Germany-Poland (1929), Art.II.

[1259] ibid., Prot.[2]. Not apparently concerned with presently-relevant claims: Belgium-Austria, Art.6; Belgium-Germany, Art.2.

[1260] *Morgenstern/Germany* (n1238) 722, see *supra*.n1238. States had extensive participatory powers, but claimants were not necessarily State-represented: RoP, Arts.8-9;11 reproduced Martens, vol.XVII, 752, cited Verzijl (n1244) 247.

[1261] Germany-Poland (1931), Art.II. Termination date: 31.Jan.1932; earlier agreement (*supra*.n1258) dated 31.Oct.1929, ratifications exchanged 21.Apr.1931, i.e., pre-termination.

[1262] Similarly *supra*.n1253; cf.*supra*.nn1258-1259.

[1263] *Supra*.nn1243-1244.

could render 'a settlement binding on the nationals of either State'.[1264] Germany and France agreed that 'pleas', encompassing those under Article 297, submitted to the MAT more than three months after their agreement were to 'be rejected as invalid'.[1265] A similar approach was taken in settling nationals' claims against Bulgaria, with '[n]o private claims' to 'be received' by the MAT after the agreement's entry into force.[1266] These approaches do not involve waiver; instead the States contemplate modifying the treaty régime.[1267] The Franco-German MAT appeared to endorse such an approach in *Sigwald*, a case concerned with an argument that the two States had, by signing a subsequent treaty, settled their nationals' claims under Article 297.[1268] The MAT held:

> il faut admettre que, dans l'hypothèse où les signataires du Traité de paix auraient, en concluant la Convention de Baden-Baden, voulu exclure les Alsaciens-Lorraines, en tant qu'il s'agit de mesure d'un caractère politique, du droit individuel résultant de l'art. 297 *e*, ils auraient dû le stipuler par une dérogation expresse aux dispositions du Traité … .[1269]

The Tribunal appears to accept that an individual claims mechanism *could* be modified by a later treaty between the relevant States, though this would need to be done expressly.[1270] The Treaty of Trianon parties likewise altered the bases for certain MAT claims,[1271]

[1264] SRA (n1243) 33. However, this posed 'considerable difficulties': ibid.

[1265] Germany-France, Art.12(1). Similarly Belgium-Germany, Art.4.

[1266] Bulgarian Settlement [10]. Further: Germany-France, Art.12(4); Anglo-Austrian (1930) 404;407; cf.Anglo-Austrian (1931) (terminating MAT when claims exhausted); Anglo-German (1932), 100-101; Anglo-Bulgarian, Art.I.

[1267] Cf.*infra*.n1361;Pt.(C)(vii) and authorities therein.

[1268] *Sigwald* (n1238) 890-891.

[1269] ibid.891. Also Isidro/Hess (n1240) 14.

[1270] Indeed, they later excluded these claims prospectively: *supra*.n1265. Further: *Bank of Egypt v Austro-Hungarian Bank* (1923) 2 ILR 23 (Anglo-Austrian MAT) 25 (nationality deprivation, consequent claim loss, required '[v]ery clear language'), cited Lauterpacht (n231) 292.

[1271] Trianon Settlement Treaty ('TST'), Agmt.II, particularly Art.VII ('judgments solely upon…basis of…present Agreement'), Art.XIII ('claims out of time…inadmissible'); see *Case concerning Pajzs, Csáky,*

including vis-à-vis pending claims,[1272] alterations that the PCIJ did not question when decisions enforcing limitations under the new treaties were appealed.[1273] The League Opinion discussed above, in referencing the closure of the MATs, similarly implies that the procedure for bringing claims could be terminated, even where claims were 'pending',[1274] and even if not automatically resulting from waiver.[1275]

A final category of State practice concerns award payments. As Blühdorn noted, whatever the nature of the rights under Article 297 of the Treaty of Versailles, if payment was not made on a claim, the individuals concerned could only have recourse to their State of nationality.[1276] Indeed, awards were often paid by the national State from confiscation funds.[1277] Practice reflects this State control over payment. Thus, the Anglo-Austrian settlement left unaffected MAT procedures but provided that 'no claim for payment shall be made' vis-à-vis future awards.[1278] In another agreement, lump-sum amounts were paid to settle outstanding MAT awards.[1279] Greece and Germany had a long-running dispute regarding whether payments due to Greek nationals under MAT

Esterházy (1936) PCIJ.Rep. Ser.A/B.No.68, 49;57-59; generally Jakab (n1240) [15]-[20]; Isidro/Hess (n1240) 14.

[1272] TST, Agmt.II, Preamble (nonetheless, not 'surrender[ing]…rights…nationals…derive[d] directly from…Treaty' not addressed in settlement); *Pajzs* (n1271) 59-60.

[1273] ibid.57-60;63-65; see Jakab (n1240) [20].

[1274] 'Petition' (n1250) 25 (Diss.Op.Soubbotitch).

[1275] *Supra*.n1253, particularly ibid.[48] (no automatic abolition, else subsequent agreement unnecessary).

[1276] Blühdorn (n1238) 145.

[1277] Wühler (n1238) 435. E.g., arrangements Anglo-Austrian (1920) [2].

[1278] Anglo-Austrian (1930), Art.11, referencing Hague Agreement, Art.IIII. Cf.Anglo-German (1929) Art.11; Australia-Germany, Art.8.

[1279] Anglo-Turkish [1]-[2].

awards had been waived.[1280] A arbitral decision concluded that they had not.[1281] The matter, treated as one of diplomatic protection,[1282] was finally settled by lump-sum agreement.[1283]

The post-WWI practice is complex. Overall, however, it suggests that – with some exceptions – States did not purport to waive, or succeed in waiving, their nationals' claims, but had no difficulty with altering the procedural mechanisms. They also in some cases interfered with, or settled, payments owing under various awards, but in a manner suggesting that they then constituted interstate obligations.[1284]

(ii) Iran-US Claims Tribunal Small Claims

The second example arises from the Iran-US Claims Tribunal, established by treaty in 1981.[1285] In 1990, Iran and the US settled all remaining claims for less than $250,000 between US nationals and Iran through a lump-sum Small Claims Settlement Agreement ('SCSA').[1286] Certain authors have suggested that this did not settle individual claims, because, pursuant to the Claims Settlement Declaration establishing the Tribunal,

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[1280] See *Greece/Germany* (n1239) 418-421;424-425;428;429 (claimants' 'vested right'); cf.430-431 ('inter-governmental debt');432-437. Original claims under Treaty of Versailles, Art.298: ibid.424.

[1281] *Greece/Germany* (n1239) 456-457;460-462. Cf.*Germany/Portugal* (n1239) 1385-1386 (interstate debt covered).

[1282] *Greece/Germany* (n1239) 437; also Weston/Lillich/Bederman (n1131): (28) FRG-Greece, Art.1(1) ('pending between…Governments').

[1283] Weston/Lillich/Bederman (n1131): (28) FRG-Greece, Art.1(2) (payment 'completely and finally release[s]…claims arising out of [Graeco-German MAT] decisions'). Cf.Lillich/Weston (n1059), App.B, Canada-Hungary, Art.1(5) (including Art.232 Treaty of Trianon claims); Parlett (n1) 51.

[1284] See *supra*.nn1236ff;1280;1282. Cf.Schmid (n1238) 103 (*supra*.n1238).

[1285] *Supra*.nn249;352.

[1286] Weston/Lillich/Bederman (n1131): (63) US-Iran, Arts.2;3; reproduced *US v Iran (Claims of less than $250,000)* (1990) 25 Iran-USCTR 327, 331-338 ('*Iran/US Settlement*'). See Parlett (n1) 100.

such claims were to 'be presented to the Tribunal … by the [individual's] government', not the individuals themselves.[1287] Nonetheless, the Tribunal did not regard these claims as diplomatic protection:

> In [the] typical case, the State espouses the claims of its nationals, and the injuries for which it claims redress are deemed to be injuries to itself; here the Government of the United States is not a party to the arbitration of claims of United States nationals, not even in the small claims where it acts as counsel for those nationals.[1288]

Whether or not one agrees,[1289] the SCSA was reached *after* the Tribunal had, on multiple occasions, confirmed this position.[1290] The States must have been aware that they were, at least arguably, settling individual claims under international law. Indeed, under the SCSA, the US was '*deemed* to have espoused' the relevant claims, not to actually have done so.[1291]

Payment under the SCSA was '[i]n consideration of complete, full, final and definitive settlement, liquidation, discharge and satisfaction' of the claims.[1292] The US was to 'cause' proceedings against Iran 'to be definitively and with prejudice dismissed, withdrawn and terminated' with the US 'barred from instituting or continuing with any

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[1287] Parlett (n1) 99, citing CSD, Art.III(3).

[1288] *Esphahanian v Bank Tejarat* (1983) 2 Iran-USCTR 157, 165; discussed Parlett (n1) 99; Douglas (n301) 15-16. Also *Iran v US (Case A/18)* (1984) 5 Iran-USCTR 251, 261;cf.294;297-298 (Diss.Op.); *Iran v US (Case A/21)* (1987) 14 Iran-USCTR 324, 330; *Iran/US (A15/24)* (n1175) [141], all referenced Parlett (n1) 99.

[1289] Cf.Parlett (n1) 99-100; Hess (n7) 140; *Lord v IHSRC* (1988) 18 Iran-USCTR 377, 382-390 (Sep.Op.Khalilian), referenced *Iran/US Settlement* (n1286) 328.

[1290] *Supra*.n1288. Indeed, an individual-Iran small claim was earlier settled, though via US-requested agreed award: *Lord/IHSRC* (n1289) 377-382.

[1291] *Iran/US Settlement* (n1286) Art.III (emphasis added). Cf.328 (fn.2), asserting consistency with *Lord/IHSRC* (n1289) (Sep.Op.Khalilian).

[1292] *Iran/US Settlement* (n1286) Art.III.

such proceedings'.[1293] The US was also to 'release and forever and definitively discharge [Iran] … from any and all claims'.[1294] The 'Claimants' tangible and intangible assets, rights, properties and real estate' in Iran, insofar as 'asserted in the [relevant] [c]laims', was 'quitclaimed and transferred' to Iran,[1295] while 'the interested parties' might 'reach agreements' regarding transfer of US-based property.[1296]

The SCSA raises two points of interest. First, with the exception of costs, the agreement does not employ 'waiver' language.[1297] Second, although the agreement apparently acknowledges that individuals were the actual claimants,[1298] as noted above, only the US could present the claims.[1299] The two States were therefore the parties to any arbitration, with the power, under the Tribunal's Rules of Procedure, to settle.[1300] With all domestic litigation already suspended,[1301] the US barring itself from further proceedings removed the only available avenue for hearing these claims,[1302] having much the same

[1293] ibid. Art.V.

[1294] ibid. Art.VI.

[1295] ibid. Art.VII.

[1296] ibid. Art.X.

[1297] ibid. Art.VIII. Neither, admittedly, do certain individual-Iran settlements: e.g., *Amoco Iran Oil v Iran (Agreed Award)* (1990) 25 Iran-USCTR 301, 305-313.

[1298] See *Iran/US Settlement* (n1286) Art.I(B).

[1299] *Supra*.n1287.

[1300] IUSCT, RoP, Art.34; *Iran/US Settlement* (n1286) 328;330. Similarly *Greece/Germany* (n1239) 425. In issuing agreed award (*Iran/US Settlement* (n1286)), the Tribunal apparently concurred. Cf.Parlett (n1) 100.

[1301] As required: Gen.Dec. [11], see *supra*.n1175. Generally Caron (n270) 282-283; Parlett (n1) 100; Roberts, 'Triangular' (n5) 384.

[1302] *Supra*.nn1293;1176; similarly Caron (n270) 283 ('claims outside both US and IUSCT jurisdiction…effectively denying their viability').

effect as a termination of municipal litigation where no international tribunal exists.[1303] Indeed, the references to property transfers resemble provisions of other lump-sum settlement agreements concerned with terminating domestic law claims.[1304] This suggests that the SCSA was not envisaged to be that different from agreements settling domestic law claims, notwithstanding the presence of individuals' international claims.[1305] As noted above, settlements that only purport to terminate claims mechanisms do not involve waiver properly so-called.[1306] The US did not apparently *waive* its nationals' claims, but rather terminated access to available fora, and ensured transfer of the relevant domestic rights.[1307] This approach does, nonetheless, suggest that States may exercise powers available to them under the treaty establishing an international tribunal to preclude individual claims.[1308]

(iii) Flight UTA 772

The third example arises out of the destruction of Flight UTA 772, with many French citizens onboard, in 1989.[1309] Certain Libyan individuals were convicted before French courts *in absentia*, though immunity barred a suit against Colonel Gaddafi.[1310]

[1303] See *supra*.Pt.II(B); similarly Vallat (n1058) 39 (post-settlement 'for all practical purposes…claim will disappear'); 45 ('claimaint…effectively deprived of any process'). Cf.Gut Dam Agreement (claims US-presented (Art.VIII(2)); individual waivers (Art.II(4))).

[1304] See *supra*.n1189.

[1305] Indeed, discussing domestic litigation termination, the Tribunal noted no individual claims were waived, except under Gen.Dec. [11] (*Iran/US (A15/24)* (n1175) [84]-[86]). However, the US does not "waive"; it merely agrees to 'bar and preclude' certain nationals' claims against Iran. This cannot be waiver, as it also does so vis-à-vis non-national claims: Gen.Dec. [11]; cf.*supra*.nn1170-1178;1182-1189.

[1306] *Supra*.Pt.II(B), particularly nn1176-1178.

[1307] Cf.*supra*.nn1176-1178;1189 and generally *supra*.nn1170-1178;1181;1184-1189;1214-1216.

[1308] Cf.*infra*.Pt.(C)(vii) and authorities.

[1309] *Assoc.SOS* (n470) [9], discussed Vermeer-Künzli, 'Concurrence' (n8) 282-284; *infra*.n1777.

[1310] *Assoc.SOS* (n470)[9],[13],[15],[38].

Negotiations took place between the French and Libyan governments regarding payment of compensation to the victims' families.[1311] The agreement ultimately reached between the Gaddafi International Foundation and the French victims' associations required those receiving compensation to 'waive the right to bring any kind of civil or criminal proceedings', not only before French, but also international, courts.[1312] When certain victims claimed France had, by recognising Gaddafi's immunity, denied them court access,[1313] the ECtHR – while recognising that the dispute was different from those to which the waiver clause applied[1314] – accepted that the agreement's conclusion, 'in line with the [victims'] interests', warranted the proceedings' being struck out.[1315]

This was, admittedly, not a case of interstate waiver, with France not party to the settlement.[1316] But this is what makes it interesting: despite government involvement in the negotiations,[1317] where the waiver referred explicitly to both French and international courts, its form was individual.[1318] This is hardly conclusive, but might suggest that individual waiver is the preferred method for finalising such claims.

[1311] See ibid.[14] (citing Agreement, Preamble),[17],[38].

[1312] ibid.[14] (citing Agreement, Art.1), also [17],[28].

[1313] ibid.[15].

[1314] ibid.[34]. Not deciding whether waiver could have encompassed ECtHR proceedings: ibid.[30].

[1315] *Assoc.SOS* (n470) [38]-[39] (when taken with judgment *in absentia*). On US claimants' domestic claims: Venema, 'The Sahara Memorial Seen From Space' *BBC.World.Serv.* (22.Jan.2014) <https://www.bbc.co.uk/news/magazine-25643103>; *Pugh v Libya* (2008) 530 F.Supp.2d 216, 219-220; discussion *Alimanestianu v US* (2018) 888 F.3d 1374, 1377-1378. These were settled by lump-sum agreement, the US terminating domestic litigation and recognising Libya's immunity: US-Libya, Art.III(1)-(2); E.O.13477; discussion *Alimanestianu* (n1315) 1378-1379; Daugirdas and Mortenson (eds), 'Contemporary Practice of the United States' (2016) 110 AJIL 789, 831-832; *supra*.n1173.

[1316] *Assoc.SOS* (n470) [34].

[1317] *Supra*.n1311.

[1318] *Supra*.n1312.

(iv) The EECC

Fourth, the EECC was 'to decide … all claims for loss, damage or injury … related to the [Ethiopia/Eritrea] conflict' and which 'result[ed] from violations of [IHL] … or other violations of international law'.[1319] Pursuant to Article 5(8) of the EECC Agreement, the States accepted that the EECC was the only forum for claims (unless filed previously) and that claims not filed within a year would 'be extinguished'.[1320] The question is whether that covered individual claims.

Chapter II outlined that claims overlapping with the interstate EECC proceedings were indeed brought by individuals both before the African Commission and domestic courts.[1321] Those claims were filed prior to the date provided for in the EECC Agreement,[1322] and no overlapping individual claims were apparently brought thereafter. Consequently, the effect of Article 5(8) on such claims remains unknown.[1323] However, it is interesting that the interstate agreement did not – unlike a number of the claims settlement agreements discussed above[1324] – purport to settle these already filed individual claims.[1325] This may have been an oversight. More plausibly, perhaps, it may

[1319] EECC Agreement, Art.5(1).

[1320] ibid. Art.5(8).

[1321] *Supra*.nn310;414;449.

[1322] One year after the 'effective date of [the] agreement' (Art.5(8)). It was signed 12.Dec.2000. For filing dates: *Interights* (n414) [11] (5.Oct.1999); *Nemariam* (n310) 672 (Jun.2000).

[1323] In both cases, Art.5(8) was referenced, but without discussing currently relevant aspects: see *Interights* (n414) [47]; *Nemariam* (n310) 674.

[1324] See *supra*.nn1255;1259;1285-1296;1301;1315 (MAT/IUSCT/US-Libya).

[1325] See *Nemariam v Ethiopia* (2005) 400 F.Supp.2d 76, 80 ('Agreement specifically provided for…continuance of claims…filed in another forum before [12.Dec.2000]').

have stemmed from a recognition that those claims were effectively outside the States' control, before an international tribunal and third-State courts respectively.[1326]

(v) The softwood lumber dispute

Fifth, the long-running dispute between Canada and the US regarding softwood lumber was ultimately settled in 2006.[1327] Critically, as discussed in Chapter II, the provisions of NAFTA covered certain investors involved in the dispute, with individual claims having been brought thereunder, as well as before domestic courts.[1328]

There are two important facets to the settlement agreement. First, it would not enter into force until waivers had been obtained from those engaged in litigation,[1329] including certain NAFTA claimants.[1330] The individuals were to 'irrevocably consent to the termination' of their claims.[1331] Second, the US and Canada suspended NAFTA's operation:

> The operation and application of Section B of Chapter Eleven of the NAFTA is hereby suspended with respect to any matter arising under [this agreement] and any measure taken by a Party that is necessary to give effect to or implement [this agreement]. Consequently, no claim under Section B of Chapter Eleven of the NAFTA may be made against a Party by investors of the United States or Canada in respect of any such matter or measure ... .[1332]

[1326] Cf.*supra*.nn1217-1218.

[1327] See Softwood Lumber Agreement ('SLA'); generally Simpson, 'Chopping Away at Chapter 11' (2007) 22 Am.Univ.ILR 479, particularly 481-483;491-493; Paparinskis, 'New' (n8) 631;645; *supra*.n360.

[1328] See the list: SLA, Ann.2A(1); also *supra*.n360.

[1329] ibid. Art.II(1)(a).

[1330] See ibid. Ann.2A(1); generally Simpson (n1327) 482.

[1331] SLA, Ann.2A(2). Similarly Weston/Lillich/Bederman (n1131): (55) US-Ethiopia, Agreed.Min.

[1332] ibid. Art.XI(2); Simpson (n1327) 482-483;498ff; Paparinskis, 'Analogies' (n14) 97-98;105; Paparinskis, 'New' (n8) 631;645.

The two States did not themselves waive claims that had already been filed, whether before domestic or international tribunals.[1333] However, they clearly considered themselves capable of modifying the treaty régime going forward.[1334] The US and Canada took a similar approach in suspending, *inter se*, the operation of Article 1709(10)(f) of NAFTA in order to implement a WTO Decision on Compulsory Licensing.[1335]

(vi) Human rights procedures

The final issue is how far States can waive access to human rights procedures.[1336] Chapter II argued that human rights obligations are owed *erga omnes (partes)*.[1337] Given that such obligations protect the 'collective interest' of a group or the international community,[1338] it would follow that States may waive such obligations only insofar as they pertain to those States.[1339] Thus, the ARSIWA commentary provides:

> Since such a breach engages the interest of the international community as a whole, even the consent or acquiescence of the injured State does not preclude that interest from being expressed in order to ensure a settlement in conformity with international law.[1340]

[1333] *Supra*.nn1329-1331; *infra*.n1390.

[1334] Similarly *ADM* (n232) [164]. Cf.Simpson (n1327) 498ff (doubts).

[1335] See Access Agreement, 1. Mendenhall alerted me to this. Although affecting substantive NAFTA provisions, this has flow-on effects for investors' Ch.11 claims, as granting compulsory licences consistent with Ch.17 is not expropriation (NAFTA, Art.1110(7)).

[1336] See, e.g., Tams, 'Waiver' (n466) 1039; *Restatement* (n107) §703, n.2.

[1337] *Supra*.nn415-420.

[1338] *Supra*.n95.

[1339] Feichtner (n468) [15]; *Restatement* (n107) §703, n.2;§902(i); Dawidowicz (n416) 304. Contending that injured States can 'extinguish all claims that "other interested States" have under article 48': Tams, 'Waiver' (n466) 1041. But, at least vis-à-vis non-reparation claims, this is doubtful: see Crawford, *GP* (n2) 564-565; ILC, 'State Responsibility: Comments and observations' (2001) UN.Doc.A/CN.4/515, 78-79 (Netherlands/Korea).

[1340] *ARSIWA*, 266-267; also Tams, 'Waiver' (n466) 1040.

Of particular importance for present purposes is authority suggesting that this extends to procedural mechanisms: the IACtHR held, for example, that States cannot waive procedures before the Commission in favour of a direct decision by the Court.[1341] This was because the Commission procedures, accessible as they are to individuals, were not 'created for the sole benefit of the States, but also … for the exercise of important individual rights'.[1342] By parity of reasoning, any interstate waiver of individual claims under human rights instruments would be ineffective: the individual claims mechanisms are not established in the interests of any given State,[1343] and States' reparations claims are 'in the interest of' the relevant individuals.[1344] Indeed, in the *Pad* case, discussed in Chapter VII, an agreement between Iran and Turkey was reached in 'final settlement' of a dispute arising from the deaths of certain Iranian citizens.[1345] The ECtHR did not regard this agreement, in and of itself, as precluding family members bringing claims against Turkey.[1346] Nonetheless, as elucidated below, States may sometimes suspend human rights claims mechanisms.[1347]

[1341] *Gallardo v Costa Rica* (1981) 21 ILM 1424 (IACtHR) [25], also [21]; see Tams, 'Waiver' (n466) 1039.

[1342] *Gallardo* (n1341) [25].

[1343] Also *Cyprus/Turkey (Compensation)* (n95) (Sep.Op.Albuquerque/Vučinić) [10] (State cannot 'waive the rights of…individual victims they represent without…latter's consent').

[1344] *Supra*.n874; *infra*.nn1654-1655.

[1345] *Pad v Turkey (Admissibility)* App.60167/00 (ECtHR, 28.Jun.2007) [31], discussed Vermeer-Künzli, 'Concurrence' (n8) 284-285; *infra*.nn1772-1777 (with further authorities).

[1346] *Pad* (n1345) [65] (cf. reparation possibly justifying discontinuance: *infra*.nn1772ff). Further: *Denmark v Turkey (Friendly Settlement)* ECHR 2000-IV 1 (concerning, *i.a*, individual citizen: ibid.[2],[14]-[20] and Court-approved settlement: [21],[25]). However, the individual instituted no proceedings. Discussed Vermeer-Künzli, 'Concurrence' (n8) 284-285.

[1347] *Infra*.nn1371-1372.

(vii) International claims: conclusion

Taking the practice as a whole, it appears that States generally do not purport to *waive* their nationals' claims brought pursuant to international treaty-based mechanisms. Consistently with the position of various tribunals in allowing individuals to waive such claims themselves,[1348] the practice suggests that States consider those claims as belonging to the relevant individuals.[1349] Nonetheless, States do sometimes employ other mechanisms to control individuals' treaty-based claims, for 'the ability to exercise rights is preconditioned on a conferred capacity',[1350] and is subject to State consent.[1351]

In some cases, States utilise powers already available under the relevant treaty: the US, for instance, leveraged its being able to present, and settle, its nationals' small claims before the IUSCT to remove the only available forum for them to be heard.[1352] This cannot be objectionable in principle, for, if States grant individuals rights under treaties, they can define the scope of those rights.[1353] States had, for instance, a mechanism built into the 1907 International Prize Court Convention, allowing them to veto their nationals' access to the Court.[1354] Similarly, as Chapter III outlined, individuals cannot present

[1348] *Supra*.nn470-481.

[1349] Similarly Tomuschat (n105) 986; Parlett (n1) 106-108.

[1350] Parlett (n1) 360; also 350;353;367.

[1351] ibid.359-363. Similarly Roberts, 'Triangular' (n5) 368-369; Roberts, 'Hybrid' (n7) 19;24;39; Lauterpacht (n231) 288. Cf.Peters (n1) 417-418.

[1352] *Supra*.Pt.II(C)(ii).

[1353] ILC, '50th' (n380) 13 (Pambou-Tchivounda) (use 'within…limits of those procedures'); Roberts, 'Triangular' (n5) 370-373; Roberts, 'Hybrid' (n7) 19; Roberts, 'Power' (n967) 208; cf.VCLT, Art.36(2) (third-State rights exercisable according to conditions); *Prosecutor v Katanga (Admissibility)* Case.ICC-01/04-01/07 (16.Jun.2009) [88] (admissibility within State's power); Gaja, 'General' (n22) 167; *infra*.nn1354-1361.

[1354] Prize Court Convention, Art.4(2); see Parlett (n1) 60; Lauterpacht (n231) 287. Similarly MTA, Art.6.

'settled' claims to the African Commission.[1355] For reasons already outlined, that Commission was not, when faced with claims overlapping with those before the EECC, concerned with whether those claims had been 'extinguished' by the EECC Agreement.[1356] As discussed further in Chapter VI, it did, however, consider that the ACHPR itself prevented the institution of proceedings before the Commission for claims being addressed by the EECC.[1357] More recently, investment tribunals have held that States may invoke 'denial of benefits' clauses, allowing denial of protections to a given investor, after claims are made.[1358] As one tribunal explained, the States' consent to arbitration contains 'an express prior reservation of the right to deny … benefits',[1359] and 'investors are aware of the possibility of such a denial, such that no legitimate expectations are frustrated by [it]'.[1360]

In other cases, States purport to modify the procedural scheme. This was the approach taken by various States vis-à-vis claims before the post-WWI MATs,[1361] by the US and Canada for claims under NAFTA consequent on the Softwood Lumber Agreement,[1362] and, as outlined below, by SADC Member States.[1363] Treaty law allows

[1355] ACHPR, Art.56(7), *supra*.nn503-505. Further *infra*.nn1604-1610.

[1356] *Supra*.Pt.II(C)(iv).

[1357] *Interights* (n414) [57]-[60], discussed *infra*.nn1500-1503;1604-1610.

[1358] See Douglas (n301) 468-472; also Paparinskis, 'Countermeasures' (n5) 343; e.g. *Guaracachi America v Bolivia (Award)* PCA.Case-2011-17 (31.Jan.2014) [371]-[384]. *Plama* (n369) [161]-[162] appears incorrect: Douglas (n301) 470-472. Similarly Peters (n1) 314-315 (tax). Cf.*PacRim* (n1009) [4.83] ('potential unfairness…State…thwart[ing]' arbitration).

[1359] *Guaracachi* (n1358) [373], also [375].

[1360] ibid.[372]. Similarly Paparinskis, 'Countermeasures' (n5) 343;335 (fn.392).

[1361] *Supra*.Pt.II(C)(i); see Lauterpacht (n231) 287 (MATs 'creation of Governments…relevant provisions could be and eventually were terminated by States, but so long as they existed…individual could enforce his right independently'); Hess (n7) 135 ('claims…dependent on…home States').

[1362] *Supra*.Pt.II(C)(v).

States to so modify their agreements by consent, as long as other parties' rights are unaffected and it is not contrary to the treaty's object and purpose.[1364] They may denounce treaties that expressly or implicitly so allow,[1365] suspend their operation,[1366] and terminate treaties by 'conclud[ing] a later treaty relating to the same subject-matter'.[1367] This applies equally to human rights, investment and other treaties creating individual claims mechanisms, which commonly contain denunciation and/or amendment provisions.[1368] Even though human rights treaty obligations are owed *erga omnes (partes)*,[1369] with modifications necessarily affecting the rights of other States parties,[1370] nothing prevents the States parties' acting 'collectively':[1371] the SADC Member States

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[1363] *Infra*.n1372.

[1364] VCLT, Arts.39-41 (multilateral treaties); Roberts, 'Triangular' (n5) 386;404.

[1365] VCLT, Art.56; Voon and Mitchell, 'Denunciation, Termination and Survival' (2016) 31 ICSID.Rev.-FILJ 413, 415-416; Paparinskis, 'Countermeasures' (n5) 342.

[1366] VCLT, Arts.57-58.

[1367] VCLT, Art.59; Voon/Mitchell (n1365) 426; also *infra*.n1388.

[1368] E.g., AmCHR, Arts.76-78; ICCPR.Prot., Arts.11-12; also *Cifuentes Elgueta v Chile*, UN.Doc.CCPR/C/96/D/1536/2006 (28.Jul.2009) [8.2] ('declaration' limiting ICCPR.Prot. consent), cf.Ind.Op.Keller/Salvioli [5]-[8] (contrary to object/purpose); ECHR, Art.58; NAFTA, Arts.2202;2205; ECT, Arts.42;47; TEU, Arts.48-50; Chaguaramas Treaty, Art.236; *ADM* (n232) [50]-[52] (Sep.Op.Rovine); Voon/Mitchell (n1365) 416; Roberts, 'Hybrid' (n7) 22; Roberts, 'Power' (n967) 210; *infra*.nn1381-1383. Cf., suggesting ICCPR not denounceable: HRC, 'General Comment 26' (1997) UN.Doc.CCPR/C/21/Rev.1/Add.8/Rev.1; generally Mégret (n381) 106-108; Roberts, 'Triangular' (n5) 405-406; Peters (n1) 418.

[1369] *Supra*.nn415-420.

[1370] See *supra*.nn1339ff.

[1371] Paparinskis, 'Analogies' (n14) 97; also 97-98, discussing (vis-à-vis UNC, Art.103): *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, particularly [26]-[39]; also *Ahmed v HM Treasury* [2010] UKSC 2 [74],[203]. Cf.*Kadi v Council and Commission* [2005] ECR II-3649 [231]-[232] (*jus cogens* human rights review); *Kadi and Al Barakaat v Council and Commission* [2008] ECR I-6351 (GC) [316]; Tzanakopoulos (n34) 161;165; *infra*.nn2121-2129; Roberts, 'Triangular' (n5) 386. Similarly *International Status of South West Africa (Adv.Op.)* [1950] ICJ.Rep. 128, 167 (Sep.Op.Read). I thank Paparinskis and Spagnolo for discussions.

recently appear to have done just that by suspending individuals' capacity to bring claims before the SADCT for alleged human rights violations.[1372]

Nonetheless, a tension arises when individuals anticipate procedures will continue to exist and States wish to alter régimes they have established,[1373] one that has arisen recently vis-à-vis actual and proposed investment treaty reforms.[1374] Given that rights to claim under treaty-based mechanisms do appear to belong to individuals,[1375] one might be tempted to compare them with third-State treaty rights, which 'may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the [third State's] consent'.[1376] Both the State practice considered above and more recent practice does not, however, generally suggest that States consider that individuals' consent is necessary before modifying treaty regimes

[1372] See de Wet, 'Reactions to the Backlash: Trying to Revive the SADC Tribunal through Litigation' *EJIL:Talk!* (5.Aug.2016); Alter, Gathii and Helfer, 'Backlash against International Courts in West, East and Southern Africa' (2016) 27 EJIL 293, 312-314; cf.Paparinskis, 'Analogies' (n14) 97 ('clear legal evaluation…complicated').

[1373] E.g., *Fábrica de Vidrios v Venezuela (Award)* ICSID Case-ARB/12/21 (13.Nov.2017) [286],[289]; Roberts, 'Triangular' (n5) 406-411;387-388;370-374 (necessary focus *State* intent); Voon/Mitchell (n1365) 433; Harrison (n970) 931-933;943-946; Peters (n1) 323-324. Similarly Roberts, 'Power' (n967) 183-185;207;212-214.

[1374] Harrison (n970) 929-930;950; Voon/Mitchell (n1365), particularly 414-415;424-426;433; Titi, 'Most-Favoured-Nation Treatment: Survival Clauses and Reform of International Investment Law' (2016) 33 JIA 425, 425-428;435-440; all cited Henin and others, 'Innovating International Investment Agreements' (2019) 36 Arb.Int. 37, 46; Roberts, 'Triangular' (n5) 387;404-405; Peters (n1) 323; authorities *infra*.nn1379ff.

[1375] *Supra*.Pt.II(C)(i)-(vii).

[1376] VCLT, Art.37(2); see Paparinskis, 'Analogies' (n14) 82;98 and generally 79-84 ('direct'/third-party/'delegated' rights perspectives); similarly Paparinskis, 'New' (n8) 622-626;645; Harrison (n970) 943-945; Roberts, 'Triangular' (n5) 370, discussion 370-373; Roberts, 'Power' (n967) 211; Peters (n1) 312.

enabling individual claims.[1377] This is demonstrated by examining potential modification at three time periods.[1378]

First, States could modify a regime *before* claims are brought. One might consider that individuals should be given notice of any modification of claims mechanisms,[1379] much as the US was obliged to wait 'a reasonable time' before withdrawing its consent to ICJ jurisdiction in *Nicaragua*.[1380] Unilateral denunciations are indeed commonly subject to a notice period,[1381] and may be ineffective for longer where 'survival' clauses extend obligations – notably investment protections – for years post-termination.[1382] Nonetheless, the effectiveness of denunciations after any required notice period, including those that remove capacities for individuals to claim, is not generally doubted.[1383]

[1377] Cf.Harrison (n970) 946-947. Also Losari/Ewing-Chow (n359) 299-302. See *supra*.Pt.II(C)(i),(ii),(v); *infra*.nn1378ff.

[1378] Considering same three time periods vis-à-vis interpretation awards: Roberts, 'Hybrid' (n7) 58;59-66; similarly Potestà, 'Role' (n353) 265-268; also Roberts, 'Triangular' (n5) 387;409-412; Roberts, 'Power' (n967) 212. Cf.Paparinskis, 'Analogies' (n14) 87.

[1379] Similarly Harrison (n970) 946; Roberts, 'Triangular' (n5) 388;cf.407-411; Peters (n1) 323; relatedly *Fedax v Venezuela (Jurisdiction)* (1998) 37 ILM 1378 (ICSID) [33] (Art.25(4) 'put[s] investors on notice'). Cf.*HICEE v Slovakia (Part.Award)* PCA.Case-2009-11 (23.May.2011) [140]; Paparinskis, 'Analogies' (n14) 92-94;96;99.

[1380] *Military and Paramilitary Activities (Nicaragua v USA) (Jurisdiction/Admissibility)* [1984] ICJ.Rep. 392, 420; also Cheng (n73) 119; Peterson, 'Arbitrators Hold State Liable For A Denial Of Justice' *IA.Rep.* (14.Jul.2016). Cf.*Vidrios* (n1373) [287].

[1381] E.g., ICSID, Art.71 (6.mnths); ECHR, Art.58 (6.mnths); generally VCLT, Art.56 (12.mnths); Voon/Mitchell (n1365) 415-416;421;423-424; Roberts, 'Triangular' (n5) 403.

[1382] See Voon/Mitchell (n1365) 421-422;429-430; Harrison (n970) 935-941; Titi (n1374) 435-439; Peters (n1) 323; Paparinskis, 'Countermeasures' (n5) 386-387; McLachlan/Shore/Weiniger (n244) [2.38]; e.g. Model BITs: UK (2008), Art.15; Germany (2008), Art.13(3) reproduced ibid. For case relying on continuing obligations despite denunciation: Hepburn, 'Palm Oil Company Sees BIT Claim Registered' *IA.Rep.* (11.Aug.2016).

[1383] See discussion Schreuer, *ICSID* (n301) 1279-1281; Voon/Mitchell (n1365) 417-419; also Parlett (n1) 106; cf.Peters (n1) 323-324. Tribunals disagree on whether individuals can consent during an ICSID denunciation notice period, however generally agree that denunciation is effective thereafter: see discussion Peterson, 'What Have We Learned from the First Wave of Post-Denunciation ICSID Claims against Venezuela' *IA.Rep.* (30.Nov.2017); Voon/Mitchell (n1365) 417-419; e.g., *Venoklim Holding v Venezuela (Award)* ICSID Case-ARB/12/22 (3.Apr.2015) [59]-[66]; *Tenaris and Talta v Venezuela (Award)* ICSID Case-ARB/12/23 (12.Nov.2016) [62]-[65]; *Blue Bank v Venezuela (Award)* ICSID Case-ARB/12/20

Moreover, with treaty law providing no limitations on termination by consent,[1384] scholarly authority suggests that treaties, including those containing 'survival' clauses, may be terminated immediately by joint action of State parties.[1385] State practice reinforces this, with Argentina, Australia, the Czech Republic, Denmark, Estonia, Indonesia, Italy, Malta, Mexico, Slovenia, Peru, and Vietnam agreeing to terminate BITs and in the process either eliminate or alter survival clauses.[1386] No cases have apparently yet been decided,[1387] though related issues have arisen concerning the effect of later treaties on intra-EU BITs.[1388]

The question arises, second, whether this position differs where States attempt to modify procedural mechanisms while proceedings are on foot.[1389] Practice suggests that

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(26.Apr.2017) [119]-[120]; cf.Sep.Op.Söderlund [45]-[56]; *Vidrios* (n1373) [250]-[304], particularly [286]-[296]. For BIT denunciations: Voon/Mitchell (n1365) 416-417 (Bolivia/Ecuador/Venezuela);424-425 (Sth.Africa/Indonesia); Titi (n1374) 435-436; Harrison (n970) 930-931.

[1384] See VCLT, Art.54(b) (termination/withdrawal 'at any time by consent of all'); Voon/Mitchell (n1365) 426; Roberts, 'Triangular' (n5) 386;404; Harrison (n970) 941-943.

[1385] Sornarajah, *Foreign Investment* (4th edn, 2017) 276-277 (noting (fn.221) views in *Eastern Sugar v Czech Republic (Part.Award)* SCC-Case.088/2004 (27.Mar.2007) [175] 'unsound'); Voon/Mitchell (n1365) 430-432; Roberts, 'Triangular' (n5) 404;411-414; Titi (n1374) 437-440; also Paparinskis, 'Analogies' (n14) 96. Cf.Harrison (n970) 942-947; Peters (n1) 324; *Oostergetel v Slovakia (Jurisdiction)* UNCITRAL (30.Apr.2010) [95]-[97].

[1386] For outline and discussion of practice: Voon/Mitchell (n1365) 427;430-431; also Peterson, 'Czech Republic Terminates Investment Treaties' *IA.Rep.* (1.Feb.2011); Peterson, 'Indonesia Ramps up Termination of BITs' (20.Nov.2015); Hepburn, 'Investor-State Arbitration Opt-Outs Proliferate in Newly-Disclosed Trans-Pacific Partnership Agreement Side Letters' (8.Mar.2018); Paparinskis, 'Analogies' (n14) 97; Roberts, 'Triangular' (n5) 387; Titi (n1374) 437-438.

[1387] See Sornarajah (n1385) 277. Cf.UNCTAD, 'UNCTAD's Reform Package for the International Investment Regime' (2017) 84 (suggesting two cases brought despite joint termination). However, one termination was 'subject to' survival clause: *Gavazzi v Romania (Jurisdiction/Admissibility/Liability)* ICSID Case-ARB/12/25 (21.Apr.2015) (fn.1). No public information is available on the other: *Impresa Grassetto v Slovenia* ICSID Case-ARB/13/10.

[1388] See *Wirtgen v Czech Republic (Fin.Award)* PCA.Case-2014-03 (11.Oct.2017) [253] (VCLT requirements unmet); cf.*Eastern Sugar* (n1385) [158]-[176] and *Oostergetel* (n1385) [72]-[98], referenced therein (suggesting not possible); discussion Voon/Mitchell (n1365) 432 and Sornarajah, *supra*.n1385. Further: Bohmer, 'In Now-Public Decision, Reasoning of German Federal Supreme Court on Set aside of BIT Award Is Clarified' *IA.Rep.* (11.Nov.2018) (EU-law effect to terminate arbitration offer).

[1389] Roberts, 'Triangular' (n5) 411-414. Generally authorities *supra*.n1378.

States are more wary of interfering at this stage: as noted above, in suspending softwood lumber-related claims under NAFTA, the US and Canada obtained the claimants' consent to termination,[1390] while the EECC Agreement left existing claims untouched.[1391] However, notwithstanding that certain treaties prevent States unilaterally withdrawing their consent to arbitrate,[1392] Roberts makes a convincing argument from the perspective of domestic public law that the State of nationality can, together with other treaty parties, jointly modify existing claims.[1393] Indeed, the very inclusion of provisions preventing unilateral withdrawal suggests that the situation may otherwise be more flexible.[1394] This is supported by the post-WWI practice, in which States altered procedural mechanisms even where claims were pending.[1395] The US-Iran settlement – albeit premised on US control of the proceedings – likewise affected ongoing cases,[1396] while the EU Commission is apparently advocating that Member States take steps to halt ongoing intra-EU investment arbitrations.[1397] Moreover, where investment tribunals have been faced

[1390] SLA, Ann.2A; see Paparinskis, 'New' (n8) 631;645. Cf.Peterson, 'U.S. Financial Firm Discontinues Argentine Claim' *IA.Rep.* (2.Apr.2009).

[1391] *Supra*.Pt.III(C)(iv). Similarly Losari/Ewing-Chow (n359) 299-300 (Mauritius Convention).

[1392] ICSID, Art.25; discussion Schreuer, *ICSID* (n301) 254ff;1280 (on Art.72); ICSID (n536) 1009-1010 (subsists notwithstanding ICSID denunciation). Also *ADM* (n232) [174] ('irrevocable offer'); Peters (n1) 286;288; Roberts, 'Triangular' (n5) 396.

[1393] Roberts, 'Triangular' (n5) 409-414.

[1394] See discussion Schreuer, *ICSID* (n301) 1280;cf.254.

[1395] *Supra*.Pt.II(C)(i), particularly *supra*.nn1272;1274.

[1396] *Supra*.Pt.II(C)(ii).

[1397] Dahlquist and Peterson, 'European Commission's Infringement Arguments Come into Focus' *IA.Rep.* (10.Sept.2015); Dahlquist, 'Investigation: European Commission's Push for Termination of Intra-EU Investment Treaties Shifts to Multilateral Plane' *IA.Rep.* (15.Nov.2018). Further: Voon/Mitchell (n1365) 428-429.

with joint treaty interpretations, even midway through a case, they have generally given these effect.[1398]

One Tribunal did recently hold, outside of the ICSID context, that Lesotho's consent to SADCT arbitration was irrevocable once proceedings had begun.[1399] Lesotho had therefore breached the SADC Protocol by (with the other Member States) allowing the SADCT to be suspended, providing no alternative forum, and thus preventing an individual from continuing its claim.[1400] However, that finding was made by a tribunal whose jurisdiction was based on a *different* instrument, and domestic courts set the award aside because the tribunal in fact lacked jurisdiction.[1401] This case suggests, nonetheless, that whether a tribunal would accept States' attempts to prevent individual proceedings already underway is not beyond dispute.[1402]

Third, States might attempt to settle a claim already adjudicated. At this stage, the individual procedural mechanism has been exhausted and the respondent State is obliged to pay any reparation awarded.[1403] However, the individual will usually – in the absence

[1398] *ADF v US* (2003) ICSID.Rev.-FILJ 195 [175]-[178]; also *Pope* (n969) [51] (NAFTA, Art.1131 mandating); cf.[47]; *Methanex* (n969), Pt.IV(C) [17]-[22]; all discussed Roberts, 'Power' (n967) 180-181;194; Kaufmann-Kohler (n19) 316-317, referencing *CME v Czech Republic (Fin.Award)* (2003) 9 ICSID.Rep. 264 [437],[504]; also Potestà, 'Potential' (n353) 763; generally Roberts, 'Hybrid' (n7) 53; *supra*.n969. Further: *HICEE* (n1379) [139]-[140].

[1399] Peterson, 'Denial' (n1380) (decision unreported).

[1400] ibid.

[1401] Peterson, 'Singapore Judge Sees Investors as Clearing Temporal Jurisdiction Hurdle in Fight with Lesotho' *IA.Rep.* (17.Aug.2017), affirmed on appeal: Charlotin, 'Singapore Appeal Court Grapples with Various Investment Treaty Arbitration Concepts' *IA.Rep*. (29.Nov.2018), referencing *Swissbourgh v Lesotho* [2018] SGCA 81.

[1402] See opposing positions *supra*.nn1385;1388; also 1390;1393.

[1403] Perez, 'Diplomatic Protection Revival for Failure to Comply with Investment Arbitration Awards' (2012) 3 JIDS 445, 447-448; e.g., concerning enforcement of *res judicata* individual-State award: *'Société*

of voluntary payment – be obliged to turn either to its State of nationality,[1404] or to domestic courts.[1405] This may explain why States felt able to settle claims for amounts owing under post-WWI MAT awards.[1406] For, whatever the source of the original debt, States undoubtedly have the power – as discussed above – to control both their own, and municipal law, claims.[1407]

D. Secondary claims

States thus have extensive powers to prevent their nationals' claims being brought before domestic and international fora. Nonetheless, States risk secondary claims should they so act.[1408] One can envisage two commonly recognised rights being of particular pertinence in this respect.[1409] First, human rights instruments and domestic constitutional provisions often protect property rights.[1410] Domestic and international courts have recognised that private claims can amount to property,[1411] and investment tribunals have

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Commercial de Belgique' [1939] PCIJ.Rep. SerA/B.No.78, 175-176; also *Pious Fund (US v Mexico)* (1902) IX UNRIAA 1, 13.

[1404] E.g., ICSID, Art.27(1) (diplomatic protection for enforcement); discussion Schreuer, *ICSID* (n301) 426-427; Paparinskis, 'Countermeasures' (n5) 309-311; Perez (n1403) 446;455ff. Cf.*supra*.n1276.

[1405] See ICSID, Art.54; Schreuer, *ICSID* (n301) 1118; Douglas (n367) 226-236; Douglas (n301) 31-32 (NY.Convention); Perez (n1403) 451-452; McCorquodale (n1) 292; Tzanakopoulos (n34) 145; Nollkaemper (n6) 3;9;177.

[1406] *Supra*.nn1276-1284, particularly *supra*.n1276.

[1407] *Supra*.Pt.II(A)-(B).

[1408] Similarly Roberts, 'Triangular' (n5) 398;411-414; also Fitzmaurice, 'FourthRep' (n16) [159]. For 'secondary' language, e.g.: Peterson, 'Singapore' (n1401).

[1409] Similarly Gattini, 'Trojan' (n421) 525-526. Further: *Julian/Drake v New Zealand* (1997) 118 ILR 223 (UNHRC) 227-228 (waiver-related claims: denying remedy/discrimination); *Kandyrine/France* (n1151) [23].

[1410] ECHR.Prot.1, Art.1 ('possessions'); ACHPR, Art.14; AmCHR Art.21. For domestic law, sources *infra*.nn1411;1414 and generally *Oppenheim's* (n73) 539.

also occasionally recognised claims as 'investments',[1412] including international claims such as those before the SADCT.[1413] Domestic courts have, in a number of decisions, considered whether a purported waiver or settlement of claims expropriates such rights.[1414]

Second, various instruments recognise fair hearing rights.[1415] As a purported waiver of claims generally involves States' barring claims before their own courts and other fora, this right might be thereby engaged.[1416] Likewise, in investment law, one tribunal found Lesotho to have committed a denial of justice by participating in suspending the SADC Tribunal when a case was pending against it.[1417] The South African Constitutional Court criticised South Africa's involvement in that suspension for, in part, similar reasons,[1418] while an ACommHR case was brought but dismissed.[1419]

[1411] E.g., *Dames* (n1059) 688-689; *Draon v France* (2006) 42 EHRR 40 [65] (where 'sufficient basis in national law'); *infra*.nn1412-1413; also *Beaumartin v France* (1995) 19 EHRR 485, *infra*.n1911; cf.*Breitung's Estate v USA (The Seguranca)* (1939) 10 ILR 598 (Arbitration) 604-605 (no individual claim under interstate agreement).

[1412] See cases referenced Charlotin (n1401); Peterson, 'Singapore' (n1401): e.g. *Mondev v US (Award)* (2002) 6 ICSID.Rep. 192 [80]-[83].

[1413] Peterson, 'In New Ruling On Covered Investors And Investments' *IA.Rep*. (14.Jul.2016); cf.Peterson, 'Singapore' (n1401); also discussing *ATA Construction v Jordan (Award)* ICSID Case-ARB/08/2 (18.May.2010) [125]-[126] ('right to arbitration…asset').

[1414] See *German Assets* (n1154) 544-546 (no expropriation); similarly *Akiyama* (n1154) 235; *State Treaty* (n1166) 186 (no unconstitutional taking); *German-Portuguese Assets Case* (1968) 51 ILR 401 (BVerfG) 411-414; *Shimoda* (n268) 642 (no taking); *Aris Gloves v US* (1970) 56 ILR 536 (US.Ct.Cl.) 542-543; cf.*Ditta* (n1167) 71 (unclear); *Household Effects* (n1165) 302;312 (compensation required). Cf.*Haas* (n1168) 317-318. Generally Roberts, 'Triangular' (n5) 398. Cf.*Dames* (n1059) 688-689.

[1415] ICCPR, Art.14(1); ECHR, Art.6(1); AmCHR, Art.8(1); ACHPR, Art.7(1).

[1416] *Infra*.nn1419;1424;1426; also *M v UN and Belgium* (1969) 69 ILR 139 (Brussels.CA), 143.

[1417] Peterson, 'Denial' (n1380).

[1418] Hepburn, 'South African Court Finds Fault with Former President's Role' *IA.Rep*. (2.Mar.2018).

[1419] *Tembani v Angola et al*, Comm409/12 (ACommHR, Oct/Nov.2013) [138]-[142],[144],[146], cited de Wet (n1372).

Naturally, the success of such claims depends on whether there are fora – domestic or international – available to hear them.[1420] Moreover, even where such fora exist, it does not follow that individual claims may never be impaired, for even most human rights may be limited to some extent.[1421] And, as noted at the outset, in the post-war or other emergency environment, it may be a laudable aim to sacrifice nationals' assets to secure peace.[1422] Thus, both domestic and international courts have generally been prepared to accept that barring individual claims does not infringe property rights where proportionate and done in pursuit of a legitimate interest.[1423] Concerning rights to a hearing, the ECtHR has, for instance, held that States may impede court access where necessary to comply with obligations concerning immunity.[1424] More pertinently, in what later became the *Certain Property Case*, the ECtHR considered a post-war treaty clause that prevented Germany from admitting claims against persons who had received property confiscated for reparations purposes.[1425] The Court examined whether Germany

[1420] See *supra*.nn1410-1419; similarly Kalshoven (n813) 41-42. Non-nationals might claim under different BITs: e.g. *Azurix (Annulment)* (n297) [109], while human rights are jurisdiction-based (Mégret (n381) 89; *Brownlie's* (n77) 651-653; Arangio-Ruiz (n182) [134]; *Restatement* (n107) 179), meaning individuals can claim despite their States being non-party: McCorquodale (n1) 290-291; e.g. *Pad* (n1345), *supra*.nn1345-1346.

[1421] E.g., *Construction of a Wall in the Occupied Palestinian Territory (Adv.Op.)* [2004] ICJ.Rep. 136 [136]; also Peters (n1) 487; *infra*.nn1422-1427.

[1422] See authorities *supra*.n1059; Gattini, 'Trojan' (n421) 541; also Peters (n1) 175 (State claim treated 'preferentially');212-213;216. Generally, on sacrificing individual interests: Cheng (n73) 47-48; Borchard (n319) 31;351; Jessup (n2) 138; Weis (n1068) 33-34; Calamita, 'International Human Rights and the Interpretation of International Investment Treaties' in Baetens, *Investment* (n357) 174-175. Cf.Aréchaga (n69) 563 and authorities (amnesties).

[1423] See *Belk v US* (1988) 858 F.2d 706 (USCA) 709 (impairment/public interest); *Draon* (n1411) [77],[78]-[86] (disproportionate *in casu*); *German Assets* (n1154) 545; also *State Treaty* (n1166) 186 (no ECHR compensation); *Kandyrine/France* (n1151) [23]; *Akiyama* (n1154) 237; *infra*.n1427; Gattini, 'Trojan' (n421) 541; Houtte/Delmartino/Yi (n266) 28; Peters (n1) 216; Benvenisti (n300) 1102-1103.

[1424] E.g., *Waite and Kennedy v Germany* (1999) 118 ILR 121 [58],[63],[67]-[73]; *Al-Adsani v UK* (2002) 34 EHRR 11 [54]-[56]; *Assoc.SOS* (n470) [38]-[39], discussed *supra*.n1310; Gattini, 'Trojan' (n421) 530; also Nollkaemper (n6) 22;29-30.

[1425] *Hans-Adam* (n404) [29]; also *Certain Property* (n404) [14]; discussion Winn, 'Peace Treaty Claim Waivers' (2006) 38 Geo.Wash.ILR 807, 809-810;816.

could, relying on this clause, deprive an individual claiming restitution of property of his right to a hearing.[1426] Ultimately, the Court considered that Germany had the 'legitimate aim' of regaining its sovereignty in the 'vital public interest', and its actions were not therefore 'disproportionate'.[1427]

III. Conclusion

The foregoing has suggested that both individuals and States have the capacity to affect claims belonging to the other. Individual waivers may affect a State's ability to establish breach or damage in a later claim.[1428] Where States waive their nationals' claims, usually as part of a settlement, the practice suggests that they intend to prevent claims before domestic courts. They generally acknowledge, however, an inability to control actions in third-State courts.[1429] Additionally, it appears that they do not generally intend – nor have the capacity – to waive their nationals' *international* claims.[1430] What States *can* do is withdraw from, or modify the operation of, the treaty régimes under which those claims are brought.[1431] However, States risk actions under human rights, investment, or domestic law if their actions are disproportionate.[1432]

[1426] *Hans-Adam* (n404) [51]-[52]; Winn (n1425) 813.

[1427] *Hans-Adam* (n404) [69]; discussion Winn (n1425) 813-815; Gattini, 'Trojan' (n421) 532.

[1428] *Supra*.Pt.I.

[1429] *Supra*.Pt.II(B).

[1430] *Supra*.Pt.II(C).

[1431] *Supra*.Pt.II(C)(vii).

[1432] *Supra*.Pt.II(D), particularly *supra*.nn1423;1427.

CHAPTER SIX: *RES JUDICATA* AND RELATED PROVISIONS AND PRINCIPLES

This Chapter turns to consider the potential operation of *res judicata* as between overlapping individual and interstate claims. Chapter III outlined that the application of *res judicata*, and treaty-based provisions reflecting its elements, depends on whether three "identities" – cause of action, object, and parties – exist between two claims.[1433] This Chapter argues that *res judicata*, as a principle or as embodied in certain treaty provisions, might operate vis-à-vis overlapping individual and interstate diplomatic protection claims. Alternatively, tribunals may prevent such overlapping claims through the application of principles including abuse of process,[1434] where *res judicata* as such is avoided.[1435]

After examining why *res judicata* is *prima facie* inapplicable to overlapping individual-interstate claims, this Chapter examines the three identities in turn. For each, it draws out principles from the case law applying *res judicata* and similar treaty-based provisions, before examining how those principles are, or might be, applied vis-à-vis overlapping individual-interstate claims. The final section outlines, utilising the categorisation of interstate claims developed in Chapters II and IV, where the necessary identity is likely to be present, namely vis-à-vis diplomatic protection (including that part of 'mixed' claims) and human rights claims, but not 'direct' claims properly so-called.

[1433] *Supra*.nn518-520;525.

[1434] Generally Shany (n4) 192 (abuse of rights general principle/custom, preventing 'abuse of process'); also Shany (n7) 256-259; *Waste.Mgmt. (Objection)* (n516) [49]-[50].

[1435] Suggesting this approach: Shany (n4) 192-194; Shany (n7) 258-259;287; Wehland (n13) [7.29]-[7.52]; Gaillard, 'Abuse of Process in International Arbitration' (2017) 32 ICSID.Rev.-FILJ 17, 22-26;32-37. Also *Dallal* (n301) 162-163, discussed Parlett (n1) 100-101; *Caratube v Kazakhstan (Award)* ICSID Case-ARB/13/13 (27.Sept.2017) [498]. See *supra*.nn463;490ff;*infra*.nn1642;1647;1651;1653;1656;1734;1764.

I. The *prima facie* non-applicability of *res judicata*

Overlapping interstate and individual-State claims do not easily satisfy the *res judicata* requirements, there being, *prima facie*, no party identity.[1436] Indeed, the inclusion in certain treaties of provisions addressing overlapping interstate-individual claims, such as ICSID's Article 27,[1437] might suggest that *res judicata* was not otherwise expected to operate,[1438] except perhaps in the very particular circumstances addressed below.[1439]

Even in diplomatic protection claims, arising from individual injury,[1440] a State is considered to institute proceedings in defence of its own rights, and thus on a cause of action peculiar to it,[1441] as well as for its own reparation.[1442] This view, accepted 'for centuries',[1443] gives diplomatic protection claims a 'qualitatively different character' from individual claims arising from the same circumstances.[1444] Thus, the PCIJ considered that an individual's restitution claim before the German-Polish MAT, and an interstate diplomatic protection claim concerning a convention's 'interpretation and application',

[1436] *Supra*.n532.

[1437] *Supra*.n536, generally Ch.III(II)(B).

[1438] Cf.*Argentina-Definitive Anti-Dumping Duties on Poultry from Brazil-Panel.Rep.* (22.Apr.2003) WT/DS241R [7.38], cited Shany (n4) 156; Salles (n473) 259; cf.Wehland (n13) [6.49] (ICCPR); Shany (n7) 254; Schreuer, *ICSID* (n301) 421 (interstate/investor-State parties separate); *supra*.n548 (not custom). Further: Shany, quoted *supra*.n533.

[1439] *Infra*.n1633 (subrogation).

[1440] *Supra*.nn640-644; generally Ch.IV(I).

[1441] Shany (n7) 36, citing *Mavrommatis* (n313) 11; also Shany (n4) 136;140-141; Borchard (n319) 799; Vermeer-Künzli, 'Concurrence' (n8) 277-278; *Barcelona Traction* (n69) [79]; *supra*.nn322;671.

[1442] *Supra*.nn812ff;834; *Chórzow (Merits)* (n80) 28, discussed Peters (n1) 171; Amerasinghe (n323) 67, also 22; Amerasinghe (n14) 49; DADP, 97-98.

[1443] Dugard, 'FirstRep' (n322) [62].

[1444] Shany (n7) 36; also Shany (n4) 42-43;136;140-141.

were neither 'identical actions', nor brought by the same parties, for *lis pendens* purposes,[1445] despite concerning, in part, the same property.[1446] As one author has said, albeit vis-à-vis domestic and international proceedings, 'although the subject-matter may be substantially the same, the parties will not be, and the issues will have a very different aspect'.[1447] Nonetheless, this Chapter argues that the three *res judicata* "identities" may be applied adaptably,[1448] such that the principle might operate vis-à-vis overlapping interstate diplomatic protection and individual claims.[1449] Each "identity" is now considered in turn.

II. Cause of action

Cause of action identity requires that the rights allegedly breached in two claims be the same.[1450] Such breach of rights in overlapping individual-interstate claims may indeed be indistinguishable.[1451] However, this requires two elements to be present. First, the relevant obligations must have the same basis, for claims brought under different

[1445] *Silesia* (n308) 20 (additionally 'not courts of the same character'); also 19; Shany (n7) 26;231-232;239-240; Shany (n4) 42-43; Hobér (n13) 325. Similarly *The 'Camouco' (Panama v France) (Prompt.Rel.)* [2000] ITLOS.Rep. 10 [55]-[58], discussed Shany (n4) 62-63; Nollkaemper (n6) 34; *Bužau-Nehoiaşi (Allemagne c Roumanie)* (1939) III UNRIAA 1827,1836, cited Cheng (n73) 337; Schreuer, *Decisions* (n2) 330 and authorities (*lis pendens* inapplicability MATs/domestic courts); *Chemins de Fer* (1929) 5 AD 498 (Franco-German MAT) 499; Shany (n7) 242.

[1446] *Silesia* (n308) 19; *Chórzow (Merits)* (n80) 26-28; Amerasinghe (n323) 17; cf.Shany (n7) 231-232.

[1447] *Brownlie (7th)* (n532) 51; also Nollkaemper (n12) 529-530.

[1448] Similarly Salles (n473) 246-247 ('substantive'/'formal'/'strict' identity options);271-277 (*res judicata* depends on 'identity' elasticity); Shany (n4) 133-144;160; Reinisch (n513) 55-72; cf.Shany (n7) 24-26.

[1449] *Infra*.Pt.V(A) and authorities therein; similarly Vermeer-Künzli, 'Concurrence' (n8) 277.

[1450] *Supra*.nn518-519.

[1451] See *infra*.nn1456;1463-1464. Cf.Shany (n4) 136; Salles (n473) 273-274 (unlikely); also Dugard, 'FirstRep' (n322) [69], *infra*.n1457.

treaties, or treaty and custom respectively, do not share grounds.[1452] The individual claims with which this thesis is concerned are treaty or domestic law-based.[1453] As interstate domestic law claims are unusual,[1454] identity as between overlapping individual-interstate claims is only therefore likely to exist where States invoke responsibility under the same treaties as individuals.

Second, the term "right" is used in a Hohfeldian sense to denote a duty, owed to the holder, not to violate it.[1455] Cause of action identity requires that two claims concern the same entity's rights, as causes of action differ where they allege breach of rights held by distinct persons.[1456] Although not addressing *res judicata* as such, the ILC's Special Rapporteur on Diplomatic Protection noted, vis-à-vis overlapping claims, that

> If the holder of the right is the State, it may enforce its right irrespective of whether the individual himself has a remedy before an international forum. If ... the individual is the holder of the right, it becomes possible to argue that the State's right is purely residual and procedural, that is, a right that may only be exercised in the absence of a remedy pertaining to the individual.[1457]

[1452] Reinisch (n513) 64-65;68-70, discussing *Mox Plant (Ireland v UK) (Prov.Measures)* [2001]) ITLOS Rep 95 [50]-[51], also Shany (n4) 7-8;111; Hobér (n13) 305-311;344-355, discussing *CME (Final)* (n1398) [432]-[433] and *Lauder* (n583) [165],[171],[177]; Salles (n473) 246;273-275; Wehland (n13) [6.124],[6.127]; Roberts, 'Hybrid' (n7) 40; Shany (n7) 27; ILA, 'InterimRep.' (n511) 57-58; Pauwelyn/Salles (n460) 103-104.

[1453] *Supra*.Ch.II(I).

[1454] *Supra*.n447.

[1455] Hohfeld (n93) 38, *supra*.n93, discussed, e.g., McCorquodale (n1) 285; Varuhas, *Damages and Human Rights* (2016) 16-17; Duijzentkunst (n684); Paddeu, *Justification* (n53) 103-105; generally Kramer/Simmonds/Steiner (n684), e.g, 245-247;cf.9; Thomas (n188) 82;88-91; Nollkaemper (n6) 95;98-99; Peters (n1) 167-169;172-173, discussing *ARSIWA*, 209-210;192-193; Graefrath (n107) 47; cf.Crawford, 'ThirdRep' (n144) [84]-[85]; Crawford, 'Multilateral' (n74) 436-437.

[1456] See *supra*.n1441; Roberts, 'Hybrid' (n7) 40, cf.*infra*.n1647; Douglas (n367) 182; also Vermeer-Künzli, 'Concurrence' (n8) 277-278; discussion *infra*.nn1698ff; *Caratube* (n1435) [495]. Cf.Paparinskis, 'Countermeasures' (n5) 297-298 (same primary rule breached).

[1457] Dugard, 'FirstRep' (n322) [69], referenced Crawford, 'Revisited' (n457) 141; Cucos (n559) 185.

However, as Chapters I and IV demonstrated, in all interstate claims, including diplomatic protection and human rights claims, a State invokes breach of obligations owed to itself.[1458] States never, therefore, exercise merely "procedural" rights to enforce obligations owed to individuals.[1459] Whether or not the rights – and alleged breach – in overlapping claims are the same therefore turns on those invoked by the individual.[1460] Human rights, for instance, are held by individuals,[1461] meaning that interstate claims for their breach necessarily invoke rights that have a 'parallel' existence to, but are not the same as, those invoked in individual claims.[1462] In other claims, an individual may likewise conceivably claim for breach of its rights (called 'direct' claims), or alternatively invoke obligations owed to the State alone ('derivative' claims).[1463] Only in the latter case would the breach alleged by individuals and States be precisely the same.[1464]

[1458] *Supra*.Ch.I(II)(D),Ch.IV(I)(A)-(B),(II) and authorities, particularly *ARSIWA*, Arts.42;48; Gaja, 'Compliance' (n190) 957-958; Nollkaemper (n6) 95; Simma/Pulkowski (n274) 160-161; Vermeer-Künzli, 'Interest' (n183) 571;579-580; authorities *supra*.nn671-673;677;831.

[1459] Cf.*supra*.n1457. See Paparinskis, 'New' (n8) 640-641; Dugard, 'FirstRep' (n322) [73] ('codifie[d]...in...traditional form'), cf.[65]-[66]; cf.Crawford, 'ThirdRep' (n144) [85]; Roberts, 'Hybrid' (n7) 33-34; Bennouna (n325) [49]; Kato (n340) 192-193.

[1460] Cf.Roberts, 'Hybrid' (n7) 40;43; Nollkaemper (n6) 98-99.

[1461] E.g. Nollkaemper (n6) 100; Roberts, 'Hybrid' (n7) 32; DADP, 25-26; *supra*.n675.

[1462] Peters (n1) 169; ILC, '50th' (n380) 27 (Brownlie); similarly ILC, '53rd' (n326) 131 (Crawford); Roberts, 'Hybrid' (n7) 33-35; Simma/Pulkowski (n274) 159. Cf.Paparinskis, 'Countermeasures' (n5) 287;295; Parlett (n1) 112; *supra*.nn348;380.

[1463] See Douglas (n367) 163-164 ('derivative' approach);183-184 ('direct'); Douglas (n301) 11-17;32-38; Paparinskis, 'Countermeasures' (n5) 288-292;334-335; Paparinskis, 'New' (n8) 622-627; Parlett (n1) 108-112; Peters (n1) 284-317 ('procedural'/'substantive'/'direct'/'derivative' rights), particularly 301-315 and authorities; Roucounas (n4) 399; Roberts, 'Hybrid' (n7) 36-39; Roberts, 'Triangular' (n5) 355-356; Duijzentkunst (n684); Kjos (n544) 92;225; cf.Spiermann (n58) 185, referencing Crawford, 'Retrospect' (n5) 888 (regardless of substantive BIT rights, 'investor...opts in...as...secondary right holder'). The issue is generally regarded as turning on treaty interpretation: e.g. ibid.887-888; Douglas (n301) 34-35; Kjos (n544) 225; Nollkaemper (n6) 98-106; Peters (n1) 315-317; Parlett (n1) 108-109;112-113; Paparinskis, 'New' (n8) 626. Further *infra*.nn2007-2010.

[1464] Cf.Douglas (n367) 182; Roberts, 'Hybrid' (n7) 40;42 ('interdependent'); Paparinskis, 'Countermeasures' (n5) 297;312.

The distinction may be of importance for *res judicata* purposes. Thus, considering whether two individual claims were 'substantially the same' as the interstate *Avena* proceedings, the IACHR observed that:

> the jurisdiction of the ICJ differs from that of the IACHR in significant respects, particularly insofar as the ICJ deals with interstate litigation whereas the Commission deals with petitions brought by individuals against states, *and insofar as the rights at issue and the remedies provided by the Commission correspond directly to the individual presumably concerned*.[1465]

Nonetheless, complete cause of action identity may be unnecessary for *res judicata*, and provisions reflecting its elements, to apply.[1466] While 'cause of action' can be narrowly defined as turning on a given legal provision or basis, it may also refer broadly to the facts giving rise to relief.[1467] It thus often suffices for *res judicata* to operate – at least under common law – if claims are the same in essentials, even if they could be brought under separate legal heads.[1468] Indeed, parties are precluded, through 'issue estoppel' (sometimes also called 'collateral estoppel'),[1469] from re-litigating essential factual or

[1465] *Rodriguez* (n407) [55] (emphasis added), also quoted *Arias* (n407) [44]. Generally *supra*.nn406-407.

[1466] Shany (n7) 26 ('degree of flexibility');133; Reinisch (n513) 68; Lowe (n516) 41; Shany (n4) 141-142;160; Hess (n7) 245; *Vivendi v Argentina (Jurisdiction)* ICSID Case-ARB/97/3 (14.Nov.2005) [74]; Wehland (n13) [6.87]-[6.88]; Salles (n473) 273-274; Crawford, 'Chance' (n96) 224; *infra*.nn1467ff; cf.Roberts, 'Hybrid' (n7) 40;43.

[1467] See discussion Hobér (n13) 276; Wehland (n13) [1.16]-[1.18],[6.85]-[6.87],[6.122]-[6.130]; also Shany (n7) 25-26; Barnett (n513) [4.86]ff and authorities; McDermott (n513) [6.21]ff; Reinisch (n513) 70; *Trawl Industries v Effem Foods* (1992) 36 FCR 406, 418; Layton and others, *European Civil Practice*, vol.1 (2nd edn, 2004) [22.008], cf.[22.011], referencing *The Tatry* [1994] ECR I-5460 [38]-[39].

[1468] Handley (n511) [7.05]-[7.06], citing *Trawl* (n1467) 422 (statutory/tortious claims same in 'substance'); Lange (n513) 124-125; Barnett (n513) [4.86]ff; *Garraway v Williams* [2011] CCJ 12 [14] ('essentially the same'). Cf.McDermott (n513) [6.04]-[6.07],[6.14]-[6.15],[6.32].

[1469] Strictly, a different US doctrine disregarding party identity in certain cases: Barnett (n513) [5.92]-[5.98]; ILA, 'FinalRep.' (n518) [59]. However, the two are sometimes used interchangeably: *Apotex* (n516) [7.18]; e.g. Roberts, 'Hybrid' (n7) 43; Dodge (n451) 366-367; ILA, 'InterimRep.' (n511) 46;48; Salles (n473) 272-273; Shany (n7) 165; cases *infra*.n1470.

legal *issues* 'distinctly raised and finally decided in earlier proceedings'.[1470] This minimises the necessity that the causes of action be identical across two claims.[1471]

Certain international case law reflects this non-formalistic approach.[1472] One UNCLOS tribunal determined, for instance, that it would be 'artificial' to treat disputes under two treaty régimes as 'distinct'.[1473] Human rights tribunals have also overwhelmingly accepted that the provisions precluding multiple claims discussed in Chapter III may apply vis-à-vis decisions under different treaties.[1474] For the ECtHR, for instance, a 'complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on'.[1475] Article 35(2)(b), preventing the ECtHR from considering matters 'substantially the same' as those already heard,[1476] therefore applied where complaints were previously brought before various other fora,[1477] including

[1470] ILA, 'InterimRep.' (n511) 42; also 47;cf.50;63; see *Apotex* (n516) [7.17]-[7.23]; *Tokios Tokelės v Ukraine (Award)* ICSID Case-ARB/02/18 (29.Jun.2007) [98]; *RSM v Grenada (Award)* ICSID Case-ARB/10/6 (7.Dec.2010) [7.1.1]-[7.1.2]; *Caratube* (n1435) [460]-[465]; generally Handley (n511) Ch.8; Barnett (n513) Ch.5; Shany (n7) 23;28;165; Brower/Henin (n514) 56; Wehland (n13) [6.73],[6.116],[6.121].

[1471] Barnett (n513) [5.05]; Lange (n513) 29-30; Salles (n473) 273; Lowe (n516) 41-42. Generally on reasoning, not just *dispositif*, being *res judicata*: ibid.39-40; Cheng (n73) 348-350; ILA, 'InterimRep.' (n511) 51-52;59-60, discussing *Delimitation of the Continental Shelf (UK v France)* (1978) XVIII UNRIAA 271 [28], *Pious Fund* (n1403); *CME v Czech Republic (Schreuer/Reinisch Exp.Op.Quantum)* UNCITRAL (20.Jun.2002) [67]-[70]; *Apotex* (n516) [7.23]-[7.32].

[1472] See Reinisch (n513) 68;71; Salles (n473) 247; Shany (n7) 26; Shany (n4) 114-116;cf.7;111-114;39-144; *Libananco v Turkey (Award)* ICSID Case-ARB/06/8 (31.Aug.2011) [548] ('strict'); Roberts, 'Hybrid' (n7) 40.

[1473] *Southern Bluefin Tuna (Australia/NZ v Japan) (Jurisdiction/Admissibility)* (2000) 39 ILM 1359 [54], discussed, e.g., Reinisch (n513) 66; *Schreuer/Reinisch* (n1471) [52]-[55]; ILA, 'InterimRep.' (n511) 57; Shany (n4) 8;119; Shany (n7) 236-237; Salles (n473) 261-262. Cf.*Caratube* (n1435) [497] ('not artificial').

[1474] *Schreuer/Reinisch* (n1471) [51],[59]-[62],[73]; Reinisch (n513) 70-72; cf.*infra*.n1479.

[1475] *Khadzhimuradov/Russia* (n492) [80]; similarly *Previti v Italy*, App.45291/06 (ECtHR, 8.Dec.2009) [293]; also Reinisch (n513) 71.

[1476] *Supra*.nn490-492. Noting the treaty already references matters '*substantially* the same': Shany (n7) 26 (emphasis added). But cf.*infra*.n1480.

[1477] Generally ibid.25-26;214; Reinisch (n513) 71-72; e.g. *Vojnović/Croatia (ECHR)* (n491) [31]-[32] (HRC 'essentially the same complaints'); similarly *Pauger/Austria* (n491) 174; *Peraldi v France*, App.2096/05

tribunals considering investment treaty claims.[1478] Similarly, although the HRC, absent reservations, sometimes admits cases considered elsewhere,[1479] various UN treaty bodies, which are precluded from rehearing the '*same* matter',[1480] have accepted that ECtHR decisions can render claims under the ICCPR inadmissible as concerning 'the same substantive rights',[1481] as can Inter-American procedures.[1482] The IACtHR likewise considers that it is 'the behavior or the event that is a violation of some human right' that is relevant.[1483] It has accepted that previous consideration by different bodies may render applications inadmissible,[1484] while the African Commission has acknowledged the preclusive effect of UN treaty body decisions.[1485]

(ECtHR, 7.Apr.2009) 11-13 (WGAD); *FHSESB v Greece*, App.72808/10 (ECtHR, 6.Dec.2011) [41]-[44] (ILOFOAC); also *Karoussiotis/Portugal* (n306) [64] (EC);cf.[76].

[1478] *LeBridge* (n490) [26] (ECHR/BIT proceedings 'same in substance'), discussed Hepburn, 'European Court of Human Rights Dismisses Investor Claim, Citing Substantial Similarity to Parallel BIT Arbitration' *IA.Rep.* (30.Apr.2018); also *Yukos/Russia* (n491) [524] ('similarities in...subject-matters');cf.[524]-[526] (parties different).

[1479] See Shany (n7) 61;254 (undermining *res judicata*), though cf.Wehland (n13) [6.47]-[6.49]; Zwart (n491) 177-178; *Smirnova/Russia* (n595) [9.2]; *Prince v South Africa*, DocCCPR/C/91/D/1474/2006 (31.Oct.2007) [6.2] (Art.5(2)(a) 'clear wording' 'militates against' broader application).

[1480] *Supra*.nn496-498 (emphasis added); see Salles (n473) 253-257 (similar standards to ECtHR despite textual differences). Cf.*supra*.n1476.

[1481] *NB v Russia*, Doc.CAT/C/56/D/577/2013 (25.Nov.2015) [8.2]; similarly *Vojnović/Croatia (HRC)* (n500) [6.2]; *Crippa v France*, DocCCPR/C/85/D/993-995/2001 (28.Oct.2005) [6.6] (no 'substantial difference', 'provisions...sufficiently close'); *Kollar v Austria* (2003) 8 Sel.Dec.HRC 21 [8.6] ('content and scope...largely converge'). Cf.*Lederbauer v Austria*, DocCCPR/C/90/D/1454/2006 (13.Jul.2007) [7.3] ('differ in substance'); generally Shany (n7) 27;216;cf.216-219; Salles (n473) 254-257.

[1482] *Acuna v Venezuela*, DocCCPR/C/65/D/739/1997 (25.Mar.1999) [5.2]; *X v Canada*, DocCAT/C/15/D/26/1995 (20.Nov.1995) [3].

[1483] *Ricardo/Panama* (n495) [55] (though vis-à-vis 'object'), referencing *Durand/Peru* (n529) [43].

[1484] E.g., *Shaw/Jamaica* (n495) [37]-[46] (HRC). Cf.*Ricardo/Panama* (n495) [56] (ILO/IACHR different 'legal grounds').

[1485] *Gabre-Salassie v Ethiopia*, Comm301/2005 (ACommHPR, 2011) [114]-[116].

Indeed, some tribunals have considered claims the same across the international-domestic divide,[1486] with at least one tribunal doing so vis-à-vis national court and MAT cases.[1487] Similarly, while most tribunals have regarded contractual and treaty claims as different for fork-in-the-road clause purposes,[1488] one tribunal considered such claims, before domestic and international tribunals respectively, as the same, with the 'claimed entitlements hav[ing] the same normative source'[1489] and 'fundamental basis'.[1490] Another tribunal has more recently taken the same approach.[1491] For its part, the ECOWAS Court has accepted that domestic decisions are *res judicata* where the protected rights are 'analogous' and the cases 'essentially the same'.[1492]

[1486] Cf.*supra*.nn1445-1447.

[1487] *Banque.Meyer* (n472) 642, cited Cheng (n73) 337. Similarly *Popanastassoglou v Bulgaria* (1924) 2 ILR 376 (Greco-Bulgarian MAT) 377; also *Waste.Mgmt. (Award)* (n297) [29] ('identical subjects').

[1488] Generally Schreuer, 'Interaction of International Tribunals and Domestic Courts in Investment Law' in Rovine (ed), *Contemporary Issues in International Arbitration and Mediation* (2011) 78-79; Hobér (n13) 384-388; Wehland (n13) [3.140]; e.g., *Toto Costruzioni v Lebanon (Jurisdiction)* ICSID Case-ARB/07/12 (8.Sept.2009) [211]; *CMS* (n472) [80]; *Desert Line* (n1094) [136]-[138]; also *Helnan v Egypt (Award)* ICSID Case-ARB/05/19 (7.Jun.2008) [124]-[125]; *Fraport v Philippines (Ord.No.1)* ICSID Case-ARB/11/12 (17.May.2012) [81]-[84]; *Caratube* (n1435) [495]; *SGS/Pakistan* (n1191) [182] Cf. authorities *supra*.n475 and, accepting contractual *res judicata*: *Desert Line* (n1094) [204]; *Ampal-American v Egypt (Liability/Loss)* ICSID Case-ARB/12/11 (21.Feb.2017) [259]; *Hochtief* (n564) [9] (Op.Thomas); *Occidental* (n564) [51]-[63]; generally Brower/Henin (n514) 59.

[1489] *Pantechniki v Albania (Award)* ICSID Case-ARB/07/21 (28.Jul.2009) [62].

[1490] ibid.[67], discussed, e.g., Salles (n473) 249-250; Wehland (n13) [3.126]; Steven and Thornton, 'Two Roads-Two Tribunals' *Kluwer.Arb.Blog* (16.Dec.2009); similarly *Malicorp* (n1086) [103]; also *Vivendi v Argentina (Award)* ICSID Case-ARB/97/3 (21.Nov.2000) [78], discussed Shany (n4) 64-66; Kjos (n544) 110-111. Cf.*Chevron/Ecuador (TIA)* (n291) [4.76] ('unlikely...triple identity test' met vis-à-vis national/international claims),[4.77]; *Libananco* (n1472) [548].

[1491] *Supervisíon* (n474) [308]-[310], also [315]-[318].

[1492] *Tasheku/Nigeria* (n297) [13]-[16],[18]-[19]; similarly *Umar v Nigeria*, Case-ECW/CCJ/JUD/17/12 (ECOWASCJ, 14.Dec.2012) [19]. Cf.Tzanakopoulos (n34) 143-144;149; Nollkaemper (n6) 9;44;247-249; *supra*.nn290-297.

Good reasons exist, even putting aside questions of identity, to be wary of *res judicata* operating between domestic and international courts.[1493] Indeed, the international/domestic distinction explains, in part, the PCIJ's decision, noted above, that *lis pendens* was inapplicable as between individual and interstate claims.[1494] Nonetheless, the cases suggest that – at least where party identity is present – international tribunals are prepared to compare causes of action, domestic and international, in a 'substantive' sense.[1495]

Most importantly for present purposes, the same approach to identity between causes of action appears applicable vis-à-vis overlapping individual and interstate claims. Thus, the IACHR, in two individual claims, accepted that 'the basis for the claim before the Commission is essentially the same, and concerns the same alleged victim' as in the interstate *Avena* case,[1496] suggesting that cause of action identity could subsist between individual and interstate claims even under different treaties.[1497] In three other cases, the Commission decided that the claims concerned 'substantive issues that are distinct',[1498] but this was apparently because *Avena* concerned VCCR obligations, while the individual claims alleged violations of 'due process' and 'fair trial' rights.[1499]

[1493] See Dodge (n451) 368-370; Reinisch (n513) 51; Shany (n4) 2-5;32-33;79-94;162-163; Nollkaemper (n6) 34;47;245;255; *Inceysa Vallisoletane v El Salvador (Award)* ICSID Case-ARB/03/26 (2.Aug.2006) [213]; *Indústria Nacional de Alimentos v Peru (Annulment)* ICSID Case-ARB/03/4 (13.Aug.2007) [87]; *Waste.Mgmt. (Award)* (n297) 66 (Diss.Op.Highet); *Chevron/Texaco v Ecuador (Track.IB)* PCA.Case-2009-23 (12.Mar.2015) [144].

[1494] *Supra*.n1445, discussed Shany (n7) 26;232; Shany (n4) 42-44.

[1495] E.g. *supra*.n1481; generally *supra*.nn1468ff. Similarly authorities *supra*.nn1466;1472; Wehland (n13) [6.130]; also Shany (n4) 160-161.

[1496] *Rodriguez* (n407) [55], also quoted *Arias* (n407) [44].

[1497] See *supra*.nn406-407;1472ff.

[1498] *Fierro* (n407) [57]; *Medellin* (n407) [104]; *Ramos* (n407) [53]. Also Shany (n4) 139.

[1499] *Fierro* (n407) [57]-[58]; *Medellin* (n407) [104]-[105]; *Ramos* (n407) [53]-[54].

Similarly, Ethiopia and Eritrea objected, under the relevant provision of the ACHPR, to an application before the African Commission, arguing that they had agreed to settle the conflict-related claims before the EECC.[1500] The Commission observed 'that the matters brought before it, are matters that have been placed before the [EECC] which can therefore adequately deal with [them]'.[1501] As the EECC would address 'all the issues before the African Commission',[1502] it suspended the case, only to 'reopen the matter' if the EECC failed to 'fully address the human rights violations contained herein'.[1503] The African Commission thus apparently accepted that the EECC claims, which were overwhelmingly interstate, not individual,[1504] and largely addressed IHL rather than human rights violations, nonetheless concerned the same subject-matter as individual human rights actions.[1505]

Finally, the CCJ declared, in a case concerned with potential overlap between individual claims and intervention by the State of nationality, that it:

> does not consider that the nature of a claim alters radically dependent upon whether it is brought by a national herself or by her State on her behalf. The character of the remedies sought from or given by the Court may vary but irrespective of which entity institutes proceedings the inquiry of the Court

[1500] *Interights* (n414) [40],[49]-[51]. See *supra*.n414.

[1501] ibid.[57].

[1502] ibid.[60].

[1503] ibid.[61]; also Gherari (n254) 785.

[1504] *Supra*.nn271-272.

[1505] Admittedly, the EECC considered 'violations of [IHL]...or *other violations of international law*' (Art.5(1) EECC Agreement, emphasis added), including human rights: see *Eritrea* (n271) [22]. However, the African Commission did not suggest the EECC claims were for ACHPR breach, but that Eritrea 'made claims' which '*also* consitute' ACHPR violations, and Ethiopia made allegations which presumably could fall thereunder: see *Interights* (n414) [49]-[50] (emphasis added). Consistently: *Ethiopia's Claim 5 (Part.Award)* (2004) XXVI UNRIAA 249 [27] (IHL 'primarily invoked'; no 'particular reliance' on ACHPR); also Murphy/Kidane/Snider (n266) 310; Sotomayer (n414) 4.

> remains, at least in part, focused on whether alleged conduct … constitutes a violation of the Revised Treaty.[1506]

In sum, while the cause of action identity requirement is more obviously satisfied where the parties are relying on exactly the same rights,[1507] it may suffice that they, and the facts underlying a given claim, are substantially similar.[1508] In either event, as will be shown, it is in interstate diplomatic protection and human rights claims that the overlap with individual claims is most apparent.[1509]

III. Object

Turning to the 'object' identity requirement, while claims for the same reparation *prima facie* evidence a common object,[1510] it may be immaterial that claims are for relief of a different form or scope.[1511] Thus, in the widely cited *Machado* case, the Umpire held a claim for restitution of a house, rent, and compensation inadmissible, being the same as a previous claim for value of the seized house, loss of debts, and seizure of livestock.[1512] Identity did 'not depend on whether the items included be the same in both cases' but on

[1506] *Myrie/Barbados* (n534) [23]. Cf.*supra*.n1456.

[1507] *Supra*.nn1451ff.

[1508] *Supra*.nn1466ff. Cf.*Rosneft v Council*, Case T-715/14 (13.Sept.2018) (EUGC) [95]-[99].

[1509] *Infra*.Pt(V)(A) and authorities; similarly Nollkaemper, *infra*.n1651.

[1510] See Hobér (n13) 272-273;303; Wehland (n13) [6.65],[6.68]; Salles (n473) 275; Reinisch (n513) 62; *Trawl* (n1467) 422, cited Handley (n511) [7.06].

[1511] See *Schreuer/Reinisch* (n1471) [45]-[46]; Reinisch (n513) 62-63; Dodge (n451) 366; Hobér (n13) 303; also Cheng (n73) 343-346; Shany (n4) 139-144, referencing (139) *Gubisch Maschinenfabrik v Palumbo* [1987] ECR 4871 [16]-[17]; cf.Salles (n473) 275.

[1512] *Machado* (1880) 3 Moore's 2193 (US-Span.Cl.Comm.) 2193-2194, discussed, together with *Delgado*, vis-à-vis *res judicata*: Cheng (n73) 343-346; *Schreuer/Reinisch* (n1471) [47]-[48]; Reinisch (n513) 63-64; also Dodge (n451) 366.

'whether both claims are founded on the same injury'.[1513] The house's seizure being the common injury, the later claim was struck out.[1514] Similarly, in *Delgado*, where a claim had been brought for lost property and income consequent on an estate's seizure, a second claim for the seized land's value was dismissed: no 'new rights' were asserted, the injury was the same, and all relief should have been claimed upfront.[1515] More recently, one investment tribunal rejected, as *res judicata*, an investor's attempt at 'reformulating their claims and arguments' to apply to similar, though not identical, alleged 'investments' to those previously considered.[1516] In two ECOWAS cases, receiving domestic law reparation for 'essentially the same' violations sufficed for *res judicata* to bar later international claims.[1517]

By contrast, tribunals have, in overlapping individual-interstate claims, tended to emphasise the distinct objects involved. Thus, the individual applications in *Varnava* concerned alleged disappearances consequent on Turkish military activities in Northern Cyprus,[1518] instituted after interstate proceedings in which, the ECtHR acknowledged, 'findings of violations ... concerning missing Greek Cypriots and their families' were made.[1519] In determining not to strike the individual applications out,[1520] the Court emphasised, *inter alia*, that compensation might be awarded for the individuals' damage,

[1513] *Machado* (n1512) 2194.

[1514] ibid.

[1515] *Delgado* (1881) 3 Moore's 2196 (US-Span.Cl.Comm.) 2199;cf.2200, also cited Shany (n4) 139; Salles (n473) 270; authorities *supra*.n1512.

[1516] *Apotex* (n516) [7.59].

[1517] *Tasheku/Nigeria* (n297) [18]-[19]; *Umar/Nigeria* (n1492) [19]-[21].

[1518] See *Varnava* (n391) [3],[20]-[65].

[1519] ibid.[118].

[1520] Cf.*infra*.n1612 (on Art.35(2)(b)).

potentially resulting in different outcomes to the interstate case.[1521] Similarly, in *Donnelly*, the applicants complained of mistreatment in custody in circumstances where Ireland had also instituted proceedings.[1522] The ECommHR, holding that the interstate claim had not yet been 'examined', also remarked that the parties and claims were 'different'.[1523] Importantly, although the interstate claim drew on certain individual applicants' situations as examples,[1524] it alleged the existence of an 'administrative practice' without claiming reparation for any individual,[1525] while the individuals necessarily claimed as *victims*, for breach of their rights, and their own relief.[1526] The IACHR similarly emphasised, as noted above, that, unlike Mexico's interstate restitution claim in *Avena*,[1527] the Commission's 'remedies ... correspond directly to the individual presumably concerned'.[1528]

More broadly, the IACtHR considers that proceedings concerning 'the general human rights situation in [a] country' have a different 'object and purpose' from procedures 'for the adjudication of certain rights'.[1529] The HRC has likewise indicated

[1521] *Varnava* (n391) [119]; *infra*.nn1614-1615.

[1522] *Donnelly* (n385) 262-266.

[1523] ibid.266, discussed Shany (n7) 36.

[1524] *Donnelly* (n385) 266.

[1525] ibid.260.

[1526] ibid. Similarly *Sequeira v Uruguay* (1980) 1 Sel.Dec.HRC 52 [7],[9](a),[11] (brief reference to applicant among hundreds not same as individual application); Zwart (n491) 175; Shany (n7) 36;63. Cf.*supra*.nn992ff.

[1527] *Avena* (n152) [12]-[13].

[1528] *Supra*.n1465.

[1529] *Saramaka/Suriname* (n495) [51], also [54]. Similarly *Bustamante v Peru*, Case-11756, Rep.54/9 (IACHR, Dec.1998) [16] (not inadmissible where 'limited to...examination of...general situation' and 'no decision on...specific facts or...will not lead to...effective settlement'); *Menendez v Argentina*, Case-11670, Rep.3/01 (IACHR, 19.Jan.2001) [64] (Rules, Art.39(2)); Shany (n7) 65; Sotomayer (n414) 6-8.

that '[t]he study of human rights problems of a more global character, although it might refer to or draw on information concerning individuals' is not 'the same matter as the examination of individual cases'.[1530] Rather, in determining whether procedures are covered by the *res judicata*-like treaty provisions outlined in Chapter III, human rights institutions consistently examine whether reparation can and will be afforded to the individuals affected.[1531]

The overlapping individual-interstate claims just considered pursued different objects, but the case law nonetheless provides clues for when object identity is likely to subsist, namely where findings are made vis-à-vis particular individuals, and their injury remedied.[1532] Given that: (i) diplomatic protection claims are based on individual injury,[1533] and thus share a common 'injury' with individual claims;[1534] and (ii) reparation is usually sought, in such claims, to remedy the individual's damage,[1535] the necessary object identity may be present vis-à-vis individual and diplomatic protection claims.[1536] Indeed, as already noted, the African Commission was prepared to bar an individual claim in light of interstate proceedings before the EECC which were diplomatic protection in

[1530] *SID v Bulgaria*, DocCCPR/C/111/D/1926/2010 (21.Jul.2014) [8.3]; similarly *Bashasha v Libya*, DocCCPR/C/100/D/1776/2008 (20.Oct.2010) [6.2]. Generally Shany (n7) 63; Zwart (n491) 174.

[1531] *SHRO/Sudan* (n509) [105] ('capable of granting [victims] declaratory or compensatory relief'); *Musicue/Colombia* (n263) [19] ('effective remedy'); similarly *SINTRAOFAN* (n509) [75]; *Gabre-Salassie/Ethiopia* (n1485) [117]; *Karoussiotis/Portugal* (n306) [74]-[75] (not 'similar'; *i.a.* no 'individual reparation'); also *Guzmán v Ecuador*, Pet.11-587, Rep.70/10 (IACHR, 12.Jul.2010) [38]; *Celniku/Greece* (n508) [40].

[1532] *Supra*.nn1518ff; also Nollkaemper (n6) 251.

[1533] *Supra*.nn640-644.

[1534] Cf.*supra*.nn1513ff; *infra*.n1717.

[1535] See DADP, 23 ('designed to secure reparation for [national's] injury'); similarly *Decision No.V* (n836) 153; Garcia-Amador, 'Problems' (n142) 462;467; *supra*.nn325;835-836.

[1536] Similarly Meron (n322) 90 (*supra*.n846, vis-à-vis *Interhandel*); Paparinskis, 'Countermeasures' (n5) 297;cf.300, *supra*.n602; Garcia-Amador, 'Problems' (n142) 462; *infra*.n1649.

part.[1537] In doing so, it envisaged that both tribunals would look to award compensation, but the EECC would be better placed to do so.[1538] Individual and interstate claims may thus have similar objects.

IV. Parties

Notwithstanding the foregoing conclusions regarding cause of action and object, party identity remains an obvious obstacle for applying *res judicata* – and treaty provisions embodying its requirements – vis-à-vis overlapping individual-interstate claims.[1539] Even so, the case law of various tribunals accepts some leniency regarding this requirement where two parties are 'closely related'.[1540] Under common law, *res judicata* operates vis-à-vis 'privies in interest', non-parties with such a 'legal or beneficial' interest in earlier proceedings that binding them to the outcome is fair.[1541] A privy has been described as one who 'claims a title or right under, through, or on behalf of, a party bound'.[1542] Privies include trustees and beneficiaries,[1543] ships and their owners,[1544] an

[1537] *Supra*.nn1500ff. On being diplomatic protection: *supra*.n643.

[1538] *Interights* (n414) [55],[59]. Also Sotomayer (n414) 4.

[1539] Authorities *supra*.n532; cf.Nollkaemper (n12) 529.

[1540] ILA, 'InterimRep.' (n511) 39 (privies); see *infra*.nn1541ff; also Shany (n4) 36;134;136 (vis-à-vis diplomatic protection); Hobér (n13) 297. Cf.*infra*.n1552.

[1541] Barnett (n513) [3.21]-[3.22]; also Handley (n511) [9.45]; ILA, 'InterimRep.' (n511) 45; Shany (n7) 24;155; Shany (n4) 137, citing *Gleeson v Wippell* [1977] 1 WLR 510, 515.

[1542] Barnett (n513) [3.20]; similarly Handley (n511) [9.45]; Hobér (n13) 156.

[1543] Handley (n511) [9.44]; Barnett (n513) [3.23]; ILA, 'InterimRep.' (n511) 44; *Gleeson* (n1541) 515; also *Kinnear v Falconfilms* [1994] ILPr 731 [26], cited Kaye, *European Case Law on the Judgements Convention* (1998) 297-298; Layton/others (n1467) [22.014] 785 (claims for another's benefit).

[1544] *India v India Steamship (No.2)* [1998] AC 878, 896;909-913, discussed Barnett (n513) [3.50]-[3.63].

insured and insurer subrogated to the insured's rights,[1545] and, in some cases, corporations and shareholders.[1546] The matter depends, substantively, on the parties' 'degree of identification',[1547] and whether their interests are the same.[1548] Additionally, domestic systems widely recognise class or representative actions,[1549] in which members of the relevant class (named or otherwise) are bound by *res judicata*,[1550] because their interests are represented.[1551]

While certain international tribunals have interpreted party identity stringently,[1552] others have similarly recognised that *res judicata* may apply despite the 'formal' absence of such identity.[1553] The general approach, divided into three categories, will be considered first, before outlining how the same conclusions may apply vis-à-vis overlapping individual-interstate claims.

[1545] *Drouot Assurances v CMI* [1998] ECR I-3075 [19]-[20] (where interests same), cited Shany (n7) 25; Handley (n511) [9.23]; *infra*.n1633.

[1546] Handley (n511) [9.47]; *Johnson* (n610) 32; *Berkeley Administration v McClelland* [1995] ILPr 201 [30] ('wholly owned subsidiary'), cited Layton/others (n1467) [22.014].

[1547] *Gleeson* (n1541) 515, referenced Handley (n511) [9.45]; Barnett (n513) [3.22]; Shany (n4) 137.

[1548] *Drouot* (n1545) [25] ('identical...and indissociable'), quoted Handley (n511) [9.23]; also Shany (n4) 133-137.

[1549] See Shah (ed), *Class Actions: A Global Guide from Practical Law* (2015); Cashman, *Class Action Law and Practice* (2007), particularly Ch.10; *Abaclat v Argentina (Jurisdiction/Admissibility)* ICSID Case-ARB07/5 (4.Aug.2011) [483]-[484] ('collective proceedings'). Cf.*infra*.nn1708;1718;1734;1844ff.

[1550] Handley (n511) [9.20]; Barnett (n513) [3.32]; McDermott (n513) [5.09]; authorities *infra*.nn1754;1847.

[1551] *Infra*.n1754.

[1552] Shany (n7) 24-25; Shany (n4) 135; Zwart (n491) 173;176-177;180-181; Wehland (n13) [6.59]-[6.62]; Vermeer-Künzli, 'Concurrence' (n8) 280-281 (*Unn/Folgero* litigation), see *Folgero v Norway*, App.15472/02 (ECtHR, 14.Feb.2006)§'The Law'(2)(B); *Unn v Norway* (2004) 8 Sel.Dec.HRC 385 [13.3]; *Fanali* (n498) [7.2].

[1553] Shany (n4) 135 ('formal'/'informal' methodologies); also Salles (n473) 275-276; ILA, 'InterimRep.' (n511) 58-59; *infra*.n1653.

First, certain cases have acknowledged that one party may represent another, the HRC observing, for instance, that the 'same matter' 'must be understood as referring to one and the same claim concerning the same individual, as submitted by that individual, *or by some other person empowered to act on his behalf*'.[1554] The ECtHR has likewise considered complaints 'essentially the same' where the first was lodged 'on behalf of' one of the later applicants.[1555] Investment tribunals have considered whether an entity's acts are attributable to the State – and thus undertaken on the State's behalf[1556] – as indicative of individual-State 'privity' for *res judicata* purposes.[1557] Another has recognised 'representative actions' under BITs, allowing thousands of individuals to consent to another 'represent[ing] their interests' and deciding 'on their behalf'.[1558] By contrast, human rights tribunals have considered treaty provisions inapplicable where an earlier claim, even regarding the same individual, was submitted by an *unauthorised* third party.[1559]

[1554] *Unn/Norway* (n1552) [13.3] (emphasis added); similarly *Fanali* (n498) [7.2], cited Shany (n4) 135; Shany (n7) 24; generally Zwart (n491) 175-177;71-80; affirmed *Kayhan v Turkey*, DocCEDAW/C/34/D/8/2005 (27.Jan.2006) [7.3].

[1555] *Vojnović/Croatia (ECHR)* (n491) [31]. Cf.*Peltonen v Finland* (1995) 80 DR 38, 43 (brother).

[1556] See *supra*.nn73-77; generally *ARSIWA*, 94; Crawford, *GP* (n2) 115ff.

[1557] *Ampal-American* (n1488) [269]; also *Helnan* (n1488) [127].

[1558] *Abaclat* (n1549) [487],cf.[486] (not class action), discussed Strong, *Class, Mass, and Collective Arbitration in National and International Law* (2013) [2.123]-[2.143]. Cf.ECtHR 'pilot judgment' procedure, with class action-like effects: Sainati, 'Human Rights Class Actions' (2015) 56 Harv.ILJ 147,151; Parlett (n1) 333; e.g. *Broniowski v Poland* ECHR 2004-V 1 [2].

[1559] *Estrella v Uruguay* (1983) 2 Sel.Dec.HRC 93 [4.3] ('unrelated third party, acting without [victim's] knowledge and consent'); *de Casariego v Uruguay*, DocCCPR/C/OP/1 (29.Jul.1981) [5], both cited Shany (n7) 25; 63; Shany (n4) 135; also Zwart (n491) 177; *Akwanga v Cameroon*, DocCCPR/C/101/D/1813/2008 (22.Mar.2011) [6.2]; *Celniku/Greece* (n508) [40]; *Domingues v US*, Case-12285, Rep.62/02 (IACHR, Oct.2002) [35] ('no mandate'); Wehland (n13) [6.61].

Second, tribunals may be more lenient where the same person is the *subject* of the claim in both cases, if not the claimant.[1560] Thus, even while requiring that parties be 'identical',[1561] the ECtHR accepted that Article 35(2)(b) applied where previous proceedings examined a particular individual's situation, despite being brought by another applicant.[1562] The IACHR similarly declared a complaint inadmissible, having earlier considered the violations alleged vis-à-vis an individual, despite that petition's having been brought without the surviving relatives' consent.[1563] The ECommHR declared an application substantially the same as an earlier ILO claim, notwithstanding the applicants being 'formally' different, where the ILO proceedings 'precisely concerned the dismissal of the ... applicants' and 'the complaint was, in substance, submitted by the same complainants': the individual workers on the one hand, and the trade union representing them on the other.[1564] Finally, the ECtHR considered two distinct complaints, concerning civil proceedings to which the complainants were joined, 'essentially the same'.[1565] The Court reasoned that no additional damages could be awarded in the second case, given that, *inter alia*, the complainants were 'parties to the same domestic proceedings' and the second complaint's 'subject matter' was therefore 'the same' as that of the first.[1566]

[1560] Similarly Zwart (n491) 165; *infra*.n1651.

[1561] *Peraldi/France* (n1477) 10.

[1562] ibid.10-11 (brother).

[1563] *de Mejía v Peru* [1996] IAYBkHR 1120,1134;1144-1148, cited Shany (n7) 25; Sotomayer (n414) 5-6.

[1564] *Martin v Spain* (1992) 73 DR 120, 134-135; also 132-133, cited Shany (n7) 24 ('*alter ego*'); 65; Shany (n4) 135; Zwart (n491) 182 (noting earlier contrary decision: *CCSU v UK* [1987] ECHR 34); Wehland (n13) [6.58],[6.60]; Reinisch (n513) 61.

[1565] *Alves/Portugal* (n590) [14], see [2]-[5],[12]-[13]. Admittedly, based on abuse of process: ibid [8]-[10],[17].

[1566] ibid.[15]. Cf.*Nobili Massuero v Italy*, App.58587/00 (ECtHR, 1.Apr.2004) 3.

By contrast, the ECtHR declined to consider individual workers the same as an organisation 'protect[ing] employers' interests', considering it 'of importance' that the earlier claim 'was of a general character' while the later concerned 'the specific situation of the ... individual applicants.'[1567] The IACtHR has likewise emphasised that 'the concept of "persons" is related to the active and passive subjects of the violation and mainly to the latter, that is, the victims',[1568] finding party identity missing where one case referenced 'workers and trade union leaders who were dismissed in general, without individualizing them specifically' while the second 'individualize[d] 270 alleged victims'.[1569]

Finally, as under domestic law, tribunals take account of whether the parties' interests are the same in two claims.[1570] Thus, a 'successor-in-interest' was held bound by the outcome of earlier proceedings.[1571] Additionally, some international tribunals acknowledge the concept of 'privity' discussed earlier.[1572] Although shareholder-company privity is not commonly recognised in investment law,[1573] one tribunal applied the doctrine where shareholders claimed 'for damage they allege they have suffered

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[1567] *Evaldsson v Sweden*, App.75252/01 (ECtHR, 28.Mar.2006) 10. Cf.*Fajardo/Nicaragua* (n509) [38]-[42]; Shany (n7) 65.

[1568] *Ricardo/Panama* (n495) [54], referencing *Durand/Peru* (n529) [43], discussed Sotomayer (n414) 8-9.

[1569] *Ricardo/Panama* (n495) [54].

[1570] Cf.*supra*.nn1540-1551.

[1571] *Vivendi (Jurisdiction)* (n1466) [73], also [82]-[87].

[1572] *Garraway/Williams* (n1468) [14]; also *Katabazi v Secretary-General EAC* (EACJ, 11.Nov.2007) [37] ('parties...litigating under...same title'); *Fenosa* (n581) [11.32]; authorities *infra*.nn1574ff.

[1573] Wehland (n13) [6.117] ('formally identical' parties), discussion [6.114]-[6.119]; cf.Brower/Henin (n514) 58 ('inconsistent'). E.g. *CME (Final)/Lauder*, *supra*.n1452; *Fraport (Order)* (n1488) [82] (no 'privity'); *Yukos/Russia* (n491) [524]-[525] (shareholders/company different); generally ILA, 'InterimRep.' (n511) 58-59; cf.Reinisch (n513) 55-61; *Schreuer/Reinisch* (n1471) [21]-[37]; also *Perenco* (n580) [11],[37]-[39],[43]-[52] (consortium).

indirectly', via the company.[1574] The Tribunal explained that where shareholders claim based on 'their indirect interest in corporate assets, they must be subject to defences that would be available against the corporation — including collateral estoppel.'[1575] The ECtHR also recently accepted that a company bringing ECHR proceedings and a sole shareholder bringing a BIT claim were 'in substance … the same'.[1576] Noting its case law allowing 'piercing of the "corporate veil"' where a shareholder 'complain[s] of acts directly affecting the company', it observed that the shareholder was 'directly involved' in the company's claim, and the two did not 'disassociate' themselves from one another.[1577] An investment tribunal recently held that such an approach is not limited to companies 'wholly-owned',[1578] but is applicable where shareholder claims 'exist only through [the company]', and vis-à-vis the company's rights, as 'reflected in [a] claim for damages' for share value diminution.[1579] The bringing of proceedings by different parties 'for recovery of the same sum'[1580] and 'in respect of the same interest' was also considered 'an abuse of process for in substance the same claim is to be pursued on the merits before two tribunals'.[1581] A third tribunal held a company bound as a 'privy' where

[1574] *RSM* (n1470) [7.1.5]-[7.1.6]; see Hobér (n13) 297-298; Wehland (n13) [6.116]. Approving: *Eskosol v Italy (Rule.41(5) Application)* ICSID Case-ARB/15/50 (20.Mar.2017) [167] (where 'interests represented'); also *Orascom* (n477) [488]; *Amoco v Iran* (1987) 83 ILR 500 (IUSCT) [16]-[18] ('indirect claim' *res judicata* effect), cited Wehland (n13) [6.58].

[1575] *RSM* (n1470) [7.1.7]. See Salles (n473) 272-273;276.

[1576] *LeBridge* (n490) [33], case discussed Hepburn, 'Parallel' (n1478), contrasting *Arif v Moldova (Award)* ICSID Case-ARB/11/23 (8.Apr.2013) [14].

[1577] *LeBridge* (n490) [29]-[32].

[1578] *Ampal-American* (n1488) [267].

[1579] ibid.[268], cited *Perenco* (n580) [11]. Cf.*supra*.608ff.

[1580] *Ampal-American v Egypt (Jurisdiction)* ICSID Case-ARB/12/11 (1.Feb.2016) [330].

[1581] ibid.[331], discussed Gaillard (n1435) 25. Similarly *Orascom* (n477) [542]-[545]. Cf.*Fenosa* (n581) [6.81].

its claim was dependent on the rights of another company it owned,[1582] the former having only an 'indirect interest'.[1583]

However, in an employment case, the ECtHR considered parties different where earlier ILO proceedings were instituted by an organisation with which the applicant was affiliated and on its behalf, but where the applicant was not joined, and the *interests* of the two did not necessarily correspond.[1584] By contrast with those decisions binding shareholders to the company's previous claim,[1585] an investment tribunal denied that an award rendered vis-à-vis a majority shareholder was *res judicata* for the company in circumstances where the shareholder did not represent the company's interests and had 'no intention ... of channelling compensation through [the company]'.[1586] Interestingly, ECommHR decisions have made a similar distinction, with claims concerning a single victim's situation found to be 'substantially the same' where an 'indirect victim' claims after the *actual* victim,[1587] but not, conversely, where the actual victim files after an 'indirect victim', as the actual victim is taken to have a 'specific personal interest' in proceeding 'in his own name'.[1588]

[1582] *Apotex* (n516) [7.39]-[7.40], see [1.2].

[1583] ibid.[7.60].

[1584] *Eğitim ve Bilim v Turkey*, App.20641/05 (ECtHR, 25.Sept.2012) [38]-[39].

[1585] *Supra*.nn1574-1583.

[1586] *Eskosol* (n1574) [168]. Cf.Shany (n4) 137; Wehland (n13) [6.118],[7.48]-[7.50].

[1587] Zwart (n491) 165, referencing *X c Allemagne* (1959) 2 YBkECHR 397, 399.

[1588] Zwart (n491) 165, referencing *X v Germany* (1980) 22 DR 236, 237.

The case law thus suggests that party identity may exist where one party represents another,[1589] where the same party's situation has been examined,[1590] and where the parties' interests are consistent.[1591] Importantly, the same concepts run through the case law concerning overlapping individual and interstate claims.

First, concerning representation, the UNCC *Well Blowout Control Claim*, brought by the State-owned Kuwait Oil Company, concerned oil fields damaged by Iraqi withdrawal.[1592] The Commission having queried whether the claim was interstate,[1593] the company – a separate entity[1594] – clarified that it was not claiming on the State's behalf.[1595] Nonetheless, the Commission, taking account of the company's being State-funded,[1596] the risk of double recovery, and that in its activities the company 'appear[ed] ... to act[], in effect, on behalf of the Ministry of Oil',[1597] concluded that the company claimed 'on behalf of Kuwait's public oil sector as a whole'.[1598] Consequently, the State was 'bound by the decision' and 'estopped from bringing the same claim'.[1599]

[1589] *Supra*.nn1554-1559.

[1590] *Supra*.nn1560-1569; also Nollkaemper (n6) 251.

[1591] *Supra*.nn1570-1588.

[1592] *Well Blowout Control Claim* (1996) 109 ILR 479 (UNCC) [1],[28].

[1593] ibid.[48].

[1594] ibid.[28], also [30].

[1595] ibid.[57].

[1596] ibid.[41],[55].

[1597] ibid.[60].

[1598] ibid.[61].

[1599] ibid.

In other cases, individuals have apparently accepted State representation.[1600] Thus, one tribunal declined jurisdiction over an individual claim, on 'international public policy' grounds, where an investor had earlier sought diplomatic protection from its owner's State of nationality.[1601] A French court held, in another case, that an interstate settlement of claims through diplomatic protection was *res judicata* vis-à-vis a later individual claim, the individual having 'at least ... tacitly accepted' it.[1602] By contrast, the IACHR noted, *inter alia*, in holding an individual proceeding not the same as Mexico's interstate *Avena* claim, that 'Mexico has no mandate from [the individual] and has brought its claim ... in its own right'.[1603]

As to the second theme, regarding subject-matter, the African Commission, in the case against Ethiopia and Eritrea noted above, appeared unconcerned that the claimants were different from those in the interstate EECC proceedings.[1604] Admittedly, Article 56(7) of the ACHPR bars consideration of cases 'settled by these States involved',[1605] a rule that could be taken as applying even without party identity.[1606] Yet the French text does not mention *interstate* settlement,[1607] and, as Chapter III highlighted, the Commission has interpreted Article 56(7) as requiring that 'the same parties' be

[1600] Cf.*infra*.nn1650;1652-1653.

[1601] *Banro* (n540) [24]-[26], discussed Schreuer, *ICSID* (n301) 419. Cf.*Tokios (Order)* (n540) [22]-[23].

[1602] *Yugoslavia v SEEE* (1970) 65 ILR 46 (TGI.Paris) 49;cf.50 (on appeal, diplomatic protection not considered to 'deprive' individual of contractual 'legal remedies').

[1603] *Ramos* (n407) [50] and see [49]-[55].

[1604] *Supra*.nn1500ff.

[1605] ACHPR, Art.56(7).

[1606] Shany (n7) 225.

[1607] Ouguergouz (n510) 613; also Shany (n7) 225.

involved.[1608] The Commission has also referred to the need to respect *res judicata*, understanding this to mean 'a final judgment ... is conclusive *on the parties*'.[1609] The Commission nonetheless accepted the preclusive effect of interstate EECC claims on an ACHPR claim where both concerned violations vis-à-vis the victims of the conflict.[1610] Similar reasoning can be detected in *Donnelly* and *Varnava*, discussed above, concerning the overlapping *Ireland/UK* and *Cyprus/Turkey* cases respectively.[1611] Admittedly, the ECtHR did, in *Varnava*, hold that Article 35(2)(b) required that 'complaints ... be introduced by the same persons', concluding that States could not 'by introducing an inter-State application ... thereby depriv[e] individual applicants of the possibility of introducing, or pursuing, their own claims.'[1612] Nonetheless, despite apparently thus requiring party identity, the Court proceeded to discuss potential strike-out under Article 37(1)(c).[1613] It refused, holding that the interstate judgment 'did not specify in respect of which individual missing persons [findings] were made', could not thus 'be regarded as determining the issues and claims' in question, and moreover – as already noted – that different remedies might be awarded.[1614] The ECtHR thus appeared willing

[1608] *Gunme/Cameroon* (n504) [86].

[1609] *Spilg/Botswana* (n504) [110] (emphasis added); similarly *SHRO/Sudan* (n509) [104], though cf.[106] (claims potentially 'submitted...by...any other individual'); similarly *Gabre-Salassie/Ethiopia* (n1485) [117]; Gherari (n254) 783; Shany (n7) 64.

[1610] *Supra*.nn1500-1505. Compare *Interights* (n414) [2]-[9] and *infra*.nn1709ff.

[1611] *Supra*.nn1518-1526.

[1612] *Varnava* (n391) [118]. Cf.*Arctic.Sun. (Merits)* (n410) [148].

[1613] *Varnava* (n391) [119] (where 'no longer justified to pursue the [application's] examination').

[1614] ibid.; *supra*.n1521. Also *Varnava v Turkey* (1998) 73 DR 5, 13 (not deciding 'whether...precluded...from examining..."matter"' where 'already...examined in an inter-State case'; *i.a.* unclear whether 'finding also concerned...applicants').

to control overlapping individual-interstate claims – albeit not through *res judicata* – only where the same individual injury had been considered and remedied.[1615]

Turning to investment law, Italy's proceedings against Cuba were brought both to protect its own rights and as diplomatic protection.[1616] Despite being a non-ICSID arbitration, the Tribunal considered that ICSID's Article 27 could be applied 'par analogie', meaning that diplomatic protection was only available in the absence of investor consent to arbitration.[1617] For reasons already noted, this is unlikely to be an application of custom.[1618] Nor were *res judicata* or *lis pendens* expressly referenced. However, the case demonstrates a preparedness to prevent overlapping individual-interstate claims involving a given 'dispute',[1619] where diplomatic protection is concerned, regardless of party identity.[1620]

Similarly concerning diplomatic protection, the Umpire in *Fabiani* concluded that an individual's denial of justice claim was barred by an earlier claim brought and resolved by France, his State of nationality.[1621] This was so notwithstanding that Fabiani's claim

[1615] Similarly *supra*.nn1518-1530. Cf.Zwaak (n993) 179; *supra*.n1560.

[1616] Roberts, 'Hybrid' (n7) 7;17; *supra*.n1050.

[1617] *Italy/Cuba* (n365) [65], discussed Potestà, 'Italy/Cuba' (n363) 342; Potestà, 'Potential' (n353) 765; Potestà, 'Role' (n353) 259; Recanati (n353) 439; Roberts, 'Hybrid' (n7) 47.

[1618] Potestà, 'Italy/Cuba' (n363) 346; Paparinskis, 'New' (n8) 643; Crawford, *GP* (n2) 591; *supra*.n548.

[1619] Cf.ICSID, Art.27, *supra*.n542. Similarly Potestà, 'Role' (n353) 271.

[1620] *Supra*.n533; similarly Roberts, 'Hybrid' (n7) 47 and, supporting approach: ibid.48-49; Juratowich (n12) 22;32;34-35; Wehland (n13) [1.57]; Amerasinghe (n323) 341; Potestà, 'Role' (n353) 271; cf.Paparinskis, 'Countermeasures' (n5) 281; Shany (n7) 195.

[1621] *Antoine Fabiani* (1905) X UNRIAA 83 (French-Ven.Cl.Comm.) 139, discussed Parlett (n1) 59-60; Cheng (n73) 337;344.

was apparently brought in his own right,[1622] the Umpire considering that the 'individual and private claims ... became national' upon France's intervention.[1623] *Apostolidis* similarly concerned 'independent' individual and interstate compensation claims against Germany.[1624] Nonetheless, upon Greece's making a claim, the individual's claim was considered to have lost 'any significance of its own', being 'completely absorbed by' that of the State.[1625] In *Houard*, the Tribunal considered that 'questions ... disposed of' between States 'should [not] be reopened' by an individual claimant.[1626] Finally, in *Newchang*, Britain exercised diplomatic protection following a domestic court decision concerning an injured British corporation and the US.[1627] Faced with a *res judicata* contention, the Tribunal noted the requirements of identity of parties and questions.[1628] Interestingly, it did not deny that they *could* have been met, but regarded the question in the previous case as distinct.[1629] While caution is required vis-à-vis early cases, given that what appear to be individual claims were sometimes actually State-brought,[1630] these authorities all appear to have concerned individual claims as such,[1631] and their potential

[1622] The Protocol, Art.1, provided for 'Frenchmen' to claim: *Fabiani* (n1621) 120. While France presented the initial claim, it 'ha[d] not assumed responsibility for' the second, which was 'wholly the work of an individual': ibid.130.

[1623] *Fabiani* (n1621) 127. Similarly Parlett (n1) 59.

[1624] *Greece (on behalf of Apostolidis) v Germany* (1960) 34 ILR 219 (Arb.Comm.) 228, cited *Oppenheim's* (n73) 512.

[1625] *Apostolidis* (n1624) 229. Cf.*Decision No.V* (n836) 153.

[1626] *Houard* (1880) 3 Moore's 2428 (US-Span.Cl.Comm.) 2429, cited Borchard (n319) 368. Cf.Parlett (n1) App.II(18) (Cl.Comm. claims State-controlled).

[1627] *The SS Newchang* (1922) 16 AJIL 323, 323-324, discussed Cheng (n73) 339-340;346.

[1628] *Newchang* (n1627) 324.

[1629] ibid.

[1630] See Parlett (n1) Pt.II(2). Cf. interstate settlement affecting apparently State-brought claims concerning individuals: *Chase v Panama* (1933) VI UNRIAA 352, 357; *McLeod* (1855) Hornsby's 428 (British-US.Cl.Comm.), 446, both cited Cheng (n73) 337.

[1631] See *supra*.nn1622;1624;1627; cf.*supra*.n1626.

preclusion consequent on, or preclusive effect vis-à-vis, interstate diplomatic protection claims, including on *res judicata* grounds.

As to the third feature of the party identity cases, relating to shared interests, the drafters of ICSID accepted that *res judicata* would – as under domestic law[1632] – bar claims brought subsequent to investor-State proceedings by a State subrogated to the investor's rights.[1633] Moreover, in three of the cases overlapping with *Avena*, the IACHR observed that the individuals were, in the interstate proceedings, without 'independent standing to make submissions ... or to request relief',[1634] and in two cases that there was no 'requirement or certainty that Mexico will represent [the individuals'] interests'.[1635] Such reasoning suggests a concern less with party identity *per se* and more with whether the individuals' interests are represented. A decision holding that UNSC sanctions de-listing proceedings and proceedings alleging ICCPR violations resulting from individuals being placed on that list were different does not undermine the point.[1636] Admittedly, the HRC emphasised that the two proceedings were not the same, being brought by different parties: individuals and their State of nationality respectively.[1637] However, although the individuals had *also* sought their de-listing in domestic proceedings,[1638] their ICCPR

[1632] *Supra*.n1545.

[1633] See ICSID (n536) 275, also 503 (no greater rights than subrogor). Generally Juratowich (n12) 24-27; Peters (n1) 313-314.

[1634] *Ramos* (n407) [52]; *Fierro* (n407) [56]; *Medellin* (n407) [103]. Also Shany (n4) 141.

[1635] *Ramos* (n407) [52]; *Fierro* (n407) [56].

[1636] See *Sayadi v Belgium*, DocCCPR/C/94/D/1472/2006 (29.Dec.2008) [7.3], discussed further *infra*.nn2021;2099;2116.

[1637] ibid.[7.3].

[1638] See ibid.[2.3],[4.3].

claim alleged violations by the very State that had instituted the UNSC de-listing procedures,[1639] meaning the two claims could hardly be the same.

Overall, these cases therefore suggest, in line with the case law more generally, that party identity may not necessarily be an obstacle to the preclusion of overlapping individual-interstate claims.

V. *Res judicata* and different categories of interstate claim

The overlapping individual and interstate claims just discussed are by no means conclusive as to the application of *res judicata*,[1640] and, in many of the overlapping claims discussed in Chapter II, no *res judicata* objections were ever raised. Yet what authority there is suggests that there is potential for *res judicata*, provisions with similar effect, or other principles such as abuse of process, to operate as between certain overlapping individual-interstate claims.[1641]

A. Diplomatic protection and human rights claims

More particularly, in all cases where tribunals were prepared to hold individual claims precluded, the interstate claim was diplomatic protection, at least in part.[1642] This

[1639] See ibid.[5.3].

[1640] Similarly Vermeer-Künzli, 'Concurrence' (n8) 277; Shany (n4) 136 (law 'unsettled'); Salles (n473) 276-277.

[1641] *Supra*.nn1434-1435;1565;1581;1599;1601-1602;1610;1617-1629;1633.

[1642] See *Banro* (*supra*.n1601); *SEEE* (*supra*.n1602); *Interights* (*supra*.nn1604-1610) and *Eritrea* (n271) [25] quoted *supra*.n643; *Fabiani* (*supra*.nn1621-1623); *Apostolidis* (*supra*.nn1624-1625); *Italy/Cuba* (*supra*.nn1616-1620). Cf.Vermeer-Künzli, 'Concurrence' (n8) 273-279 (*res judicata* vis-à-vis diplomatic protection/individual human rights claims); *Sayadi* (n1636), *supra*.nn1636ff and on de-listing as diplomatic protection: *Ayadi v Council* [2006] II-ECR 2148 [141],[149], cited Mazzeschi (n217) 226.

makes intuitive sense, for three reasons.[1643] First, diplomatic protection claims are commonly brought on the basis of rules protecting individuals.[1644] Individual claims overlapping with diplomatic protection claims, albeit for the individuals' own protection,[1645] will likely therefore have a cause of action similar to the State's.[1646] This is particularly so, as noted above, where the individual claims, outside the human rights context, for breach of the State's rights – precisely the same rights for breach of which the State might claim itself.[1647]

Second, while tribunals have consistently emphasised that cases not examining individual situations, nor obtaining remedies for violations vis-à-vis given individuals, have different objects from individual claims,[1648] diplomatic protection claims are generally brought – and seek reparation – for individual injury.[1649] Third, party identity may be more leniently interpreted where diplomatic protection and individual claims overlap, either because: (i) the State actually acts on the individual's behalf;[1650] (ii) the

[1643] Similarly *infra*.nn1651-1653; Paparinskis, 'Countermeasures' (n5) 297-298; Vermeer-Künzli, 'Concurrence' (n8) 276.

[1644] See discussion Amerasinghe (n14) 163-165; Wittich (n73) 136-137;181-182; generally *supra*.nn684-695;Ch.IV(I)(A)-(B).

[1645] See *infra*.n1717.

[1646] See *supra*.Pt.II, particularly *supra*.nn1460-1464;1495-1509. Similarly Paparinskis, 'Countermeasures' (n5) 297; Peters (n1) 173; Roberts *infra*.n1647.

[1647] *Supra*.nn1460ff. Cf.Roberts, 'Hybrid' (n7) 43 (*res judicata* where State/individual rights 'interdependent').

[1648] *Supra*.nn1518-1531;1567-1569.

[1649] *Supra*.nn1532-1538. Similarly Paparinskis, 'Countermeasures' (n5) 298; *Brierly's* (n324) 256; Vermeer-Künzli, 'Concurrence' (n8) 276-277.

[1650] E.g., DADP, 99, discussing *Decision No.V* (n836) 152; cf.Garcia-Amador, 'Problems' (n142) 472 ('representative'). See *Banro* (n540) (*supra*.n1601) (protection sought); cf.*Ramos* (n407) (*supra*.n1603) ('no mandate'); *supra*.nn1554-1559.

claims concern the same individual's injury;[1651] and/or (iii) the State represents the individual's interest, common in diplomatic protection,[1652] meaning that the relevant individuals are the 'true beneficiaries' and reference to parties' 'formal identity' to deny this requirement is not 'satisfactory'.[1653] Indeed, where States bring *erga omnes*-type claims – including human rights claims – pursuant to Article 48 of the ARSIWA, they *must* seek reparation 'in the interest of' the 'beneficiaries of the obligation breached',[1654] i.e., the relevant individuals.[1655]

Subject to what will be said below, there is therefore a good argument that *res judicata* should apply as between overlapping individual and interstate diplomatic protection (including human rights) claims, in order to avoid respondents being faced with two essentially identical actions.[1656]

[1651] *Supra*.nn1560ff; similarly Nollkaemper (n12) 529 (party identity 'closer' where 'international proceedings...based on diplomatic protection and related to…same individuals'); Nollkaemper (n6) 251.

[1652] Shany (n4) 133-135; also Amerasinghe (n323) 69;76; Roberts, 'Hybrid' (n7) 7-8 (*Italy/Cuba*); cf.49-50; cf.Fitzmaurice, *LP* (n69) 670-671; *supra*.nn1570ff; *infra*.nn1748-1753.

[1653] Schreuer, *Decisions* (n2) 331-332, discussed Shany (n4) 134-135; also 136-137. Cf.Vermeer-Künzli, 'Concurrence' (n8) 276-278.

[1654] *ARSIWA*, Art.48(2)(b); generally Vermeer-Künzli, 'Interest' (n183) 557-559; Lauterpacht (n231) 299-300; Gaja, 'Affected' (n340) 382; *supra*.nn415-420. Although originally 'progressive development' (*ARSIWA*, 279), see *supra*.n95.

[1655] See *ARSIWA*, 209;279; Gaja, 'Position' (n455) 12; Gaja, 'Affected' (n340) 380;382; Gaja, 'Compliance' (n190) 958;961; Gaja, 'Injuries' (n340); Vermeer-Künzli, 'Interest' (n183) 577; Sicilianos (n204) 1144; Simma/Pulkowski (n274) 160. Cf.Shany (n7) 171-173 (rejecting special human rights considerations).

[1656] Cf.*supra*.nn1472ff;1647; similarly Vermeer-Künzli, 'Concurrence' (n8) 278.

B. ‘Direct’ and ‘mixed’ claims: distinguishing the ‘general interest’ from diplomatic protection

Diplomatic protection (including human rights) claims may be contrasted with ‘direct’ claims where, as noted in Chapter II, the State ‘represents principally its own interests rather than the interests of its nationals’.[1657] The *res judicata* effect of a claim that is truly ‘direct’ is unlikely, as shown below, to bar an individual claim.[1658] However, many interstate claims are ‘mixed’, containing aspects of diplomatic protection.[1659] The question is whether the foregoing conclusion, that *res judicata* has potential operation as between individual claims and interstate diplomatic protection claims, extends to such ‘mixed’ claims.[1660]

The focus here is on two situations.[1661] First, as Chapter IV discussed, a State’s ‘general interest’ is enlivened and moral injury caused where extensive or serious violations affect its nationals,[1662] including vis-à-vis human rights abuses.[1663] For instance, despite the *Nicaragua*, *Bosnian Genocide* and *Croatian Genocide* cases concerning claims for individual damage, they were brought not as diplomatic protection but in the respective States’ ‘own right and as *parens patriae* for [their] citizens’.[1664] Does

[1657] *Supra*.n330.

[1658] *Infra*.nn1698-1717;1732-1736; also ICSID (n536) 66;274.

[1659] *Supra*.nn332ff.

[1660] Cf.Roberts, ‘Hybrid’ (n7) 10 and discussion *infra*.nn1708;1718;1734ff.

[1661] Generally *supra*.Ch.IV(III)(B) for ‘mixed’/direct claims distinction.

[1662] Garcia-Amador, ‘Problems’ (n142) 474; also 485-486;422, discussed Dugard, ‘FirstRep’ (n322) [72]; Jessup (n2) 98; generally *supra*.Ch.IV(III)(B)(i) and authorities, particularly *supra*.nn950-954.

[1663] *Supra*.n951; generally nn950-954.

the State's 'general interest' in such situations obviate the potential application of *res judicata* vis-à-vis any individual claim that might be brought, or can the State purport to bar its population's claims with a single proceeding?[1665]

Second, States' interests include the economy and environment, as well as their population's safety,[1666] interests which individuals may share.[1667] Indeed, in some interstate claims to defend such interests, large numbers of individuals are also affected: take the environmental claims in *Trail Smelter*,[1668] or *Aerial Herbicide Spraying*,[1669] and economic claims such as those in the *Nicaragua* and *Genocide* cases already noted.[1670] States often likewise purport to bring such environmental or economic claims 'as *parens*

[1664] *Croatian Genocide* (n698) [20] ('damages to persons and property…economy and environment'); similarly *Bosnian Genocide* (n697) 64; *Military and Paramilitary Activities (Nicaragua v US) (Merits)* [1986] ICJ.Rep. 14 [15]; also *Georgia/Russia* (n386) 77-78. See Gaja, 'Position' (n455) 12; Tams, *Enforcing* (n344) 135; Kokott (n266) 608; cf.ILA, 'Toronto' (n667) [28]; *supra*.nn700;924;956; *infra*.Ch.VII(II)(B).

[1665] Similarly Roberts, 'Hybrid' (n7) 4;9-10;29;67 (vis-à-vis 'class'); Kalshoven (n813) 46-47; *infra*.n1718. Struggling with similar distinction: Sohn/Baxter (n58) 47 (when 'claims must begin to be treated on…wholesale basis…left to…particular cases'); authorities *infra*.n1756; cf.*supra*.Ch.V(II); generally *infra*.nn1672ff;1734.

[1666] The law of necessity recognises a State's 'essential interest' (*ARSIWA*, Art.25) in such matters: see Ago, 'Eighth Report (Addendum)' [1980] 2(1) ILCYB 13,14; Heathcote, 'Necessity' in Crawford/others, *Responsibility* (n6) 495-496; *ARSIWA*, 183; Crawford, *GP* (n2) 308; Paddeu, *Justification* (n53) 389;397;399-400;401-413; *Impregilo (Award)* (n581) [346] (including 'fundamental needs of...population'); *Continental Casualty v Argentina (Award)* ICSID Case-ARB/03/9 (5.Sept.2008) [177]-[180]; *infra*.nn1668-1671;1682ff. Similarly Sloane, 'On the Use and Abuse of Necessity in the Law of State Responsibility' (2012) 106 AJIL 447, 454 (practice suggests 'roughly three categories…state security, fiscal crises…ecological harms');cf.460ff. Cf.Paparinskis, 'New' (n8) 634; *infra*.nn1675-1676.

[1667] See Lemos, 'Aggregate Litigation Goes Public: Representative Suits by State Attorneys General' (2012) 126 HLR 486, 494 ('state's interest in [residents'] well-being...might overlap with the [residents'] personal interests'); Sloane (n1666) 504 ('for…sake of…state's constituents'). Also Garcia-Amador, 'Report' (n2) [112].

[1668] *Trail Smelter* (n723) 1917;1920;1924-1931;1965-1966, discussed DADP, 82; Dugard, 'ThirdRep' (n716) [75]; ILC, '50th' (n380) 17 (Hafner); ILC, '54th' (n727) 34;41;43 (Dugard/Brownlie/Opertti Badan);cf.48-49 (Yamada/Xue); Meron (n322) 98; *supra*.nn723-727.

[1669] *Herbicide Pleadings* (n718), Mem.Ecuador, Chs.VI-IX (claims), Ch.X, particularly [10.29]ff (reparation), Rep.Ecuador [3.152] ('claims...on behalf of...citizens'); *supra*.nn718-720.

[1670] *Supra*.n1664. Also *infra*.nn1877ff.

patriae for [their] citizens'.[1671] Does *res judicata* have any potential relevance in such circumstances, as between interstate claims and those that might be brought by affected individuals?

In answering these questions, it is particularly helpful to compare common law, as interpreted by US courts, concerning *parens patriae* claims.[1672] As noted above, States have employed this *parens patriae* terminology in interstate claims where significant individual injury has occurred alongside injury to State interests.[1673] However, the main reason for considering the operation of the *parens patriae* doctrine under US law is that, with the benefit of a wealth of case law, it provides a helpful analytical framework for distinguishing the general State interest from individual claims, including for determining when *res judicata* should operate between State and individual claims.[1674]

US courts relevantly distinguish two kinds of claims: first, there are claims brought for a US state's 'quasi-sovereign interest'[1675] in 'the health and well-being – both physical and economic – of [its] residents in general'.[1676] Second, there are claims which,

[1671] *Supra*.n1664.

[1672] Explaining differences with common law: *Snapp v Puerto Rico* 458 US 592 (1982) 600; Ratliff (n313) 1850-1851; Curtis, 'The Checkered Career of *Parens Patriae*' (1976) 25 Depaul.LR 895, 895-898;907-908; Hawkes, '*Parens Patriae* and the Union Carbide Case' (1988) 21 Corn.ILJ 181,186-187.

[1673] *Supra*.n1664. Cf.Crawford, *System* (n190) 352; Crawford, 'Community' (n416) 315.

[1674] See *infra*.nn1675ff. On US law 'analogy', cf.Demirkol (n266) 624; authorities *infra*.n1682.

[1675] *Snapp* (n1672) 601-602; also Tribe, *American Constitutional Law*, vol.1 (3rd edn, 2000) 453; Curtis (n1672) 895;908; Hawkes (n1672) 187; Ratliff (n313) 1851;1853; Metz, 'Reconstitutionalizing *Parens Patriae*: How Federal *Parens Patriae* Doctrine Appropriately Permits State Damages Suits Aggregating Private Tort Claims' <http://www.law.columbia.edu/sites/default/files/microsites/career-services/Reconstitutionalizing%20Parens%20Patriae.pdf>, 6-7.

[1676] *Snapp* (n1672) 607, quoted Tribe (n1675) 453; also Ratliff (n313) 1853; Hawkes (n1672) 187-189; *Kansas v Colorado* 206 US 46 (1907) 99 ('general welfare'); Caplan, 'Parens Patriae Antitrust Suits by Foreign Nations' (1977) 6 Denv.J.Intl.L&Pol. 705, 724-725.

even if asserting such interests,[1677] cannot be brought by states under US law,[1678] because the states are actually 'pursu[ing] the interests of a private party ... only for the sake of the real party in interest'[1679] and do not 'articulate an interest apart from the interests of particular private parties'.[1680] The latter have been held akin to diplomatic protection claims under international law.[1681]

Importantly, reflecting the same State interests recognised under international law,[1682] *parens patriae* suits can concern environmental damage and other 'public nuisances',[1683] as well as economic damage,[1684] where the state acts as 'representative of

[1677] See *infra*.nn1687-1692.

[1678] See Metz (n1675) 13-19, discussing US Constitution, Art.III; Eleventh Amendment; *Snapp* (n1672) 611 (Sep.Op.Brennan).

[1679] *Snapp* (n1672) 602; also Tribe (n1675) 453;452 (cannot be 'conduit for [citizens'] claims'); Ratliff (n313) 1851; Hawkes (n1672) 188-190; Himes, 'State *Parens Patriae* Authority: The Evolution of the State Attorney General's Authority' (ILEP Symposium, 23-24 Apr.2004) 4; Metz (n1675) 6;15.

[1680] *Snapp* (n1672) 607; also Ratliff (n313) 1852-1853; Himes (n1679) 7; Hawkes (n1672) 190;193-194; Garner, *Black's Law Dictionary* (10th edn, 2014) 1287. Cf.*Impregilo (Award)* (n581) [354].

[1681] See *North Dakota v Minnesota* 263 US 365 (1923) 376 (*parens patriae* 'differentiated from [state's] lost power...to present and enforce individual [citizens'] claims'); discussion Nowak and Rotunda, *Constitutional Law* (6th edn, 2000) 102; Thomas, 'Parens Patriae and The States' Historic Police Power' (2016) 69 SMULR 759, 788; cf.Himes (n1679) 3-4.

[1682] *Supra*.n1666; also Thomas (n1681) 790;802 (*parens patriae* based on 'police power');791 ('general welfare'); similarly Borchard (n319) 31; Garcia-Amador, 'Problems' (n142) 427; Caplan (n1676) 719;724; and on 'analogy to independent countries': *Snapp* (n1672) 603, referencing (603-604) *Missouri v Illinois & San.Dist. Chicago* 180 US 208 (1901) 241; also *Trail Smelter* (n723) 1964.

[1683] Hawkes (n1672) 188, also 193; *Snapp* (n1672) 603-605, discussing cases; similarly Tribe (n1675) 454-455; Nowak/Rotunda (n1681) 102; Curtis (n1672) 908-909; Himes (n1679) 3-4;10-11;20-22; Metz (n1675) 6; Ratliff (n313) 1852;1856; Note, 'State Protection of Its Economy and Environment: Parens Patriae Suits for Damages' (1970) 6 Colum.J.L&Soc.Probs. 411, 412-413. E.g., *Missouri/Illinois* (n1682) 211-214;241;243 (sewerage); *Georgia v Tennessee Copper* 206 US 230 (1907) 238-239 (fumes); *Kansas/Colorado* (n1676) 98-100 (water diversion); *ND/Minnesota* (n1681) 371-372 (flooding). Further Craig (n97) [25-009].

[1684] Generally Hawkes (n1672) 188-189;cf.191-192; Himes (n1679) 11-12; Curtis (n1672) 909; Ratliff (n313) 1852;1855. E.g. *Pennsylvania v West Virginia* 262 US 553 (1923) 591-592;594-598 (gas restrictions); *Maryland v Louisiana* 451 US 725 (1981) 734;736-738 (tax affecting consumers), discussed Himes (n1679) 8-9; *Louisiana v Texas* 176 US 1 (1900) 19 (quarantine restrictions), discussed Hawkes (n1672) 186-187 (fn.41).

the public' in subjects 'of grave public concern'[1685] 'affect[ing] [its] citizens at large'.[1686] However, not all claims involving such interests are properly regarded as *parens patriae* claims:[1687] economy-based claims are not *parens patriae* when really on behalf of particular individuals,[1688] a category thereof,[1689] or 'nothing more than a collectivity of private suits',[1690] and an environmental case regarding flooding of state territory was not *parens patriae* where damages were claimed 'for the benefit of' affected farmers.[1691] Importantly, at least under federal US common law, when states make claims akin to class actions, alleging and claiming compensation for mass injury to the state's citizens, they are not acting as *parens patriae* and in the general interest within the traditional meaning of the doctrine.[1692]

[1685] *Pennsylvania/WV* (n1684) 592; *Georgia v Pennsylvania Railroad* 324 US 439 (1945) 451, both quoted *Snapp* (n1672) 605-606. Also Tribe (n1675) 455.

[1686] *Louisiana/Texas* (n1684) 19, quoted *Snapp* (n1672) 603.

[1687] On difficulties differentiating: Caplan (n1676) 723-724; Note (n1683) 414-418; Hanna, 'The Helicopter State: Misuse of Parens Patriae Unconstitutionally Precludes Individual and Class Claims' (2017) 92 Wash.LR 1955, 1961-1964;1973; Hawkes (n1672) 191-192;194; also Metz (n1675) 18; Ratliff (n313) 1857-1858; also authorities *infra*.nn1884ff (damages).

[1688] See *New Hampshire v Louisiana* 108 US 76 (1883), particularly 89 (assigned debts claim 'by and for [citizens]'), discussed Himes (n1679) 4-5; Metz (n1675) 16-18; *Maryland/Louisiana* (n1684) 767-768 (Diss.Op.Rehnquist); also *Kansas/Colorado* (n1676) 99; similarly Note (n1683) 412-413.

[1689] *Oklahoma v Atchison* 220 US 277 (1911) 286;289 (shippers), discussed Hawkes (n1672) 188-189;192.

[1690] *Pennsylvania v New Jersey* 426 US 660 (1976) 666, discussed Himes (n1679) 5; Metz (n1675) 16.

[1691] *ND/Minnesota* (n1681) 374-375, discussed Metz (n1675) 16; *Maryland/Louisiana* (n1684) 768 (Diss.Op.Rehnquist).

[1692] Note (n1683) 418;423-424;426-428; also Hawkes (n1672) 191;193-194;198-199, discussing *Pfizer v Lord* 522 F.2d 612 (1975) 617-618 (class action alternatives); Curtis (n1672) 912-914; Caplan (n1676) 736-737; *California v Frito-Lay* 474 F.2d 774 (1973) 775-777 and *New York v Seneci* 817 F.2d 1015 (1987) 1017-1018, both discussed Metz (n1675) 7-9; cf.15;18; also Schaerer, 'A Rose by Any Other Name' (2013) 16 NYUJ.Legis.&Pub.Pol. 39, 76 ('where...State seeks monetary relief for discrete group of...citizens' they 'are real parties in interest'); see *infra*.nn1848;1885. Cf.Ratliff (n313) 1854;1856; Lemos (n1667) 494-495; Hanna (n1687) 1967 ('minority' approach); Tribe (n1675) 454; Himes (n1679) 9; Thomas (n1681) 762-763;798-799.

The difference is critical for *res judicata* purposes because, as noted above, members of class actions – recognised across legal systems – are bound by the suit's outcome.[1693] The same is true vis-à-vis the relevant individuals where, pursuant to legislation,[1694] US states are in fact able to bring 'aggregated private claims'[1695] as *parens patriae*.[1696] In such a case, as has been explained in a domestic context, States are 'represent[ing] unknown but real individuals' and their 'claims are not severable from the legitimate claims of their individual inhabitants'.[1697] By contrast, *res judicata* does not bar individuals from bringing claims where *parens patriae* suits concerning 'public' interests have already been brought, except insofar as those individuals are 'privies' because they seek compensation for damage arising from violation of the same 'public' rights.[1698]

The Tribunal in the *Chevron/Ecuador* investment arbitration drew the same distinction between public and individual claims, albeit under Ecuadorian law,[1699] in determining whether mass environmental litigation by citizens was barred by a settlement agreement entered into by the State.[1700] It held that the settlement agreement would be *res*

[1693] *Supra*.nn1549-1550.

[1694] On such claims being normally statutorily-based: Cox, 'Public Enforcement Compensation and Private Rights' (2016) 100 Minn.LR 2313, 2322-2331; Hanna (n1687) 1967-1968; Lemos (n1667) 493;495-498; Thomas (n1681) 762;799; also Metz (n1675) 8.

[1695] Metz (n1675) 8 and authorities, particularly fnn.42-43; also Thomas (n1681) 762;796-799; Himes (n1679) 12-14; Ratliff (n313) 1847;1854.

[1696] Lemos (n1667) 500; Metz (n1675) 22-24; Schaerer (n1692) 76; Hanna (n1687) 1966. Cf.Cox (n1694) 2336-2339 ('public compensation' not precluding); cf.2340 ('class actions');2346-2349 (depends on claim's statutory basis); *infra*.n1697.

[1697] Note (n1683) 426.

[1698] *Alaska Sport Fishing Association v Exxon* 34 F.3d 769 (1994) [12]-[19], discussed Hanna (n1687) 1978-1980; Metz (n1675) 23-24; also Lemos (n1667) 532-535; Cox (n1694) 2342-2344; similarly Handley (n511) [9.13].

[1699] Although referencing US law: *Chevron/Ecuador (IB)* (n1493) [176]-[180].

[1700] ibid.[150]ff.

judicata regarding environmental claims brought in the relevant community's 'diffuse' or 'collective' interest,[1701] but would not prevent individuals bringing 'separate and different claim[s] for personal harm',[1702] the latter including a class action for thousands of named and unnamed persons.[1703]

This case law suggests, first, that there is a distinction between a State's "public" claims and claims more akin to class action suits where mass individual injury is alleged.[1704] Second, claims may be akin to class actions even where broader State interests are involved, including where large numbers of citizens are affected.[1705] Is this analysis helpful for international law purposes?[1706] It is suggested that it is, because – as introduced in Chapter IV and elaborated further in Chapter VII[1707] – international law recognises a similar distinction between interstate claims in the 'general interest', akin to *parens patriae* suits proper, and those 'mixed' claims, more like class actions, where States bring claims concerning large numbers of individuals.[1708]

[1701] See *Chevron/Texaco v Ecuador (First.Part.Award, Track.I)* PCA.Case-2009-23 (17.Sept.2013) [96],[108]; cf.*Chevron/Ecuador (IB)* (n1493) [186] (not on facts).

[1702] *Chevron/Ecuador (FPA(I))* (n1701) [108].

[1703] *Chevron/Ecuador (IB)* (n1493) [147]-[149], also [159]ff.

[1704] *Supra*.nn1682-1703;1692.

[1705] *Supra*.nn1688-1692. Cf.*supra*.nn1662-1664;1668-1670;1683-1686.

[1706] Cf.Fitzmaurice, *LP* (n69) 11; *Trail Smelter* (n723) 1964; Peters (n1) 47; Vermeer-Künzli, 'Interest' (n183) 571-572 and see *supra*.n1682.

[1707] *Supra*.Ch.IV(III)(B)(i); *infra*.Ch.VII(II)(B).

[1708] Cf.Berman (n18) 72 ('generic situation' regarding 'class'); Roberts, 'Hybrid' (n7) 4;9;14-15;29;67 (class action); Juratowich (n12) 32-33; Borchard (n319) 353; Kalshoven (n813) 46; generally *supra*.Ch.IV(III)(B)(i); *infra*.nn1718;1733ff;1811ff;1862ff. Cf.Borchard, 'Protection of Citizens Abroad and Change of Original Nationality' (1934) 20 YLJ 359, 363 (diplomatic protection as *parens patriae*); *Liechtenstein's Pleadings* (n329), Obs.Liechtenstein [6.37].

Thus, the EECC, addressing claims concerning hundreds of thousands of persons,[1709] noted that 'some of both States' claims are made in the exercise of diplomatic protection, *in that they are predicated upon injuries allegedly suffered by numbers of [their] nationals*.'[1710] It thereby acknowledged the individual basis partially underlying the claims, notwithstanding that significant material and consequent moral injury was also allegedly caused to the States.[1711] The ECtHR likewise distinguished, in the *Cyprus/Turkey* case, interstate claims 'substantially similar' to diplomatic protection[1712] – even those concerning large numbers of victims[1713] – from claims 'about general issues (systemic problems and shortcomings, administrative practices, etc.)' where 'the primary goal ... is that of vindicating the public order'.[1714] It thus similarly recognised that diplomatic protection could be present in a claim where large numbers of nationals are impacted, notwithstanding that States' own interests are also implicated in such a case.[1715] The IACHR, apparently recognising a similar distinction, accepts that States might claim not only regarding 'individual or identifiable victims' but also – and *unlike* individuals themselves – regarding 'generalized situations of widespread or systematic violation of human rights'.[1716]

[1709] See *Eritrea* (n271) [197],[205]-[206]; *Ethiopia* (n428) [55].

[1710] *Eritrea* (n271) [25]; *Ethiopia* (n428) [25] (emphasis added); authorities *infra*.n1826.

[1711] See *Ethiopia* (n428) [54]-[65] (moral damage); *infra*.nn1863;1874 (State damage).

[1712] *Cyprus/Turkey (Compensation)* (n95) [45], discussed Peters (n1) 394.

[1713] See *infra*.n1815.

[1714] *Cyprus/Turkey (Compensation)* (n95) [44].

[1715] See *supra*.nn1662-1663. Also Gattini, 'Trojan' (n421) 537.

[1716] *Nicaragua/CR* (n994) [195].

Individual claims under international law are generally brought for individuals' own damage, rather than to defend the 'public' interest.[1717] If certain 'mixed' interstate claims are likewise brought for individual damage – even if State interests are also involved – it is possible to see, for the reasons discussed above, how the principle of *res judicata* might be engaged as between the two.[1718] Indeed, the potential operation of *res judicata*, not only vis-à-vis overlapping individual and diplomatic protection claims, but also such 'mixed' claims, is supported by the African Commission's preparedness to suspend, where interstate EECC claims were on foot, a claim brought regarding individuals affected by the same conflict.[1719] The *Italy/Cuba* Tribunal also considered that overlapping diplomatic protection and individual claims were to be prevented,[1720] notwithstanding that a number of individuals were involved and Italy made a satisfaction claim for its own moral damage.[1721] Admittedly, the ECtHR did not consider the interstate *Cyprus/Turkey* claim preclusive vis-à-vis individual claims.[1722] However, it reached that conclusion five years before deciding – in the context of interstate reparation claims for the individuals' damage – that the interstate claim was diplomatic protection-like.[1723] As

[1717] Douglas (n301) 31; also *Picq v France*, Doc.CCPR/C/94/D/1632/2007 (17.Aug.2009) [6.3] (no *actio popularis*); *Nicaragua/CR* (n994) [189]-[193]; generally Zwart (n491) 50ff; Connors (n258) 394. Cf.*supra*.nn1598-1599;1609;1698; Crawford, *GP* (n2) 374; Peters (n1) 291-293;303;472ff; Shany (n7) 64.

[1718] See *supra*.Pt.(A); *supra*.nn1693ff. Cf.Higgins, *Problems* (n298) 52, quoted *supra*.n950; Roberts, 'Triangular' (n5) 395-396 (States may 'settle…class action diplomatic protection claim'); similarly *infra*.nn1734;1756.

[1719] *Supra*.nn1500-1505;1604-1610;1710-1711.

[1720] *Supra*.nn1617-1620.

[1721] *Italy/Cuba* (n365) [34], discussed Potestà, 'Italy/Cuba' (n363) 342; Potestà, 'Potential' (n353) 758. See *supra*.n365.

[1722] *Supra*.nn1612-1615;1715.

[1723] *Supra*.n1712, cf.*Varnava* (n391). Further: Roberts, 'Hybrid' (n7) 48.

noted earlier, it had apparently not been satisfied at the earlier stage that the same individuals' claims would be determined and remedied.[1724]

The same presence of diplomatic protection, potentially enlivening *res judicata* vis-à-vis individual claims, is detectable in other interstate claims defending State interests.[1725] As Chapter IV outlined, the *Trail Smelter* case was arguably more an exercise of diplomatic protection vis-à-vis numerous individuals than a 'direct' claim, even if State interests in the environment were also present.[1726] Indeed, a US court concluded, in strikingly similar circumstances, that a claim was not one brought *parens patriae*, but in reality on behalf of the affected individuals.[1727] Moreover, that a class action was lodged by individuals arising from the same circumstances as *Aerial Herbicide Spraying*, albeit under domestic law,[1728] suggests that the latter may also have been – at least in part – brought for individual injury.[1729] Given that class actions are generally regarded as preclusive of later claims brought by individual members of the class,[1730] it is at least arguable that *res judicata* would apply as between a decision in such an interstate case and any individual claim arising from the same circumstances.[1731]

[1724] *Supra*.n1614.

[1725] Cf.*supra*.nn1666-1671.

[1726] *Supra*.nn723-727; see *Trail Smelter* (n723) 1964 ('quasi-sovereign').

[1727] *Supra*.n1691.

[1728] *Arias v Dyncorp* 752 F.3d 1011 (2014) 1013; Defendant's Dismissal Motion (26.Jun.2009) <http://www.expose-the-war-profiteers.org/archive/legal/2009-1/20090624.pdf>, 3.

[1729] See *supra*.n1669.

[1730] *Supra*.nn1550-1551;1693ff.

[1731] Cf.*supra*.n1493 (domestic courts);1693-1703;1708;1718; *infra*.nn1734-1736;1740ff.

Such cases may be contrasted with those brought in the State's interest, for either of the two reasons noted above,[1732] but *not* for individual damage.[1733] Roberts has suggested, in this respect, that collateral estoppel should bind individuals vis-à-vis liability findings in interstate claims such as those in the Mexico-US *Cross-Border Trucking* case, where Mexico alleged violations affecting Mexican-owned carriers, but did not identify particular individuals affected or claim compensation.[1734] However, for the reasons outlined in Chapter IV, this case was not one of diplomatic protection.[1735] Moreover, the case law discussed above demonstrates that, even if a claim concerns individual injury, and individual examples are given, decisions examining circumstances in general are not the same, for *res judicata* and related purposes, as those concerning, and repairing violations vis-à-vis, particular individuals.[1736] Rather, it is diplomatic protection claims for reparation, whether or not part of a 'mixed' claim concerning a State's moral or material damage,[1737] that provide the potential for *res judicata* to operate vis-à-vis individual claims.[1738]

[1732] *Supra*.nn1662-1663;1666.

[1733] Cf.*supra*.nn1688-1698;1704-1705; authorities *infra*.nn1848;1884ff on damages; generally *supra*.Ch.IV(I)(C);(III)(B) (direct/indirect claims distinction); also *Ecuador/US* (n85) [203]-[204].

[1734] Roberts, 'Hybrid' (n7) 67; also 9 ('resembling...class actions'); *Cross-Border* (n373) [281]-[283],[292],[298].

[1735] *Supra*.nn989-991.

[1736] *Supra*.nn1518-1531;1567-1569;1614; similarly *Consular Assistance (Ad.Op.)* (n407), *supra*.n407; cf.*supra*.nn1675-1692. Cf., on treaty interpretation: authorities *supra*.nn969;1398.

[1737] E.g., *supra*.nn1662;1711;1721; *infra*.Ch.VII(II)(B); cf.*supra*.nn755;905.

[1738] *Supra*.Pts.V(A)-(B).

C. Outstanding concerns

Despite the foregoing conclusion that *res judicata* may apply to preclude individual claims where an interstate diplomatic protection claim has been brought, such claims – and any remedies awarded – belong to the State and are utilised in its discretion.[1739] The party identity requirement recognises the injustice of binding an entity to the outcome of litigation over which it has no control.[1740] This may explain why the IACHR was reluctant to allow Mexico's *Avena* claim to preclude the individual claims overlapping with it.[1741] The 'mixed' interstate claim, both diplomatic protection and 'in [Mexico's] own right',[1742] would *prima facie* appear to be akin to those just discussed in which *res judicata* might potentially operate.[1743] Nonetheless, the IACHR expressed concern in certain cases that Mexico had no 'mandate' from the individuals, and did not have to act in their interests.[1744]

It is impossible to say in the abstract when a tribunal addressing overlapping individual-interstate claims might be prepared to bind a non-party.[1745] Certainly, it

[1739] See DADP, 97-100;29, quoting *Barcelona Traction* (n69) [78]-[79]; Borchard (n319) 29;353;357-358;366-368; Vermeer-Künzli, 'Concurrence' (n8) 276-278; Mazzeschi (n217) 211; Fitzmaurice, *LP* (n69) 26; Aréchaga (n69) 575; Bollecker-Stern (n231) 107-109; Amerasinghe (n323) 22;67; Whiteman (n649) 275;282-283; Douglas (n367) 169; Roberts, 'Hybrid' (n7) 30;35-36; *Decision.No.8* (n1060) [3]; cf.Hanna (n1687) 1967 (similar *parens patriae* concerns).

[1740] *Gleeson* (n1541) 516; also Cheng (n73) 341-343 (*audi alteram partem*); Shany (n4) 132-133;137; Shany (n7) 23-24;155; Wehland (n13) [7.47]-[7.51]; *infra*.nn1754-1755; also Roberts, 'Hybrid' (n7) 10.

[1741] *Supra*.nn1603;1634-1635.

[1742] *Supra*.nn431-432.

[1743] *Supra*.Pt(V)(B); see *Avena* (n152) (Sep.Op.Vereshchetin) [8] ('specific individuals', 'specific injuries' suggests diplomatic protection); also Berman (n18) 72; Nollkaemper (n12) 529-530; Nollkaemper (n6) 251 (potential identity vis-à-vis similar cases). Cf.*supra*.n1647.

[1744] *Supra*.nn1603;1634-1635. Cf.*Nicaragua/CR* (n994) [183].

[1745] Similarly Wehland (n13) [7.33]; Salles (n473) 247 ('case-by-case'); Shany (n7) 155 ('overly broad...bar' unduly limits 'party autonomy'); Shany (n4) 133.

appears unproblematic to bind individuals where they have sought, or consented to, diplomatic protection,[1746] as indeed the IACHR's decision, by noting the absence of 'mandate', implicitly suggests.[1747] More generally, Article 19 of the DADP recommends that States '[t]ake into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation ... sought',[1748] requiring consultation,[1749] and transfer of compensation.[1750] Insofar as Article 48 claims are at issue, States are obliged to act 'in the interest of' the 'beneficiaries',[1751] the same phrase used vis-à-vis countermeasures envisaging action requested by, and 'on behalf of', another.[1752] Where individuals are similarly involved in interstate diplomatic protection claims, this might mitigate concerns regarding *res judicata* or provisions with similar effect barring those individuals' claims.[1753]

As to broader 'mixed' claims akin to class actions, such actions are usually binding only provided the representative actually represents the class's interests,[1754] with

[1746] See, e.g., *Banro* (n540) (*supra*.n1601); also *SEEE* (n1602) (*supra*.n1602); *Chagos/UK* (n481) [79]-[81] (individual settlements; 'proceedings…widely known'). Similarly Borchard (n319) 357; Peters (n1) 175;212-213. Generally *supra*.nn1650-1655.

[1747] *Supra*.n1603.

[1748] DADP, Art.19(b).

[1749] ibid.97; similarly *Mexican Railway* (n1069) 209. Cf.Tams, 'Well' (n5) 782; Gattini, 'Trojan' (n421) 537.

[1750] DADP, Art.19(c), 97. Generally Roberts, 'Hybrid' (n7) 50-51; Mazzeschi (n217) 221; Vallat (n1058) 39-41; Parlett (n1) 89-90; Roberts, 'Triangular' (n5) 397-398.

[1751] *Supra*.n1654.

[1752] *ARSIWA*, 305 (vis-à-vis ARSWIA, Art.54), citing *Nicaragua (Merits)* (n1664) [199]; similarly Crawford, 'Community' (n416) 321.

[1753] Cf.Vermeer-Künzli, 'Concurrence' (n8) 276; Shany (n7) 36; Wehland (n13) [7.47] (inconsistent interests); Roberts, 'Hybrid' (n7) 29;51;67;69 (individuals' intervention possibility).

[1754] See discussion Mulheron, *The Class Action in Common Law Legal Systems* (2004) 276;289-303; Hanna (n1687) 1975;1978; Lemos (n1667) 501-503; *Hansberry v Lee* 311 US 32 (1940) 42 ('due process' breached if not 'fairly insur[ing]...protection of...interests of absent parties'), cited Nagareda, *The Law of*

individuals normally obtaining notice and the possibility to decline inclusion therein.[1755] The question that tribunals may have to consider, in an appropriate case, is how far it can be assumed that States represent their citizens, and thus how far *res judicata* should operate to bar their individual claims.[1756] For, as Chapter V outlined, it may sometimes be important that States are able to settle claims on their population's behalf.[1757]

Importantly, the possibility also remains that an individual's claim may preclude an interstate diplomatic protection claim regarding the same individual.[1758] Indeed, given that interstate diplomatic protection claims are 'indirect',[1759] the jurisprudence noted above suggests that there may be greater justification for the 'direct' individual's claim to bar that of the State than the contrary.[1760]

Class Actions and Other Aggregate Litigation (2009) 45; generally 76ff; Metz (n1675) 20-21; Handley (n511) [9.20]; Barnett (n513) [3.26].

[1755] Mulheron (n1754) 337-359; Barnett (n513) [3.32]; Hanna (n1687) 1975;cf.1976-1980 (*parens patriae*); Lemos (n1667) 507;cf.508-510; also Kalshoven, *infra*.nn1811;1847.

[1756] Raising the same concerns vis-à-vis *parens patriae* claims: Hanna (n1687) 1958-1959;1964-1967;1974-1980, particularly 1976-1977;1982-1983; Lemos (n1667) 503-504;505-509;511ff;531-542; discussion Metz (n1675) 20-24; Hawkes (n1672) 196-198;cf.199; Ratliff (n313) 1857-1858; also Note (n1683) 428-432; Caplan (n1676) 737-739 and see authorities *supra*.n1753. Cf.*supra*.nn1612;1653; Kalshoven (n813) 46-47, *infra*.nn1811;1847; Tams, 'Well' (n5) 782; *Decision No.V* (n836) 152; *Nemariam* (n310) 677-678; Portmann (n73) 130; also Shany (n4) 133 ('[p]olicy choices…flexible reading of…tests');136-137. Suggesting States might settle without individuals' consent: Roberts, 'Hybrid' (n7) 49;69; also 8;10 ('weigh[ing]…interests' of individuals/States).

[1757] *Supra*.nn1058ff;1718; Peters (n1) 175;212-213; also Roberts, 'Hybrid' (n7) 49; Metz (n1675) 23-24.

[1758] Similarly Juratowich (n12) 32; Nollkaemper (n6) 251; cf.*infra*.ChVII(I).

[1759] *Supra*.n324.

[1760] See cases *supra*.nn1574-1583;1586-1588. Cf.Roberts, 'Hybrid' (n7) 47; Vermeer-Künzli, 'Concurrence' (n8) 277;288; Paparinskis, 'Countermeasures' (n5) 298.

VI. Conclusion

The limited case law discussed does not demonstrate that *res judicata* would certainly operate to bar the second of two overlapping individual-interstate claims.[1761] It seems particularly unlikely to do so vis-à-vis interstate 'direct' claims that do not address, nor award remedies for, individual injury.[1762] However, there is authority, and good reason, for tribunals faced with individual claims overlapping with a diplomatic protection action, or similar Article 48 human rights claim, even if as part of a 'mixed' claim, to seriously consider invoking the doctrine or treaty provisions with similar effect to preclude one or the other of those claims.[1763] A 'liberal construction' of *res judicata* is justified, in some circumstances, to avoid abuse of process,[1764] which may also provide an alternative basis for addressing the same situations.[1765] In any event, as Chapter VII demonstrates, it is highly likely that the rule against double recovery will operate in such circumstances.

[1761] Cf.authorities *supra*.nn1448;1640;1753. Similarly Vermeer-Künzli, 'Concurrence' (n8) 277.

[1762] Cf.*supra*.n1736.

[1763] *Supra*.nn512-513;1472ff;1641;1656;1718;1738. Similarly Vermeer-Künzli, 'Concurrence' (n8) 278.

[1764] Shany (n7) 259; also 270-271.

[1765] *Supra*.nn1434-1435;1565;1581.

CHAPTER SEVEN: DOUBLE RECOVERY

As Chapter III outlined, the application of the principle precluding double recovery depends on whether the damage alleged in two claims is the same.[1766] This Chapter begins with an overview of case law, which demonstrates that the principle operates as between certain overlapping individual and interstate claims. It then analyses in which categories of interstate claims (diplomatic protection and human rights; 'mixed'; and 'direct' claims) identified in Chapter II the necessary identity of damage is present. It concludes that – apart from 'direct' claims – these interstate claims are necessarily at least partially for individual damage, meaning that the double recovery rule operates as between them and individual claims for the same damage.[1767] Moreover, even certain 'direct' claims are caught by the rule where State loss itself results from such individual damage.[1768]

I. Double recovery and overlapping individual and interstate claims

Beginning with case law concerning overlapping individual-interstate claims, on the one hand, reparation awarded to a State may preclude later individual compensation claims.[1769] Thus, the *Arctic Sunrise* Tribunal awarded a State compensation, under UNCLOS, for 'non-material damages in relation to the arrest, detention, and prosecution of' certain individuals aboard a vessel.[1770] As noted in Chapter III, it appeared to acknowledge that the double recovery rule might operate in those circumstances vis-à-vis

[1766] *Supra*.n607.

[1767] *Infra*.Pts.II(A)-(B); similarly Crawford, *GP* (n2) 590; Roberts, 'Hybrid' (n7) 50 (fn.228). Generally *supra*.Ch.IV(I)(C);(II);(III)(B).

[1768] *Infra*.Pt.II(C).

[1769] Similarly Borchard (n319) 368 ('settlement of a claim by agreement of...two governments...estops the claimant from...again demand[ing] any redress').

[1770] *Arctic.Sun. (Compensation)* (n599) [85].

ECtHR claims brought by the relevant individuals and resulting from the same factual situation.[1771] Similarly, in *Pad*, the applicants alleged ECHR violations resulting from the killing of their Iranian relatives.[1772] After Iran's diplomatic intervention, Turkey agreed to pay the State compensation, for the families, in 'final settlement'.[1773] Iran ultimately determined to pay the victims less than half of the money.[1774] The applicants, declining the compensation, proceeded with their application.[1775] While ultimately declaring the case inadmissible on other grounds,[1776] the ECtHR considered that, given the interstate payment, Turkey 'could be deemed to have fulfilled [its] duty to make reparation for the alleged wrong' and that further proceedings might, consequently, be unwarranted.[1777]

On the other hand, individual compensation affects the State's ability to claim reparation. Thus, the ILC's Special Rapporteur on State Responsibility, observing that *Chórzow* concerned proceedings brought both by affected German companies before MATs, and by Germany before the PCIJ, concluded that 'it is quite clear that any compensation payable to the companies would have been taken into account in assessing the amount of compensation payable to Germany.'[1778] Indeed, as Chapter IV highlighted,

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[1771] ibid.[86]; *supra*.n600.

[1772] *Pad* (n1345) [39]-[47], discussed Vermeer-Künzli, 'Concurrence' (n8) 284-285 (vis-à-vis overlapping individual/interstate claims).

[1773] *Pad* (n1345) [31] (Turkish-Iranian Protocol) .

[1774] ibid.[33].

[1775] ibid.[58].

[1776] ibid.[71]-[72].

[1777] ibid.[65] (under Art.37(1)(c)); also Paparinskis, 'New' (n8) 639-640. Further: *Assoc.SOS* (n470) [38]-[39] (compensation agreement resulting from diplomatic intervention 'in line with...interests'; claim struck out), discussed Vermeer-Künzli, 'Concurrence' (n8) 282-284; Mackenzie/others (n252) [11.20]; *supra*.Ch.V(II)(C)(iii).

[1778] Crawford, 'ThirdRep' (n144) [248], referencing *Chórzow (Merits)* (n80); also Shany (n4) 43.

even where individuals are compensated by *domestic* courts while exhausting local remedies, States are precluded from bringing diplomatic protection claims for their injury.[1779] The Franco-Italian Commission similarly considered that the obligations at issue in interstate proceedings could have been 'discharged' had the individual – claiming before domestic courts – had their property restored.[1780] Consistent with this position, Cyprus withdrew from its interstate reparation case claims concerning persons already awarded compensation in individual applications.[1781] The UNCC, having categorised its claims into six groups,[1782] some of which were individual,[1783] also recognised the application of the rule precluding double recovery in overlapping individual-interstate claims across categories, observing:

> While the potential for duplicate recovery is more subtle and not as directly ascertainable between individuals in category "C" and the corporations, Governments or international organizations who may have compensated them for the same losses they claim in their individual capacities, ... it certainly does exist.
>
> This duplicate recovery potential has most relevance when the corporation, Government or international organization is also claiming for losses that are essentially the same but viewed from another perspective, e.g., amounts paid by these entities to reimburse individuals for costs related to departure, relocation, personal property, real property or employment losses, in addition to relief, injury and death benefits. ...
>
> ... the Panel therefore urges that all attempts reasonably possible be made to minimize the risks of double recovery ... .[1784]

[1779] Authorities *supra*.nn849-850. Even concerning different defendants: *The Neptune* (1797) 3 Moore's 3076, 3088 (Pinkney); *CME v Czech Republic (Part.Award)* (2001) 9 ICSID.Rep. 121 [304],[410] (may influence quantum); and vis-à-vis the opposite: *Fujimori* (n592) [780]-[781], cited Nollkaemper (n6) 209 (no double recovery; IACtHR already compensated).

[1780] *Ottoz (France v Italy)* (1950) 18 ILR 435 (Franco-Italian.Cl.Comm.) 439. See *Brownlie (7th)* (n532) 51.

[1781] *Cyprus/Turkey (Compensation)* (n95) [48].

[1782] Houtte/Delmartino/Yi (n266) 57-58 (individual departures (A); personal injury (B); individual damage under/over $100,000 (C/D); corporations' claims (E); State/organisational claims (evacuation/relief/State property/environmental) (F)); also Murphy/Kidane/Snider (n266) 48; Houtte/Das/Delmartino (n269) 335-338.

[1783] *Infra*.n1821.

[1784] *Seventh Instalment* (n437) [75]-[77].

These authorities suggest that the principle precluding double recovery operates vis-à-vis overlapping individual and interstate claims when the defendant has repaired the damage, regardless of which entity invokes responsibility.[1785]

II. Identity of damage

Individuals claim, pursuant to the mechanisms discussed in Chapter II, for their own damage.[1786] It follows that double recovery rules should operate vis-à-vis overlapping individual and interstate claims insofar as the latter claims for the same individual damage. What is crucial, however, is to appreciate what amounts to individual damage, as distinct from that suffered by a State.[1787] It is helpful, in this respect, to examine the different categories of interstate claim outlined in Chapter II, considering diplomatic protection and human rights claims together,[1788] followed by 'mixed' and 'direct' claims.

A. Diplomatic protection and human rights claims

In terms of diplomatic protection, as noted in Chapter IV, the PCIJ considered that 'the damage suffered by an individual is never … identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the

[1785] See Paparinskis, 'Countermeasures' (n5) 297-300; *Pad* (n1345), *supra*.n1777; similarly Paparinskis, 'New' (n8) 639-640; also Aréchaga (n69) 564; *supra*.nn570ff. I thank Paparinskis for discussion.

[1786] *Supra*.n1717; generally Ch.II(I); *ARSIWA*, 209-210; Crawford, *GP* (n2) 585-588.

[1787] Cf.*supra*.Ch.III(III)(B). See discussion *supra*.Ch.IV(III)(B)(i);VI(V)(B).

[1788] For reasons explained *supra*.Ch.IV(II).

reparation due to the State'.[1789] Accordingly, as noted above, States claim for *their own* damage in diplomatic protection claims.[1790]

Nonetheless, Chapter IV outlined that diplomatic protection claims (including the diplomatic protection aspects of 'mixed' claims), are in reality based on damage suffered by an individual,[1791] the State's damage being purely "fictional".[1792] Indeed, the DADP observe that defendant State objections regarding the bringing of separate diplomatic protection claims vis-à-vis dual nationals, particularly where one State has already been compensated, 'should be dealt with in accordance with the general principles of law ... governing the satisfaction of *joint claims*.'[1793] The ICJ in *Reparations* likewise noted that, although diplomatic and functional protection claims are different, a defendant State could not 'be compelled to pay the reparation due in respect of *the damage* twice over.'[1794] Both assume – contrary to the premise of diplomatic protection – that the claims are for the same damage in each case, namely that to the individual.[1795]

The authorities just discussed bear this out, establishing that, whatever the forum, the principle precluding double recovery operates vis-à-vis overlapping individual claims

[1789] *Chórzow (Merits)* (n80) 28 (emphasis added), discussed Wittich (n73) 150 ('no identity'); Aréchaga (n69) 574-575; Peters (n1) 170; Garcia-Amador, 'SixthRep' (n105) [11]; Fitzmaurice, *LP* (n69) 670-671; Kalshoven (n813) 45-46; *supra*.n812.

[1790] *Supra*.nn813;1442; Garcia-Amador, 'Problems' (n142) 482; Kalshoven (n813) 45; Fitzmaurice, *LP* (n69) 670-671;cf.26.

[1791] *Supra*.Ch.IV(I)(C) and authorities, particularly *supra*.nn814-836;851.

[1792] *Supra*.Ch.IV(I)(C) and authorities, particularly *supra*.nn820-823;826;828-836.

[1793] DADP, 43 (emphasis added). Cf.Amerasinghe (n14) 50-51.

[1794] *Reparations* (n69) 186 (emphasis added). Similarly *Barcelona Traction* (n69) 130-131 (Sep.Op.Tanaka) (where one 'claim…realized' other's 'extinguished'); 200 (Sep.Op.Jessup); *Restatement (Second)* (n1076) 609. See authorities *supra*.nn572-574;754.

[1795] *Supra*.nn1789-1792; similarly Amerasinghe (n14) 50.

and such cases of diplomatic protection,[1796] including the diplomatic protection aspect of 'mixed' claims,[1797] to prevent a State having to compensate an individual's damage twice, albeit that in one claim this is "fictionally" distinct State damage.[1798]

What is true for diplomatic protection is even more so where human rights claims are instead brought under Article 48,[1799] because States acting under Article 48 do not claim as 'injured', for their own damage and reparation, but 'in the interest of' the 'beneficiaries', namely the individuals affected.[1800] The ECtHR has thus emphasised that 'it is the individual, and not the State, who is directly or indirectly harmed and primarily "injured" by a violation of ... Convention rights' and should receive reparation.[1801] The authorities just discussed suggest, consistently with human rights claims being premised on individual damage, that double recovery is precluded as between overlapping individual and interstate human rights claims.[1802]

As Chapter IV outlined, authorities on diplomatic protection establish that individual damage, for these purposes, concerns 'personal injury and ... injuries in respect

[1796] See *Chórzow (Merits)* (n80), discussed *supra*.n1778; local remedy compensation: *supra*.nn1779-1780; also *Cyprus/Turkey (Compensation)* (n95), *supra*.nn1781;1712 (diplomatic protection). Further Paparinskis, 'Countermeasures' (n5) 300.

[1797] *Arctic.Sun. (Compensation)* (n599), *supra*.n1771. Ch.IV established why this claim is rightly 'mixed': *supra*.nn934-943. Further authorities *supra*.n849.

[1798] *Supra*.nn1792;1794-1795.

[1799] *Supra*.nn415-420.

[1800] *Supra*.nn1654-1655.

[1801] *Cyprus/Turkey (Compensation)* (n95) [46]; see Peters (n1) 394-396 (secondary rights individual); Vermeer-Künzli, 'Interest' (n183) 557-558.

[1802] *Pad* (n1345), *supra*.nn1772ff; also *Cyprus/Turkey (Compensation)* (n95), *supra*.n1781.

of property',[1803] with these widely recognised as individual – not State – losses for reparation purposes.[1804] Any interstate claim brought for such damage is 'indirect', suffered via the individual,[1805] and thus 'derivative' and for the same loss.[1806] Insofar as diplomatic protection and human rights claims are thus brought for the same damage as that in an individual claim, they will be caught by the double recovery rule, and the claims will preclude one another,[1807] a finding consistent with that reached vis-à-vis *res judicata* in Chapter VI.

B. Mass 'mixed' claims

Importantly, as Chapters IV-VI foreshadowed, while extensive damage to nationals may result in moral damage to a State,[1808] and voluminous claims may be settled through lump-sum settlements[1809] – settlements that commonly involve no effort 'to adjudicate each claim or to allocate any specified amount to any designated claim'[1810] –

[1803] Amerasinghe (n323) 37. See *supra*.nn817-818.

[1804] See authorities *supra*.nn817-827; generally Garcia-Amador, 'SixthRep' (n105) [11],[30]-[31],[34]-[40],[176]; Brown (n109) 199-208; *ARSIWA*, 222-225; Crawford, *GP* (n2) 517. Cf.*supra*.n1792 (fiction).

[1805] *Supra*.n324.

[1806] *Restatement* (n107) 217; similarly *Heathrow* (n656) 51;53. Cf.*supra*.nn609;611 (shareholders). Generally *supra*.Ch.IV(I)(C) and authorities.

[1807] See *supra*.Ch.III(III)(A)-(B).

[1808] *Supra*.nn1662;1711.

[1809] See Gaja, 'Injuries' (n340); *Decision No.V* (n836) 152, quoted DADP, 99; Benvenisti (n300) 1095; Murphy/Kidane/Snider (n266) 32-34. Generally *supra*.nn1058-1061.

[1810] *Decision No.V* (n836) 152, quoted DADP, 99; also *Oppenheim's* (n73) 538; cf.Murphy/Kidane/Snider (n266) 33-35.

the individual element does not necessarily disappear merely because a claim is not individually addressed, nor the full loss repaired.[1811]

This is evident from certain 'mass claims'[1812] concerned with individual injury.[1813] For instance, in *Cyprus/Turkey*, the ECtHR, having distinguished diplomatic protection and other interstate claims,[1814] considered that claims brought 'for the benefit of individual victims' vis-à-vis 'two sufficiently precise and objectively identifiable groups of people' were diplomatic protection-like, notwithstanding that the individuals numbered over a thousand,[1815] the State was ultimately awarded sizeable 'aggregate sums',[1816] and one group was 'defined in an abstract manner'.[1817] Likewise, in the *Nicaragua* case, Nicaragua engaged in diplomatic protection,[1818] providing detailed evidence of personal injury to thousands of individuals, and significant property losses.[1819] Even so, 'because of the difficulties both moral and economic of calculating damages for persons killed, wounded and missing on a case-by-case basis', it ultimately claimed 'a lump-sum award

[1811] See *infra*.nn1812ff; Holtzmann (n266) [2] (States may exercise diplomatic protection); Kalshoven (n813) 46; cf.46-47 (where 'lump-sum' interstate settlement 'does not...meet the actual damage...difficult to maintain that...in [sic] behalf of…victims'; 'cannot...depriv[e] individual victims of...right to press…own claims for damage'). Cf.*supra*.nn80;1718.

[1812] Generally Holtzmann/Kristjánsdóttir (n266); Murphy/Kidane/Snider (n266) 45-49, also 32-45; Houtte/Delmartino/Yi (n266) Ch.2; Holtzmann (n266); Demirkol (n266) 616;626-628; Gray, 'Remedies' (n151) 887-890; Das and van Houtte, *Post-War Restoration of Property Rights under International Law*, vol.2 (2008), particularly 24-25 (defined vis-à-vis 'high number of claims' being 'sufficiently similar').

[1813] Cf.Demirkol (n266) 627 ('fast but individualised proceeding'); *supra*.Ch.VI(V)(B).

[1814] *Cyprus/Turkey (Compensation)* (n95) [44]-[45], cf.302-303 (Diss.Op.Karakaş).

[1815] ibid.[47].

[1816] ibid.[58]. Cf.[3]-[6] (Op.Casadevall).

[1817] ibid. [4] (Op.Casadevall), 306 (Diss.Op.Karakaş).

[1818] *Liechtenstein's Pleadings* (n329), Obs.Liechtenstein [6.37].

[1819] *Nicaragua's Pleadings* (n825), vol.V, 263-268.

of reparation for all the injuries to persons'.[1820] The numerous 'individual and corporate claims' for injury before the UNCC belonged to those claimants, notwithstanding their filing by governments,[1821] and irrespective of certain compensation amounts being capped.[1822] The ECtHR has likewise adopted 'fixed-rate sums' reparation where addressing thousands of similar applications.[1823]

For its part, while the EECC acknowledged that it was mainly addressing interstate, not individual, claims *per se*,[1824] and 'mass claims' mechanisms were not used,[1825] it nonetheless observed that 'some of both States' claims are made in the exercise of diplomatic protection, *in that they are predicated upon injuries allegedly suffered by numbers of [their] nationals*.'[1826] For instance, Ethiopia claimed 'fixed-sum[s] ... multiplied by the number of victims' in its 'claims for deaths and injuries, for certain property losses, for moral damages, and for injuries to prisoners of war'.[1827] The EECC raised concerns, including that 'claimant classes' were 'abstract',[1828] but ultimately

[1820] ibid.268.

[1821] Houtte/Delmartino/Yi (n266) 62 and other authorities *supra*.n270.

[1822] See Houtte/Delmartino/Yi (n266) 63;309; Caron (n270) 290; Houtte/Das/Delmartino (n269) 359; generally 341-344;348-351;353-366.

[1823] *Burmych v Ukraine*, App.46852/13 (ECtHR, 12.Oct.2017) [32] and see [8],[13],[43]-[44]. Generally Demirkol (n266) 627; *supra*.n1558.

[1824] *Eritrea* (n271) [3], *supra*.n271; also [25],[229] (POWs); Murphy/Kidane/Snider (n266) 57 ('largely...traditional interstate claims, albeit...often [seeking] recovery for loss, damage, or injury to thousands of people'); 301-303; Houtte/Delmartino/Yi (n266) 49;99.

[1825] Murphy/Kidane/Snider (n266) 57; also 60-62; *Eritrea* (n271) [38] ('State claims, not mass claims'), [53] (not 'mass claims on behalf of individuals'),[65]; Caron (n270) 293.

[1826] *Eritrea* (n271) [25]; *Ethiopia* (n428) [25] (emphasis added); also Murphy/Kidane/Snider (n266) 57 ('espousing' claims);68-70 (nationality). Generally on the damages awards: ibid.137-151;183-188;197-202;219-228;230-236;301-303;383-393. Cf.Demirkol (n266) 627.

[1827] *Ethiopia* (n428) [68]; generally [71]-[78].

[1828] ibid.[84], further concerns [84]-[92]. Discussion Murphy/Kidane/Snider (n266) 185.

awarded lump-sums for '*jus in bello* violations ... involving death, physical injury, disappearance, forced labor and conscription of civilians',[1829] individual property damage,[1830] and civilian injuries in Eritrea.[1831] It also held Eritrea responsible for personal and property damage arising from *jus ad bellum* violations,[1832] awarding lump-sum compensation.[1833] In Eritrea's case, in addition to awards for identified individuals,[1834] the EECC made, for instance, lump-sum awards for losses of persons' 'residential and business property'[1835] based on population estimates and likely damage incidence and severity.[1836] Sums were also awarded for civilian injury regarding 'loss of access to medical care',[1837] expulsion of residents,[1838] deprivation of nationality concerning an 'unknown, but apparently small, number of dual nationals',[1839] and detention of some thousand civilians.[1840] In both cases, awards were made 'for failing to prevent the rape of known and unknown victims'[1841] and for prisoners' personal injury, taking account, *inter alia*, of 'the total numbers of probable victims', and 'the extent of the injury or

[1829] *Ethiopia* (n428) [103], also [157]-[158],[161]. Discussion Murphy/Kidane/Snider (n266) 187.

[1830] E.g. *Ethiopia* (n428) [126],[135],[147],[180]ff,[199]ff.

[1831] ibid.[214]-[262] (numbers often unclear).

[1832] ibid.[292],[296],[300],[304]-[305],[391]. See Murphy/Kidane/Snider (n266) 133-136.

[1833] *Ethiopia* (n428) [332],[349],[356],[393]. See Murphy/Kidane/Snider (n266) 137-147.

[1834] See *Eritrea* (n271) [393]ff ('Individual Claims').

[1835] ibid.[76].

[1836] ibid.[72]-[76]; also [99]ff (building claims, some private), [331]-[340],[344]-[365] (property). Discussion Murphy/Kidane/Snider (n266) 199.

[1837] *Eritrea* (n271) [216].

[1838] ibid.[244]-[246]. See Murphy/Kidane/Snider (n266) 236.

[1839] *Eritrea* (n271) [267].

[1840] ibid.[374]-[376].

[1841] ibid.[239]; *Ethiopia* (n428) [110]; similarly *supra*.n1839.

damage'.[1842] Such claims appear to be – in the EECC's words – 'predicated' on individual injury, and thus diplomatic protection.[1843]

Taken holistically, these cases suggest, as the ECtHR made particularly clear, that, although it is relevant 'whether the victims of violations can be identified',[1844] a claim can still be for individual damage, notwithstanding that a group of persons is identified in an 'abstract' way.[1845] The EECC, for instance, often had to estimate the populations affected.[1846] In such cases, the claim is – as discussed in Chapter VI – more akin to a domestic class action, where 'unnamed' individuals may form part of the 'abstract class' bound by the outcome.[1847] Indeed, the US law of *parens patriae*, discussed in Chapter VI, recognises that a case brought simply to recover for losses suffered by individuals, even where those individuals are numerous, does not concern State damage.[1848] Moreover, claims can still be for individual damage even if lump-sums are awarded,[1849] or

[1842] *Eritrea* (n271) [229]; *Ethiopia* (n428) [209].

[1843] *Supra*.n1826; also Caron (n270) 293 (EECC 'state espousal'); cf.Juratowich (n12) 28-29.

[1844] *Cyprus/Turkey (Compensation)* (n95) [43]; similarly *supra*.nn1736;1743; also *Decision No.V* (n836) 152 ('demand...on behalf of a *designated national*', 'payment...on that *specific demand*...not a national fund' (emphasis added)), quoted DADP, 99; also Borchard (n319) 353;357; cf.Note (n1683) 425 ('unknown plaintiffs').

[1845] *Supra*.n1817, cf.*supra*.n1828; also *Eritrea* (n271) [38]; Mulheron (n1754) Ch.9(B) (on class definition).

[1846] *Supra*.nn1836;1842; similarly Murphy/Kidane/Snider (n266) 138; also Gray, 'Remedies' (n151) 888-889. Cf.Burgorgue-Larsen and de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (Greenstein tr, 2011) 227 (IACtHR awards group reparation 'even if...impossible to define...precise contour of the group').

[1847] Demirkol (n266) 624 and authorities; *supra*.n1550. Cf.*supra*.nn1697;1734;1841; Kalshoven (n813) 46 (if individuals 'failed without…fault to join the group...requesting diplomatic protection...right to claim compensation...remains intact').

[1848] *Supra*.n1692; *NY/Seneci* (n1692) 1017 (no separate State damage '[w]here...only seeks to recover money damages for injuries suffered by individuals'); also *Frito-Lay* (n1692) 775-776, both discussed Metz (n1675) 7-9; and see 9 (State damages suit 'only insofar as…damages it seeks are discrete from those potentially recoverable by individuals'); 24.

[1849] E.g. vis-à-vis quantification problems: *supra*.nn1816;1820; *Eritrea* (n271) [38] ('compensation levels...reduced, balancing...uncertainties flowing from...lower standard of proof'); Gray, 'Remedies' (n151) 888-889; generally Caron (n270) 290; Kalshoven (n813) 46.

compensation amounts are capped.[1850] Because such claims can nonetheless be for individual damage, the possibility remains that the double recovery rule will operate as between any interstate claim for such damage and individual claims for the same damage, precluding recovery in whichever claim is brought second.[1851]

The sense of such an outcome lingers in the ICJ's *Immunities Case*, addressing circumstances in which Germany had agreed with Italy to settle 'all outstanding claims on the part of [Italy] or Italian natural or legal persons' arising from WWII, paying sums in 'final settlement' 'for the benefit of' the latter's persecuted nationals.[1852] Although the case primarily concerned State immmunity, the ICJ considered that the consistent post-war practice of concluding 'lump-sum settlements' – or otherwise not requiring reparation – evidenced the absence of any *jus cogens* rule 'requiring the payment of full compensation to each and every individual victim'.[1853] The Court expressly did not rule on whether individuals have 'directly enforceable' international rights to compensation for IHL violations.[1854] Nonetheless, it appeared to assume that States can settle claims for such violations, thereby displacing any obligation to compensate affected individuals, observing:

> Where the State receiving funds as part of what was intended as a comprehensive settlement in the aftermath of an armed conflict has elected to use those funds to rebuild its national economy and infrastructure, rather than distributing them to individual victims amongst its nationals, it is difficult to see why the fact that those individuals had not received a share in the money should be a

[1850] *Supra*.nn1822-1823. Cf.Note (n1683) 425.

[1851] *Supra*.Ch.III(III)(A)-(B). Cf.Kalshoven, *supra*.n1811.

[1852] See *Immunities* (n39) [24]-[25].

[1853] ibid.[94]. Further: Peters (n1) 209.

[1854] *Immunities* (n39)[108]; generally *supra*.nn1223-1224.

> reason for entitling them to claim against the State that had transferred money to their State of nationality.[1855]

While the primary point is that the rules on State immunity cannot be relaxed merely because individuals have not received compensation,[1856] the tenor of the Judgment suggests that States may preclude later individual compensation claims by accepting reparation, even where it is by way of lump sum not spent on those affected.[1857] The ECtHR in *Pad* likewise appeared to envisage individual claims being precluded even where, as discussed above, the national State was only prepared to distribute a portion of the compensation intended for the victims.[1858]

The cases therefore suggest that interstate claims can be for individual damage even if brought for 'abstract' groups, lump sums, and where individuals receive no compensation.[1859] While mass claims are likely – as noted in Chapters VI and VI – to be 'mixed', owing to the presence of a State's moral or material damage,[1860] the diplomatic protection element therefore remains present. This is critical, because, as Chapter IV outlined, diplomatic protection claims are for individual damage, likely to be the same as that in an overlapping individual claim.[1861] The principle of double recovery will, accordingly, be engaged, and preclude one of those claims for reparation. This conclusion

[1855] ibid.[102]. I thank Paparinskis for discussion.

[1856] ibid.[101]-[102].

[1857] Cf.Note (n1683) 428-429; Hanna (n1687) 1985-1986 (*parens patriae*); Tomuschat (n105) 988-989; *Immunities Pleadings* (n1059), Rep.Germany [46]; *infra*.nn1858;1909.

[1858] *Supra*.nn1774-1777; Vermeer-Künzli, 'Concurrence' (n8) 284;288.

[1859] *Supra*.nn1844-1858.

[1860] *Supra*.Ch.IV(III)(B)(i);VI(V)(B).

[1861] *Supra*.nn1786;1791-1807. Generally *supra*.Ch.IV(I)(C).

is consistent with that reached in Chapter VI that *res judicata* also potentially applies as between such claims.

C. 'Direct' claims

While diplomatic protection claims, and human rights claims similar to diplomatic protection, are brought for individual personal or property damage, so-called 'direct' claims are not.[1862] Indeed, insofar as 'direct' claims are brought for damage peculiar to the State – State property, for instance,[1863] or 'security and defence costs',[1864] which can be appreciated as 'public'[1865] – the double recovery rule seems unlikely to be engaged vis-à-vis an individual's claim for damage.[1866]

However, States may bring claims that are 'derivative' of individual injury in a sense different to diplomatic protection, in the same way that heirs, dependents, and insurers[1867] may claim for their *own* loss resulting from damage done to others.[1868]

[1862] *Supra*.Ch.IV(I)(C);(III)(B)(i).

[1863] *Supra*.n899 and, e.g., *Ethiopia* (n428) [53] ('public property'),[143]ff,[162]ff,[357]ff,[410]ff,[436] (government property),Ch.X(C) (diplomatic property),Ch.XI(M) ('State-owned' ([449]) airline); *Eritrea* (n271) [101]-[103],[108],[111],[114]-[133],[136],[142],[157]-[172],[179],[186],[188],Ch.VII(J) (diplomatic).

[1864] *Nicaragua's Pleadings* (n825) 273;Ch.4.

[1865] Weinstock, 'The Lorax State: Parens Patriae and the Provision of Public Goods' (2009) 109 Colum.LR 798, 831 ('public good...national defense'); *Lusitania* (n107) 42 ('cost to [US] in prosecuting the war'); 43 ('cost...falls on all American taxpayers'). Cf.*Ethiopia* (n428) [286]; Tomuschat (n105) 989.

[1866] See analysis Note (n1683) 414-418;424. Cf.*supra*.n1717; *infra*.n1885 (separate State/individual damage).

[1867] See Borchard (n319) 627 ('Derivative Claimants', namely 'successors in interest'); *Wyoming v Oklahoma* 502 US 437 (1992) 476 (Diss.Op.Thomas) (tax loss 'derivative injury'); *Texas/AT* (n916) 965 (argument State healthcare costs 'derivative'), discussed Ratliff (n313) 1853-1854; Meron (n611), particularly 641;643;646; cf.*US v Germany (Administrative Decision No.VI)* (1925) VII UNRIAA 155 (US-German.Cl.Comm.) 165 (survivors' claims 'not derivative').

[1868] Similarly: Sohn/Baxter (n58) 46 and authorities *infra*.nn1869-1870. Cf.'indirect' human rights victims: Zwart (n491) 69-71;80-84. Generally on 'consequential losses': Aréchaga (n69) 568-569; also *Eritrea*

Borchard, for instance, foresaw such losses if 'the citizen has been rendered unable to perform his duties toward the state, *e.g.*, his duties of loyalty, the performance of military service, or the payment of taxes'.[1869] More generally, depending on the State concerned, injured individuals may, for example, be entitled to State-funded medical care, or social benefits, meaning the State bears certain costs.[1870] Chapter IV outlined how, in *Corfu Channel*, such damage was properly regarded as State damage, with State costs, in the form of payments, deriving from personal injury.[1871] Indeed, the UNCC compensated States for citizens' relief payments,[1872] Bosnia claimed, in the *Bosnian Genocide* case, for its own 'expenditures' in 'remedy[ing] or mitigat[ing] damage' separately from damage to persons and property,[1873] and both Ethiopia and Eritrea claimed for public spending consequent on individual injury.[1874]

The question here is whether such claims also engage the double recovery rule. The above extract from the UNCC suggests, in the affirmative, that double recovery operates even vis-à-vis such claims, where State costs were themselves incurred to

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(n271) [203] (no 'separate category of..."consequential damages"'); Wittich (n73) 122-125; *ARSIWA*, 203-205 (causation). Cf.*supra*.Ch.III(III)(B) (shareholders); *supra*.nn1570ff.

[1869] Borchard (n319) 362.

[1870] See Bollecker-Stern (n231) 101ff, particularly 101 (public social insurance may remove fiction); Arangio-Ruiz (n142) (fn.110) (quoting Reuter) (taxation/healthcare); *ARSIWA*, 221 (officials' 'pensions and medical expenses' State damage); Sohn/Baxter (n58) 46 (hospital expenses/benefits/travel/repatriation/legal costs); similarly *Reparations* (n69) 181;197 (Diss.Op.Hackworth); 215-216 (Diss.Op.Badawi Pasha); 217 (Diss.Op.Krylov).

[1871] *Supra*.nn909-914.

[1872] Houtte/Delmartino/Yi (n266) 58.

[1873] *Bosnian Genocide* (n697) 72.

[1874] *Eritrea* (n271) [290] (post-expulsion),[307] (payments/'social services'),[308]('expenses...incurred'); *Ethiopia* (n428) [143] ('public expenditure'),[471] (IDP care),[156],[159] (civilians' medical treatment), Ch.XI(O) (civilian assistance/reconstruction). Generally Murphy/Kidane/Snider (n266) 140;143-152;199;201.

compensate individual damage.[1875] Indeed, when Guatemala brought a claim against tobacco companies, under the US law of *parens patriae* discussed in Chapter VI, for additional healthcare costs for its citizens, the Court similarly concluded that the State damage was 'identical' to that of the relevant individuals.[1876]

Similarly, it is not uncommon for States to claim for damage to their economy,[1877] representing – as discussed in Chapter VI – the State's interest.[1878] Nicaragua, for instance, claimed for losses resulting from trade embargoes[1879] and to its 'development potential',[1880] the latter including GDP and 'social losses' vis-à-vis health, education, housing and infrastructure,[1881] calculated respectively based on import/export figures, and welfare expenditure combined with more general overall effect estimates.[1882] The difficulty arises, however, that – as Chapter IV outlined – it is only 'by a fiction' that 'the economic assets of an individual' are 'regarded as part of the wealth of his national state'.[1883] A case brought under the US law of *parens patriae* explains the relevance for

[1875] See *Seventh Instalment* (n437), *supra*.n1784. Generally Note (n1683) 414ff.

[1876] *In Re Tobacco/Governmental Healthcare Costs Litigation* 83 F.Supp.2d 125 (1999) 131 ('Although Guatemala may be pursuing the recoupment of…medical expenses under different legal theories than would individual smokers, it...seeks damages for identical injuries');132; generally Murphy, 'Liability and the WHO Framework Convention on Tobacco Control' (2003) 5 Int.L.Forum 62, 63; cf.Note (n1683) 417-418;428 ('effects on...individual[s]...indirect'). Cf.*Texas/AT* (n916) 960-963, discussed Ratliff (n313) 1853-1854; Metz (n1675) 1.

[1877] See cases *supra*.n1664; *Ethiopia* (n428), Ch.XI(N) (tourism/aid/investment), particularly [468] (economy); *Nicaragua's Pleadings* (n825) 307-308; also Murphy (n265) 202 (WTO).

[1878] *Supra*.nn1666;1684.

[1879] *Nicaragua's Pleadings* (n825) Ch.5.

[1880] ibid.Ch.6.

[1881] ibid.298.

[1882] See ibid.313-317; also *Guyana v Suriname (Award)* PCA.Case-2002-4 (17.Sept.2007) [266].

[1883] Amerasinghe (n14) 53. Similarly Wyler/Papaux (n158) 628; authorities *supra*.nn825-827.

present purposes:[1884] the Supreme Court noted 'the problems of double recovery inherent in allowing damages for harm both to the economic interests of individuals and for the quasi-sovereign interests of the State' given that:

> [a] large and ultimately indeterminable part of the injury to the "general economy", as it is measured by economists, is no more than a reflection of injuries to the "business or property" of consumers, for which they may recover themselves ... .[1885]

Being such a 'reflection' of individual injury, this suggests that – even if economic loss may indeed amount to State damage[1886] – it is often, as in the shareholder claims discussed in Chapter III, 'reflective' or 'derivative' loss,[1887] which cannot be claimed both by the State and an individual.[1888] The same applies vis-à-vis tax revenue losses which, although State damage,[1889] are often consequent on individual economic losses;[1890] or a

[1884] On individual/*parens patriae* double recovery risks: *infra*.n1885; Note (n1683) 414;417; Metz (n1675) 4;22-24. Cf.Hawkes (n1672) 184;190;192;194; Caplan (n1676) 744-745; Hanna (n1687) 1985-1986.

[1885] *Hawaii v Standard Oil* 405 US 251 (1972) 264; cf.276-277 (Diss.Op.Brennan) (State 'asserting claims "independent of and behind the titles of its citizens," [citation omitted]...excluded from its recovery any monetary damages that might be claimed by its citizens individually or as part of a properly constituted class'); 269 (Diss.Op.Douglas) ('Injury to...collective will commonly include injury to members of the collective'); cf.269-270 (possible distinctions), case discussed Hawkes (n1672) 191-192; Caplan (n1676) 710-711;728-729;744; Metz (n1675) 15; Curtis (n1672) 912-913.

[1886] See *supra*.nn1877-1878;1882; *NY/Seneci* (n1692) 1017, quoted Metz (n1675) 15 (fn.61). Cf.Bollecker-Stern (n231) 100-105.

[1887] *Supra*.nn609-611;1867;*infra*.n1890. Similarly *Ethiopia* (n428) [468], discussed Murphy/Kidane/Snider (n266) 150; also *Nicaragua's Pleadings* (n825) 277 ('direct repercussions upon...economy'); 306 (and authorities);311-312. Cf.Gourgourinis (n357) 301 (WTO 'beneficiaries...private parties').

[1888] *Supra*.n1885 and cf.*supra*.nn611-613. Cf.*Eritrea* (n271) [195]ff (individual 'consequential damages'); Murphy/Kidane/Snider (n266) 221-223.

[1889] See *Wyoming/Oklahoma* (n1867) 448; also 449;451, discussed Nowak/Rotunda (n1681) 102; *Hawaii/Standard* (n1885) 274 (Sep.Op.Brennan) ('additional payments from...public purse...or the failure to generate additional wealth' represent 'harm to...economic wellbeing'); Curtis (n1672) 914 (fn83); *Eritrea* (n271) [174] ('direct claim for lost tax revenue'), discussed Murphy/Kidane/Snider (n266) 224; also *Saiga* (n657) [135] (State's 'interest in maximizing…tax revenue'); Note (n1683) 414-417.

[1890] *Wyoming/Oklahoma* (n1867) 476 (Diss.Op.Thomas) ('derivative injury'); Dimitrakopoulos, *Individual Rights and Liberties Under the U.S. Constitution* (2007) 19 (fn.89) ('consequential loss'); *supra*.nn1867-1869. Cf.Note (n1683) 415-417.

loss of State services,[1891] which ultimately harms individuals.[1892] Indeed, as Chapter VI noted, even environmental damage, often claimed by States,[1893] and which may indeed reflect State damage under international law,[1894] may in some circumstances actually reflect individual damage, where the reparation sought is quantified based on losses vis-à-vis private property.[1895]

Unless claims like these are in fact brought for individual damage and thus – like those discussed in Chapter VI as potentially engaging *res judicata* – diplomatic protection, at least in part,[1896] they remain 'direct' claims for State damage.[1897] Nonetheless, by contrast with *res judicata*, which does not operate as between overlapping individual and 'direct' interstate claims,[1898] double recovery may operate to preclude one or the other when the 'direct' interstate claim is, for the reasons explained, consequent on individual damage.

[1891] See *supra*.nn1666-1667;1881; *Eritrea* (n271) [125]-[128],[208](hospital costs),[136],[183](schools).

[1892] Cf.*supra*.nn1876;1881-1882; *Hawaii/Standard* (n1885) 262-263 (fn.14) ('[State] injury...affects the citizens' similarly to *parens patriae* injury. 'Each...increas[es] taxes, or reduc[es] government services, or both'); also Note (n1683) 428 ('compensation, in…form of increased governmental services or lowered taxes'); cf.*Eritrea* (n271) [21] (significant compensation risks 'diversions of national resources from...paying country – and…citizens needing health care, education…other public services');630 (award 'to provide relief to [States'] civilian populations'); discussed Crawford, *GP* (n2) 483-484.

[1893] Cases *supra*.nn1668-1669; *Ethiopia* (n428) Ch.XI(H) (environment),[421]-[422]; *Nuclear Tests (Australia v France; New Zealand v France)* ICJ.Pleadings., vol.I, 14; vol.II, 8, discussed Brownlie, *System* (n76) 68-69; also 237 (*Cosmos* incident).

[1894] *ARSIWA*, 223; Barker (n138) 604; Houtte/Delmartino/Yi (n266) 58 (UNCC State category); further Kanner, 'The Public Trust Doctrine, *Parens Patriae*, and the Attorney General as the Guardian of the State's Natural Resources' (2005) 16 Duke.Env.L.&Pol.For 57, 61-90;94;100-112, discussing authorities; Note (n1683) 417-418 ('public injury');421.

[1895] See *Trail Smelter* (n723), discussed *supra*.nn1726-1727; Jessup (n2) 120; also Kanner (n1894) 99.

[1896] *Supra*.Pts.(II)(A)-(B);Ch.VI(V)(A)-(B).

[1897] See *supra*.Ch.IV(III)(B)(i);Ch.VII(II)(C).

[1898] *Supra*.nn1658;1734-1736.

III. Conclusion

This overview of double recovery confirms Chapter IV's conclusion that diplomatic protection and human rights claims, brought under either Article 42 or 48, are premised on individual damage, with the rule operating vis-à-vis individual claims overlapping with these kinds of interstate claim.[1899] In 'mixed' claims, the rule applies to preclude later individual claims for compensation insofar as individual damage has already been compensated.[1900] Moreover, even certain 'direct' claims may be sufficiently based on individual damage for the purposes of the rule's application.[1901]

A consequent risk of prejudice to either the State or individual is apparent.[1902] State prejudice would appear to be limited to situations in which the State has paid an individual funds it is unable to recover.[1903] For the individual, the Court in *Cyprus/Turkey* did suggest that compensation payments made in human rights cases 'substantially similar' to diplomatic protection 'should always be done for the benefit of individual victims',[1904] referencing the DADP's recommendation that compensation be given to the injured individual,[1905] and the ICJ's finding that human rights compensation 'is intended

[1899] *Supra*.Pt(A).

[1900] *Supra*.Pt(B).

[1901] *Supra*.Pt(C).

[1902] Similarly Vermeer-Künzli, 'Concurrence' (n8) 285-286.

[1903] See *Seventh Instalment* (n437), *supra*.n1784; *supra*.n611 (on loss disappearing once primary entity compensated).

[1904] *Cyprus/Turkey (Compensation)* (n95) [45]-[46].

[1905] DADP, Art.19(c), quoted *Cyprus/Turkey (Compensation)* (n95) [46].

to provide reparation for the [individual's] injury'.[1906] This is also consistent with the injunction under Article 48(2)(b) discussed above.[1907] Nonetheless, the general position remains that a State is free to use funds obtained in a diplomatic protection suit as it sees fit,[1908] and the case law suggests that – even in human rights cases – payment to the State may preclude later individual compensation claims, including where those individuals have received nothing.[1909]

There is no reason in principle why actions under domestic, human rights, or investment law such as those discussed in Chapter V vis-à-vis waiver would not also potentially be available to provide some recourse against a State party that thus fails to share the proceeds of a diplomatic protection action, whether because of the operation of the rule precluding double recovery or the principle of *res judicata* discussed in Chapter VI.[1910] Indeed, although the facts of the case were quite particular, the ECtHR in *Beaumartin* found that a lump-sum agreement, in providing that France was responsible for apportioning the sum among the beneficiaries, 'proclaimed the principle of the right to compensation of certain categories of expropriated persons', who thus had a property right thereunder that France could not refuse to recognise.[1911] Such actions may be critical in circumstances where an overlapping interstate claim is brought, and there is a

[1906] *Cyprus/Turkey (Compensation)* (n95) [46], quoting *Diallo (Compensation)* (n325) [57], also 391 (Sep.Op.Greenwood); Peters (n1) 395-396.

[1907] *Supra*.nn1799-1801. Also *Pad* (n1345) [65]; *supra*.n1777.

[1908] Authorities *supra*.n1739.

[1909] See Vermeer-Künzli, 'Concurrence' (n8) 285 (interstate settlement possibly denying 'effective remedy'); *supra*.nn1857-1858; Roberts, 'Triangular' (n5) 395.

[1910] Similarly Roberts, 'Hybrid' (n7) 51. See discussion *supra*.Ch.V(II)(D).

[1911] *Beaumartin* (n1411) [28], discussed Parlett (n1) 89. Similarly under domestic law: *Irresberger v Austria* (1953) 20 ILR 433 (Austria.Landesgericht) 433-434.

consequent risk that the individual's claim will be barred by *res judicata* and/or the rule against double recovery.

PART C

CHAPTER EIGHT: CIRCUMSTANCES PRECLUDING WRONGFULNESS

I. Introduction

Part B of this thesis considered how far, in situations of overlapping individual and interstate claims identified in Chapter II, rules of State responsibility may operate to preclude one of those claims because of action taken (or not taken) by the other entity.

Part C turns to consider the potential operation of particular circumstances precluding wrongfulness ('CPW'), because of individual or State conduct, likewise to preclude claims of the other. Like Part B, the situations envisaged by this Part are those where, but for the operation of a given CPW, States and individuals would have overlapping claims against the same respondent State.[1912] However, unlike Part B, which concerned the potential preclusion of *one* claim by invocation (or non-invocation) of responsibility by the other, Part C considers how far such CPW may be relied upon by a respondent State to preclude *both* claims, but in response to the conduct of only one entity.[1913] This Part thus considers to what extent States can invoke CPWs against (i.e. in response to the conduct of):

(1) *another State*, and thereby preclude wrongfulness not only vis-à-vis that State but also vis-à-vis *individuals* and their claims; and
(2) *an individual*, and thereby preclude wrongfulness vis-à-vis those individuals' claims, as well as any overlapping *interstate* claim.

[1912] *Supra*.nn12-13;63.

[1913] Similarly authorities *supra*.nn43;226.

Chapter I explained that CPW operate to prevent a State being in breach of its international obligations.[1914] Accordingly, while Part B was concerned with preclusion through the operation of rules relating primarily to admissibility and reparation, this Part is concerned with rules precluding breach.

Countermeasures and self-defence provide the focus. Unlike other CPWs, such as *force majeure*, distress, or necessity,[1915] these arise because of an entity's 'conduct'.[1916] They are therefore an appropriate focus for a thesis concerned with the effects of one entity's conduct on another's ability to invoke responsibility. While consent likewise depends on conduct,[1917] it is excluded from consideration here, both for reasons of space and because Chapter V considered similar issues vis-à-vis waiver.[1918]

Parts II and III of this Chapter introduce self-defence and countermeasures, outlining when their operation vis-à-vis overlapping individual-interstate claims potentially arises. Part IV considers these CPW in the context of such overlapping claims. It focuses on suggestions that they cannot operate to preclude claims by 'third parties' not committing the relevant wrongs,[1919] thus limiting the scope for their operation vis-à-vis

[1914] *Supra*.Ch.I(III).

[1915] Generally *ARSIWA*, Arts.23-25.

[1916] Crawford, 'SecondRep' (n1078) [278]; also *ARSIWA*, 178; cf.Paddeu, *Justification* (n53) 84-85;120-122;125-126; Ago (n1666) 44 (fn.143) (necessity vis-à-vis natural phenomena); Brownlie, *International Law and the Use of Force by States* (1963) 376. See *infra*.nn1922;1935-1936.

[1917] Crawford, 'SecondRep' (n1078) [278]; *ARSIWA*, 178, generally 163-165. Considering impact of individual/State consent on the other's claims: Paparinskis, 'New' (n8) 629-631; Paparinskis, 'Analogies' (n14) 100-101.

[1918] Cf.*ARSIWA*, 163; *supra*.n467.

[1919] See *infra*.nn1998 and 1994-2012; 2198 and 2222-2224;2226ff.

overlapping individual-interstate claims.[1920] However, Part IV queries whether State practice supports this approach, arguing that these CPW may indeed operate to preclude at least certain overlapping individual-interstate claims.[1921]

II. Countermeasures and overlapping claims

Pursuant to the ARSIWA, countermeasures are actions, otherwise internationally wrongful,[1922] that are justified where taken 'against a State which is responsible for an internationally wrongful act' and 'in order to induce that State to comply with its obligations'.[1923] Countermeasures must be 'limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State',[1924] and 'commensurate with the injury suffered'.[1925] As both a CPW and a manner of invoking responsibility,[1926] countermeasures are important 'self-help' mechanisms for enforcing States' obligations in the decentralised international legal system.[1927]

[1920] See *infra*.Pts.II-IV, particularly *infra*.nn1994-2011;2195-2203;2212-2227.

[1921] *Infra*.Pt.IV(B);(C)(ii)-(iv).

[1922] *ARSIWA*, Art.22, 168; Dawidowicz (n416) 19; Alland, 'The Definition of Countermeasures' in Crawford/others, *Responsibility* (n6) 1132.

[1923] *ARSIWA*, Art.49(1), 284-285, also referencing *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgment)* [1997] ICJ.Rep. 7 [83]; similarly Alland (n1922) 1135; Dawidowicz (n416) 19; Elagab (n1190) 44-51;62; White/Abass (n194) 540. Insofar as relevant, the ARSIWA are assumed to reflect custom: see Crawford, *GP* (n2) 293-294; *Corn Products* (n14) [145]; *ADM* (n232) [125], cf.[2] (Op.Rovine); Lesaffre, 'Countermeasures' in Crawford/others, *Responsibility* (n6) 472-473; cf.470. Cf.White/Abass (n194) 540; *Cargill* (n359) [381]; also Ruys (n94) 4.

[1924] *ARSIWA*, Art.49(2).

[1925] ibid. Art.51; also *Air Services* (n183) 443; O'Keefe (n949) 1157ff. The ARSIWA's procedural requirements are not discussed here: see *ARSIWA*, Art.52; Paddeu, *Justification* (n53) 264-266; Paparinskis, 'Countermeasures' (n5) 269-270; Dawidowicz (n416) 243;346-379.

[1926] *ARSIWA*, 168-169;256; Paparinskis, 'Countermeasures' (n5) 270; Lesaffre (n1923) 469-470; Paddeu, *Justification* (n53) 225;252-261.

[1927] Paparinskis, 'Countermeasures' (n5) 269; Guilfoyle, 'Interdicting Vessels to Enforce the Common Interest: Maritime Countermeasures and the Use of Force' (2007) 56 ICLQ 69, 69; Criddle (n57) 596; also

With certain exceptions,[1928] any international obligation might be subject to countermeasures,[1929] including in fields in which individuals can claim.[1930] Importantly, the same countermeasures may be invoked vis-à-vis overlapping individual and interstate claims: Mexico, for instance, defended both a US-brought interstate WTO claim and investor-State claims by arguing that its actions were countermeasures taken against the US, the investors' State of nationality.[1931] Indeed, earlier Chapters outlined that circumstances giving rise to individual claims simultaneously engage interstate responsibility.[1932] Accordingly, whenever countermeasures are relied upon vis-à-vis individual claims, the question whether an overlapping interstate claim is also precluded will arise.

III. Self-defence and overlapping claims

Self-defence as a CPW adopts the definition in Article 51 of the UN Charter,[1933] which recognises a State's 'inherent right of individual or collective self-defence if an

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Tams, 'The Use of Force against Terrorists' (2009) 20 EJIL 359, 372; Paddeu, *Justification* (n53) 225-226;247-251;268-269; Parlett (n5) 395; van Aaken, 'International Investment Law and Decentralized Targeted Sanctions: An Uneasy Relationship' (2016) 164 Colum.FDI Perspectives <http://ccsi.columbia.edu/files/2013/10/No-164-van-Aaken-FINAL.pdf> 1.

[1928] *ARSIWA*, Art.50; further *infra*.Pt.IV(B)(iii).

[1929] Paddeu, *Justification* (n53) 264; Zoller (n144) 42-43; Dawidowicz (n416) 307. Cf.O'Keefe (n949) 1158-1159.

[1930] Paparinskis, 'Countermeasures' (n5) 270;317;351-352 (investment); see *infra*.nn2004ff; cf.*infra*.n2185 (human rights).

[1931] See *infra*.nn2005-2006 with authorities.

[1932] *Supra*.nn216-217;1457-1463. Similarly O'Keefe (n949) 1164.

[1933] *ARSIWA*, 166-167; Crawford, *GP* (n2) 289.

armed attack occurs against [it]'.[1934] Self-defence thus operates in response to an 'armed attack', which is a use of armed force of a sufficiently grave nature.[1935] Like countermeasures, self-defence both responds to conduct[1936] and is a 'self-help' mechanism.[1937] Actions in self-defence must be both necessary and proportionate.[1938]

Much discussion of self-defence focuses on its operation vis-à-vis the prohibition on the use of force in Article 2(4) of the UN Charter,[1939] with actions taken in self-defence 'not, even potentially, in breach of [that] Article'.[1940] Additionally however, under Article 21 of the ARSIWA, '[s]elf-defence may justify non-performance of certain [other] obligations … provided that such non-performance is related to the breach of that provision'.[1941] As Paddeu highlights, it is in relation to claims for breach of these obligations that self-defence as a CPW may be invoked.[1942] Interstate claims potentially

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[1934] UNC, Art.51.

[1935] See *Oil Platforms* (n183) [64],[72]; *Nicaragua (Merits)* (n1664) [191]; discussion Gray, *International Law and the Use of Force* (4th edn, 2018) 150-157; Tams, 'Terrorists' (n1927) 369-370; Greenwood, 'Self-Defence' in *MPEPIL* (2011) [12]; Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Sutcliffe tr, 2010) 403.

[1936] *Supra*.n1916; Alland (n1922) 1132. Cf.*Oppenheim's* (n73) 417-418 (fn.3) ('wider sense' against natural forces); cf.*supra*.n1916 (necessity).

[1937] Dinstein, *War, Aggression and Self-Defence* (6th edn, 2017) [534]-[535]; also Bowett (n69) 3-4; cf.11; cf.Zoller (n144) 40-41; Tams, 'Terrorists' (n1927) 372.

[1938] *Nicaragua (Merits)* (n1664) [176]; Greenwood, 'Self-Defence' (n1935) [8],[25]-[29]; Gray, *Force* (n1935) 157-164.

[1939] See, e.g., Lubell (n10) 25-26; Greenwood, 'Self-Defence' (n1935) [4]; Tams, 'Terrorists' (1927) 360-362; Bowett (n69) 22-24; generally *infra*.nn2213-2218;2239; similarly Paddeu, *Justification* (n53) 176;187-189. UNC, Art.2(4) relevantly obliges States to 'refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state…'.

[1940] *ARSIWA*, 166; similarly Greenwood, 'Self-Defence' (n1935) [4]; Paddeu, 'Use of Force against Non-State Actors and the Circumstance Precluding Wrongfulness of Self-Defence' (2017) 30 Leid.JIL 93, 99-102; Paddeu, *Justification* (n53) 177-178;189;194-197; Bowett (n69) 185-186; Corten, *War* (n1935) 402; Crawford, *GP* (n2) 290.

[1941] *ARSIWA*, 166; see Paddeu, *Justification* (n53) 175;192;197-205; Paddeu, 'Force' (n1940) 102-104.

[1942] Paddeu, *Justification* (n53) 175-179;183;192-193;197-205; Paddeu, 'Force' (n1940) 102-104. Cf.Greenwood, 'Self-Defence' (n1935) [4].

precluded by actions being in self-defence include those for breach of territorial sovereignty or non-intervention,[1943] law of the sea,[1944] and trade and commerce.[1945]

No reported *individual* claim under international law appears to have yet been held precluded on self-defence grounds, though one such claim depended on the legality of action purportedly taken in self-defence.[1946] Nonetheless, self-defence could well become relevant in individual claims, given that States exercising self-defence will commonly harm individuals,[1947] and individuals have made international law claims concerning States' exercise of military force.[1948]

More particularly, human rights and IHL obligations apply in armed conflict.[1949] Human rights norms protect individuals from arbitrary deprivation of life,[1950] but such

[1943] Crawford, *GP* (n2) 290; Paddeu, *Justification* (n53) 175-177;182-183;199-202 (with references); generally authorities *infra*.nn2215-2218;2224;2238ff.

[1944] Paddeu, *Justification* (n53) 183; discussion *infra*.nn2241ff.

[1945] ibid.176-177;182-183;197;199;202-205 (with references); *Oil Platforms* (n183) [25]-[26],[37],[43]-[44],[77]-[79]; *Nicaragua (Merits)* (n1664) [221]-[224]; Crawford, *GP* (n2) 290.

[1946] *Coenca Brothers v Germany* (1927) 7 TAM 683 (Greco-German MAT) 686-688, cited Cheng (n73) 88; also Guideu, 'Defending America's Cambodian Incursion' (1994) 11 Ariz.JICL 215, 223-224.

[1947] See *Chemical Weapons Deployment* (1987) 106 ILR 389 (BVerfG) 395-396; Jessup (n2) 211-212; Dinstein (n1937) [478]; e.g. Gray, *Force* (n1935) 213 (Israel/Lebanon-2006); discussion Schreuer, 'The Protection of Investments in Armed Conflict' in Baetens, *Investment* (n357) 13-16. Indeed, IHL dictates when individuals cannot be harmed: e.g., ICRC, 'Introduction' (n736); Alston, 'Study on Targeted Killings', UN.Doc.A/HRC/124/24/Add.6 (28.May.2010) [30],[57]-[67]; cf.Lauterpacht (n231) 283; *infra*.nn2241ff;2257 (ships/aircraft).

[1948] E.g., *supra*.nn269;272;388;409;414;449; Schreuer, 'Protection' (n1947) 6-8;15-16; also 8-10;18-19; Murphy/Kidane/Snider (n266) 39; Nollkaemper (n6) 12.

[1949] *ARSIWA*, 166; also ILC, 'Draft articles on the effects of armed conflicts on treaties, with commentaries' [2011] 2(2) YBILC 108, Ann.(f), 126-127.

[1950] ICCPR, Art.6; AmCHR, Art.4; ACHPR, Art.4; also ECHR, Art.2 ('force…absolutely necessary') and, e.g., *Giuliani and Gaggio v Italy* ECHR 2011-II 275 [298] ('general legal prohibition of arbitrary killing').

deprivation is not arbitrary if in compliance with IHL.[1951] Self-defence cannot excuse violations of human rights or IHL norms.[1952] However, the HRC has recently outlined that 'acts of aggression … violate ipso facto article 6 [right to life]', implying that a deprivation will nonetheless be arbitrary if *jus ad bellum* requirements are unmet.[1953] With States relying on self-defence in situations giving rise to individual human rights claims,[1954] whether actions are indeed undertaken in self-defence could become relevant to such claims' success.[1955]

Investment treaties are also presumed to remain in force during armed conflicts.[1956] Cases have concerned alleged BIT breaches resulting from State action

[1951] *Legality of the Threat or Use of Nuclear Weapons (Ad.Op)* [1996] ICJ.Rep. 226 [25]; also *Wall* (n1421) [105]-[106]; Parlett (n1) 194-195; Houtte/Delmartino/Yi (n266) 247-249.

[1952] *ARSIWA*, 166; Paddeu, *Justification* (n53) 175-176;198-199; Paddeu, 'Force' (n1940) 104.

[1953] HRC 'General Comment No.36' (draft) <https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf> [71], see [67]-[70]. Further: State practice and scholarly authorities in support reproduced Yip, 'Written Contribution to the General Discussion' (14.Jul.2015), <https://www.ohchr.org/Documents/HRBodies/CCPR/Discussion/2015/KaLokYip.doc> [11]-[13], particularly Jinks, 'International Human Rights Law in Time of Armed Conflict' in Clapham and Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (2014) 668.

Force may also be employed, purportedly in self-defence, where IHL is inapplicable: see Milanovic, 'More on Drones, Self-Defense, and the Alston Report on Targeted Killings' *EJIL:Talk!* (5.Jun.2010); Alston (n1947) [28]-[33],[44],[50],[56],[86]; also Kress, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts' (2010) 15 JC&SL 245, 259-264; Gray, *Force* (n1935) 233-237.

[1954] See individual Ethiopia/Eritrea claims (*supra*.nn272;414;439); self-defence claims: *Jus Ad Bellum–Ethiopia's Claims 1-8 (Part.Award)* (2005) XXVI UNRIAA 457 [11]-[12],[14],[17],[19]; individual claims arising from Russia/Georgia conflict (*supra*.n388); Georgia's self-defence claim: *Georgia/Russia* (n386) [108]; Russia's claim: Gray, *Force* (n1935) 168-169; generally discussion Corten, *War* (n1935) 465; individual claims arising from Ukraine/Russia conflict (*supra*.n394); Russia's self-defence claim: Wisehart, 'The Crisis in Ukraine and the Prohibition of the Use of Force' *EJIL:Talk!* (4.Mar.2014).

[1955] Cf.*R (Gentle and Clarke) v Prime Minister* (2006) 132 ILR 721 (EWCA) [41]-[51].

[1956] See Schreuer, 'Protection' (n1947) 4-5, referencing DAEAC, see Arts.5-7; Ann.(e); also 124-126. Similarly Hernández, 'The Interaction between Investment Law and the Law of Armed Conflict in the Interpretation of Full Protection and Security Clauses' in Baetens, *Investment* (n357) 31-32; Paddeu, 'Force' (n1940) 99; Paddeu, *Justification* (n53) 181-182.

taken during a civil war,[1957] and related to the Russia/Ukraine conflict.[1958] A State might argue that self-defence necessitated BIT violations within its territory:[1959] for instance, as justifying its failure to protect an investment from violence in breach of a 'full protection and security' provision,[1960] or as justifying requisition of property in breach of obligations not to expropriate.[1961] Self-defence might be alleged to preclude a claim under custom or a BIT's exception clause.[1962]

[1957] *AAPL v Sri Lanka (Award)* (1991) 6 ICSID.Rev.-FILJ 526 [8],[62],[79]-[86], see [63]-[64] (considering necessity), discussed Schreuer, 'Protection' (n1947) 8-11;14-15; Hernández (n1956) 36-37.

[1958] See Vaccaro-Incisa, 'Crimea Investment Disputes' *EJIL:Talk!* (9.May.2018); Hepburn and Kabra, 'Further Russia Investment Treaty Decisions Uncovered' *IA.Rep*. (17.Nov.2017); further *supra*.nn392-394.

[1959] Although BITs are usually territorially-limited (authorities *infra*.n2133; cf. discussion authorities *supra*.n1958), self-defence may require action within State territory: Bowett (n69) 23-24; Ruys, *'Armed Attack' and Article 51 of the UN Charter* (2010) 185-187; also Cheng (n73) 87; *infra*.n1961.

[1960] On such clauses and conflict: Schreuer, 'Protection' (n1947) 6-10; Hernández (n1956) 33-43; *AAPL* (n1957) [7],[43],[46]ff; also Dupont, 'The Arbitration of Disputes Related to Foreign Investments Affected by Unilateral Sanctions' in Marossi and Bassett (eds), *Economic Sanctions under International Law* (2015) 205; Henckels, 'Investment Treaty Security Exceptions, Necessity and Self-Defence in the Context of Armed Conflict' (Mar.2018) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3136191&download=yes, 10-11. Cf.'war clauses' discussed Schreuer, 'Protection' (n1947) 13-16; Paddeu, *Justification* (n53) 93 ('collateral [property] damage').

[1961] Considering self-defence vis-à-vis requisition: Bowett (n69) 23-24; cf.Cheng (n73) 40-49; Schreuer, 'Protection' (n1947) 13-14 (BIT 'war clauses'); Paddeu, *Justification* (n53) 184; similarly McNair, *Opinions* (n666) 231-232 (necessity); Dawidowicz (n195) 372-373;407 (self-defence asset freeze); generally Ruys (n94) 12 ('economic sanctions' self-defence); cf.Paddeu, 'Self-Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility' (2015) 85 BYBIL 90, Pt.III(A)(1). Further on requisition generally: Borchard (n319) 109-115;246-255;262-270; Criddle (n57) 599-601; Jessup (n2) 212; Ago (n1666) 35-36 ('military necessity'). Generally on expropriation *infra*.Pt.IV(B)(ii)(b); vis-à-vis conflict: e.g.: *Ports-Ethiopia's Claim 6* (2005) XXVI UNRIAA 489 [10],[27]; *Civilian Claims-Eritrea's Claims 15,16,23 and 27-32 (Part.Award)* (2004) XXVI UNRIAA 195 [124]-[125],[152].

IHL allows requisition in some circumstances: ICRC, 'Rule 51: Public and Private Property in Occupied Territory', *Customary IHL Database* <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule51>; *Ports* (n1961) [23]-[31]; *Ethiopia* (n428) [455]; *Eritrea (Civilian)* (n1961) [123]-[129],[146],[151]-[152]; discussion Murphy/Kidane/Snider (n266) 345ff; Criddle (n57) 599-600. However, self-defence remains potentially relevant: (1) IHL may not apply: cf. discussion *supra*.n1953; (2) the IHL/investment relationship might be unclear: Radjai, Halonen and Kyriakou, 'An Analysis of the Compensation Regime Applicable to Claims Arising from Armed Conflicts Affecting Investments in MENA' (2016) 3 BCDRIAR 219, 225; cf.Hernández (n1956) 25-29 (*lex specialis*); Schreuer, 'Protection' (n1947) 14; cf.*supra*.n1953; (3) investment law 'may make a difference…to…applicable standard of reparation': Houtte/Delmartino/Yi (n266) 225; also Schreuer, 'Protection' (n1947) 14; Radjai/Halonen/Kyriakou (n1961) 225-229;233-234; Paparinskis, 'New' (n8) 632-633; cf.*infra*.n2200.

[1962] Such clauses may be enlivened by self-defence: *Oil Platforms* (n183) [40]-[43]; *Nicaragua (Merits)* (n1664) [224]; generally Henckels (n1960), particularly 7-10; Schreuer, 'Protection' (n1947) 16-18. Discussing the custom/exception clause relationship: e.g. Heathcote (n1666) 500; Tomka, 'Defences Based

Self-defence might, therefore, be invoked to preclude individual claims. Because individual claims necessarily overlap with at least one interstate claim,[1963] the question arises whether both can be precluded.[1964]

IV. Countermeasures, self-defence and third parties

Parts II and III have outlined how States have, or might, invoke countermeasures and self-defence to preclude claims by both individuals and other States. This Part considers whether these CPW can so operate, and particularly the contention that they can only preclude breach of obligations vis-à-vis the entity whose conduct has given rise to the CPW's operation, i.e. the entity in breach of its obligations (countermeasures),[1965] or undertaking an "armed attack" (self-defence).[1966] On this approach,[1967] as will be seen, it is only in certain circumstances that CPWs taken against a State could also preclude an individual's claim.[1968] Moreover, it may be doubtful that either CPW could be invoked in response to individual conduct, meaning that neither those individuals' claims, nor any overlapping interstate claim, could be precluded.[1969] However, acknowledging that

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on Necessity under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties' in Kinnear/others (n514) 485-487 and authorities therein; Henckels (n1960) 3-12. Cf.'armed conflict' BIT provisions: Criddle (n57) 600; similarly Schreuer, 'Protection' (n1947) 12-16; Radjai/Halonen/Kyriakou (n1961) 231ff. On self-defence possibly allowing treaty suspension: DAEAC, Art.14, 117-118; also Paddeu, *Justification* (n53) 223-224.

[1963] *Supra*.n1932; similarly Roberts, 'Hybrid' (n7) 40.

[1964] Cf.*supra*.nn1928-1932.

[1965] *Infra*.Pt.IV(A)-(B), particularly *infra*.nn1994ff.

[1966] *Infra*.Pt.IV(C), particularly *infra*.nn2198-2199;2202-2203;2214-2218;2222-2224;Pt.IV(C)(ii)-(iii).

[1967] See *infra*.n2012.

[1968] *Infra*.Pts.IV(A);(C).

individuals sometimes 'pose an equal or greater threat to public order' than States,[1970] this Part argues, particularly in light of recent State practice, that this approach is, at least as regards certain individuals, unwarranted.[1971]

A. Countermeasures: an accepted approach?

A lawful countermeasure must respond to a breach of interstate obligations (*legal* injury) committed by another State.[1972] Countermeasures are therefore necessarily taken against States, not individuals.[1973] Individual conduct may, it is true, be attributed to the State in accordance with the rules briefly introduced in Chapter I.[1974] Those rules generally identify individuals or entities who are *agents* for the State,[1975] primarily its organs, or those acting with government authority, or under the State's direction, or its control.[1976] The conduct of such individuals is treated as that of the State,[1977] where it is 'official' in nature.[1978] Conversely, 'the conduct of private persons or entities is not

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[1969] *Infra*.Pts.IV(A);(C)(i)-(iii), particularly *infra*.nn1972-1973;1980;2195;2212-2213;2274ff.

[1970] Cogan (n739) 330; also 344-345; authorities *infra*.nn2057-2058;2210-2211.

[1971] See *infra*.PtIV(B);(C)(ii)-(iv) and authorities therein.

[1972] *Supra*.n1923. Vis-à-vis Art.48 States, generally *ARSIWA*, Art.54, 302-305; Dawidowicz (n416); Dawidowicz (n195); White/Abass (n194) 547-550; Ruys (n94) 22-26; Criddle (n57) 596; also Sicilianos (n204) 1137-1140;1144-1145; *supra*.nn189-203.

[1973] See Paparinskis, 'Countermeasures' (n5) 332-334.

[1974] *Supra*.nn73-77.

[1975] Authorities *supra*.n77.

[1976] *ARSIWA*, Arts.4-11, 94-123; Crawford, *GP* (n2) 115, generally 113ff; Condorelli/Kress (n73) 229;229-231.

[1977] Condorelli/Kress (n73) 221.

[1978] *ARSIWA*, 96; Crawford, *GP* (n2) 117; Cheng (n73) 210; Stern (n71) 203.

attributable to the State under international law'.[1979] Countermeasures cannot therefore respond to individuals' conduct *per se*.[1980]

Countermeasures can, nonetheless, *affect* individuals.[1981] Indeed, reprisals – the precursors to countermeasures[1982] – were commonly directed at individuals.[1983] Through reprisals, a sovereign sanctioned a citizen 'to retrieve … his property or the equivalent of the same, from the subjects of the prince who had denied him justice'.[1984] With reprisals able to be taken vis-à-vis 'everything that belongs … to the delinquent State *or its citizens*',[1985] individual nationals could suffer in retaliation for the actions of their State.[1986] While reprisals have since been supplanted by non-forcible countermeasures,[1987] and diplomatic protection,[1988] one Tribunal recently mused 'that countermeasures directed

[1979] *ARSIWA*, 110; also 38-39; Cheng (n73) 184;208-210; Ruys (n1959) 409; Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 EJIL 387, 387-388; Vattel (n324) 161.

[1980] Paparinskis, 'Countermeasures' (n5) 332-334; e.g., Jessup (n2) 181 (boycotts); similarly Zoller (n144) 103-104; cf.Aréchaga (n69) 562. States may nonetheless be responsible for failing in their 'preventive and remedial obligations' vis-à-vis individuals: *Oppenheim's* (n73) 502; also 549 ('due diligence'); similarly Jessup (n2) 104;107-108; Condorelli/Kress (n73) 232; Ruys (n1959) 375; Crawford, *GP* (n2) 117-118; *Brownlie's* (n77) 543; Aréchaga (n69) 536;560-561; Brownlie, *System* (n76) 36; Stern (n71) 208-209; Wittich (n73) 126; Brierly, 'Complicity' (n946) 42; also Garcia-Amador, 'Report' (n2) 187; Cheng (n73) 211.

[1981] *Infra*.nn1983ff, particularly *infra*.n1989.

[1982] Paparinskis, 'Countermeasures' (n5) 268-269; Paddeu, *Justification* (n53) 226;228;250.

[1983] See Zoller (n144) 37; Paparinskis, 'Countermeasures' (n5) 266; Elagab (n1190) 7-9;12;17;18-23;29-30;36; Borchard (n319) 453; *infra*.nn1984-1986.

[1984] Aréchaga (n69) 553. Similarly Alland (n1922) 1130; Paddeu, *Justification* (n53) 228;230; Jessup (n2) 174-175.

[1985] Oppenheim, *International Law: A Treatise*, vol.II (1905) 38 (emphasis added), quoted Paparinskis, 'Countermeasures' (n5) 266; also 277-278. Similarly Elagab (n1190) 7-9;12;17;36; also 111; Paddeu, *Justification* (n53) 230-235;242;247.

[1986] See Paddeu, *Justification* (n53) 228-229; Ago, 'Eighth Report on State Responsibility' [1979] 2(1) ILCYB 3, 42; Paparinskis, 'Countermeasures' (n5) 324. Generally Zoller (n144) 36-37.

[1987] See Alland (n1922) 1130; Ruys (n94) 12; Paparinskis, 'Countermeasures' (n5) 268-269; Parlett (n5) 395; also Paddeu, *Justification* (n53) 229.

[1988] Aréchaga (n69) 555; Parlett (n1) 49; Amerasinghe (n14) 27;86.

at an offending State will in many, if not most, circumstances have its intended effect on the offending State through its impact on nationals of that offending State.'[1989] In *Air Services*, for instance, the US took action vis-à-vis a French carrier in response to France's refusal to allow a US airline to undertake certain flights.[1990] The Tribunal accepted this as a proportionate countermeasure, considering, *inter alia*, 'the injuries suffered by the companies concerned' and their respective 'losses'.[1991] "Injury" in this context apparently means *factual* injury (i.e. damage), the Tribunal determining that the State's rights were breached.[1992] Consequently, it appears that States may legitimately, through countermeasures, cause *damage* to nationals of another State acting wrongfully.[1993]

Many suggest, however, that the situation is different where individuals' rights would be breached through countermeasures taken against a State.[1994] The starting-point for this argument is that countermeasures '"must be directed against" a State which has committed an internationally wrongful act'[1995] and 'may only be adopted against a State

[1989] *Cargill* (n359) [421]; also Parlett (n5) 404; Peters (n1) 329-330; Zoller (n144) 101; Losari/Ewing-Chow (n359) 283-284;294.

[1990] *Air Services* (n183) 420-421;426; discussion *ARSIWA*, 294-295.

[1991] *Air Services* (n183) 443-444; also *ARSIWA*, 294-295; White/Abass (n194) 540-541; Dawidowicz (n416) 349-351.

[1992] See discussion *supra*.n656; also *Corn Products* (n14) [177]-[178]; Paparinskis, 'Countermeasures' (n5) 349.

[1993] E.g. Paparinskis, 'Countermeasures' (n5) 266;307;322-324;329;336-337; Dawidowicz (n195) 365-367;369;374-375;377-379;393; Dawidowicz (n416) 129-132;134-136;138;142-143;153;156-158;176;186-189;191 (fishing/airlines); Losari/Ewing-Chow (n359) 281-284 (WTO); *Brazil-Export Financing Programme for Aircraft* WT/DS46/ARB (28.Aug.2000) [IV.114] (concession suspension countermeasure); *Heathrow* (n656) 55 ('retaliatory…charges'); also *Guyana/Suriname* (n1882) [446] (against licensee); Sacerdoti (n356) 414-415 (property restrictions).

[1994] Authorities *infra*.n2003.

[1995] *ARSIWA*, 285, quoting *Gabcikovo* (n1923) [83]; also 169; Parlett (n5) 396.

which is the author of the internationally wrongful act.'[1996] Consequently, countermeasures cannot preclude the wrongfulness of actions taken against *other* States.[1997] The ARSIWA commentary acknowledges that countermeasures might 'incidentally affect the position of third States or indeed other third parties', and '[i]f they have no individual rights in the matter they cannot complain'.[1998] However:

> where a third State is owed an international obligation by the State taking countermeasures and that obligation is breached by the countermeasure, the wrongfulness of the measure is not precluded as against the third State. In that sense the effect of countermeasures in precluding wrongfulness is relative.[1999]

States accept that countermeasures cannot thus infringe third-State rights.[2000] The question is whether individuals are to be treated as akin to such States, meaning that, while countermeasures can cause individuals *factual* injury,[2001] they cannot cause *legal* injury in breach of obligations owed to those individuals.[2002]

[1996] *ARSIWA*, 285; also Paparinskis, 'New' (n8) 632; Paparinskis, 'Countermeasures' (n5) 332; *Corn Products* (n14) [148].

[1997] *ARSIWA*, 169;285; Ago (n1986) [96]-[98]; Dawidowicz (n416) 288-290; authorities *infra*.nn1999-2000.

[1998] *ARSIWA*, 285; also Parlett (n5) 397. Different to 'third parties' vis-à-vis treaties (*supra*.n1376): Paparinskis, 'Countermeasures' (n5) 333-334; Nollkaemper (n6) 98; cf.vis-à-vis 'injury': Sicilianos (n204) 1138-1139.

[1999] *ARSIWA*, 285;169, referencing *Cysne (Portugal v Germany)* (1930) II UNRIAA 1035, 1056-1057. Similarly Parlett (n5) 396; Elagab (n1190) 34;111-112; Zoller (n144) 98; *ADM* (n232) (Op.Rovine) [4],[7]; *Corn Products* (n14) [163]-[164]; *Cargill* (n359) [422].

[2000] Zoller (n144) 99 ('[b]eyond doubt');99-102; e.g. ILC, 'State Responsibility: Comments and observations' (1998) UN.Doc.A/CN.4/488;Add.1-3, 155 (Nordic States/Ireland); 154 (Singapore), referencing ILC, 'Thirty-First Session' (1979) 2 ILCYB 1, 120; Comments (n1339) 55;57 (UK/Japan); generally Crawford, 'SecondRep' (n1078) [381]; also *infra*.n2184 (Mexico); cf.Elagab (n1190) 111-113.

[2001] *Supra*.nn1989ff.

[2002] Similarly Peters (n1) 329; cf.330-331; Paparinskis, 'Countermeasures' (n5) 332;336-337; Paparinskis, 'Analogies' (n14) 102 ('analogized to third states'); Aaken (n1927) 2; cf.*Cargill* (n359) [422] ('that a legitimate countermeasure…will likely affect [a State's] nationals does not mean…this same countermeasure necessarily has legal effects on…obligations owed directly to [them]'); Comments (n2000) 155 (Ireland: organisations); authorities *infra*.nn2003ff.

Scholars overwhelmingly answer in the affirmative: countermeasures may preclude wrongfulness vis-à-vis individuals where the allegedly wrongdoing State's rights alone are violated, but not if those individuals invoke their own 'individual rights' under international law.[2003] They often point to three investment tribunal decisions which accepted that interstate countermeasures cannot affect individuals' rights under BITs.[2004] These cases concerned Mexican allegations that a corn syrup tax was a valid countermeasure against the US, in response to its wrongful conduct in, *inter alia*, refusing Mexican sugar producers market access.[2005] When claims were brought against Mexico by individual US investors, Mexico alleged that its actions *also* constituted a valid countermeasure vis-à-vis those individuals, precluding their claims under NAFTA.[2006]

Engaging in the debate introduced in Chapter VI regarding whether investment rights are 'direct' (owed to individuals), or 'derivative' (State-owned and only enforced by individuals),[2007] two tribunals held that rights under NAFTA were the former, and thus

[2003] Parlett (n5) 397 (emphasis removed, discussing *ARSIWA*, 285); also 398-403; Parlett (n1) 110-111;116; Paparinskis, 'Countermeasures' (n5) 268;332;336-337; Paparinskis, 'New' (n8) 632; Aaken (n1927) 2; Ruys (n94) 13; Criddle (n57) 598; Dupont, 'Investments' (n1960) 210-211; also Paddeu, *Justification* (n53) 278-279; *infra*.n2009; cf.Roberts, 'Triangular' (n5) 356;357 ('more nuanced');400-402; Losari/Ewing-Chow (n359) 296;302-303; Peters *infra*.n2013.

[2004] E.g. Parlett (n5) 397-404; Parlett (n1) 116-118; Paparinskis, 'New' (n8) 632; Paparinskis, 'Countermeasures' (n5) 335-336; Aaken (n1927) 2; Dupont, 'Investments' (n1960) 210-211; Peters (n1) 329. See *Corn Products* (n14) [162],[165],[176]; *ADM* (n232) [127],[180]; also (Op.Rovine) [5]-[15],[80],[82]-[83]; *Cargill* (n359) [424]-[429],[553]; also [387].

[2005] *ADM* (n232) [4],[88]-[89],[106],[110]; *Corn Products* (n14) [150]; *Soft Drinks-PanelRep*. (n359) [8.162],[8.176]-[8.180],[8.186]-[8.190] (defending WTO claim); Parlett (n5) 397; Pauwelyn (n359) 199.

[2006] *ADM* (n232) [4],[106],[110],[127]; *Corn Products* (n14) [151]; see Roberts, 'Triangular' (n5) 386; Paparinskis, 'Countermeasures' (n5) 276; Losari/Ewing-Chow (n359) 287-294.

[2007] *Supra*.n1463. See *ADM* (n232) [161]-[180]; *Corn Products* (n14) [153]-[176]; *Cargill* (n359) [415]-[416],[424]-[426]; Paparinskis, 'Countermeasures' (n5) 336-337; Losari/Ewing-Chow (n359) 288-291; Parlett (n5) 398-404. Suggesting 'substantive'/'procedural' rights indistinguishable: *ADM* (n232) [47]-[49] (Op.Rovine); also *Cargill* (n359) [426]. Cf.*ADM* (n232) [179]-[180]; *supra*.Ch.I(III).

unable to be subject to countermeasures,[2008] while one held that they were in theory so subject.[2009] Each accepted, however, that *if* individuals held rights under BITs, countermeasures could not affect them.[2010] Any violation of human rights would therefore also not be able to be excused, via countermeasures, vis-à-vis the relevant individuals.[2011] This is called the "third-party rights approach" to countermeasures herein.[2012]

In sum, while countermeasures cannot be taken against individuals as such, they may be taken against States in a manner that affects individuals and their claims. They may preclude overlapping claims, except, on the third-party rights approach, insofar as individuals' rights under international law are violated.

B. Countermeasures: an alternative to the third-party rights approach?

Notwithstanding its acceptance in case law and scholarly discussion, this thesis suggests caution in assuming that *all* individuals are really 'third parties' vis-à-vis States

[2008] *Corn Products* (n14) [161],[167] ('substantive rights separate and distinct from...State'),[174],[176]; *Cargill* (n359) [424]-[429]; discussion Paparinskis, 'Countermeasures' (n5) 275;335-336; Parlett (n5) 399-404; also *ADM* (n232) (Op.Rovine) [12], quoting *ARSIWA*, 210.

[2009] *ADM* (n232) [171] (no 'individual rights'),[180] (countermeasure 'not…valid' for other reasons); cf.Op.Rovine [5],[43]ff,[77]-[80],[82]-[83]; discussion Paparinskis, 'Countermeasures' (n5) 275;335-336; Parlett (n5) 398-399.

[2010] *Supra*.n2004.

[2011] Paparinskis, 'Countermeasures' (n5) 329;332-334; Aaken (n1927) 2; also *ADM* (n232) [170]-[171]; cf.*infra*.Pt.IV(B)(iii).

[2012] For 'third parties' language: *supra*.n1998; also Paparinskis, 'Countermeasures' (n5) 332-333;344 ('quasi-third party' more accurate) and referencing, *i.a.*, Chinkin (n2) 13-14; Paddeu, *Justification* (n53) 278-279. Cf.Criddle's 'intermediate approach' *infra*.n2014; Peters *infra*.n2013 and see *infra*.n2071; 'rights-based' terminology, used in human rights: e.g., OHCHR, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation* (2006).

and that countermeasures cannot, consequently, affect their rights.[2013] As will be explained, this Part builds on the observation made by Criddle vis-à-vis asset freezes:

> that an intermediate approach may be emerging in state practice. Even if states generally may not target private foreign assets when imposing countermeasures, the intermediate approach suggests that states may freeze the private assets of foreign officials who bear direct responsibility for a target state's internationally wrongful conduct.[2014]

Referring to certain measures directed at government regimes, but targeting 'public officials who directed or carried out [human rights] abuses',[2015] he argues:

> In effect, these countermeasures struck a compromise between the derivative-rights theory and the direct-rights theory: they preserved direct-rights style investment protection for ordinary foreign investors, while treating the private property of regime leaders as constructively 'public assets' that were valid targets for interstate countermeasures. Further study will be necessary to confirm whether this growing body of state practice meets the generality and *opinio juris* requirements for customary international law. Nonetheless, the early returns suggest that the law of countermeasures may be evolving to permit host states to freeze not only the public assets of rights-abusing states but also, at a minimum, the private assets of public officials who orchestrate or carry out a target state's internationally wrongful conduct.[2016]

Practice does, it will be suggested, bear out this argument that certain individuals are treated as akin to the State for countermeasures purposes.

Difficulties in making claims regarding State practice in the countermeasures context are plentiful because, *inter alia*, States seldom actually characterise their actions

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[2013] *Supra*.nn1998;2002ff; similarly *infra*.nn2014-2016;2071;2092;2383; cf.Peters (n1) 330 ('investors…sometimes…at fault for breaches of international law'; '"third parties"…should only include uninvolved third parties, such as…nationals of third-party States'; 'not all kinds of rights should enjoy equal protection'); 331 ('intermediate solution'; compensation payable); 312; also Roberts, 'Triangular' (n5) 356;399-402.

[2014] Criddle (n57) 598.

[2015] ibid.598 (Iran/Libya/Syria).

[2016] ibid.598-599; also 609-610.

as countermeasures,[2017] and not all States employ such practices.[2018] Nonetheless, putting aside the other suggested requirements for countermeasures,[2019] this section evaluates actions that: (i) purport to respond to internationally wrongful conduct; and (ii) would, but for being excused, themselves be unlawful, and that can thus properly be characterised as countermeasures.[2020] Like Criddle, and for reasons explained below, this section concentrates on asset freezes.[2021] Moreover, with custom established by practice that is 'sufficiently widespread and representative, as well as consistent',[2022] together with the requisite *opinio juris*,[2023] the focus is on measures taken by multiple States.[2024] In particular, consideration is given to "sanctions"[2025] insofar as that term refers to

[2017] Dawidowicz (n416) 14;112;251, referencing Tzanakopoulos (n151) 188-189; Dawidowicz (n195) 349-350;407;412-415; Ruys (n94) 24. My thanks here to Franchini. Exceptions: *supra*.nn2005-2006; *Application of the Interim Accord (Macedonia v Greece)* [2011] ICJ.Rep. 644 [114],[120]-[122]; *Gabcikovo* (n1923) [69],[82]-[83]; *Guyana/Suriname* (n1882) [270],[446].

[2018] Dawidowicz (n195) 409-412; cf.*infra*.n2183.

[2019] *Supra*.n1925. Cf.Dupont, 'Countermeasures and Collective Security: The Case of the EU Sanctions Against Iran' (2012) 17 JC&SL 301, 324-325;331-332.

[2020] Similarly Dawidowicz (n195) 349-350; Dawidowicz (n416) 111-231;253;263-268;287-288; Criddle (n57) 595-599; cf.584;599-603 (other asset freeze justifications); Ruys (n94) 5;24; Dupont, 'Unilateral European Sanctions as Countermeasures: The Case of the EU Measures Against Iran' in Happold and Eden (eds), *Economic Sanctions and International Law* (2016) 40-41;51-63; also Alland (n1922) 1128-1129;1131-1132;1135; White/Abass (n194) 540; Dopagne, 'Sanctions and Countermeasures by International Organizations' in Collins and White (eds), *International Organizations and the Idea of Autonomy* (2011) 180; Lesaffre (n1923) 469;471; Sicilianos (n204) 1145; Elagab (n1190) 44; Ruys (n94) 5; Pellet and Miron, 'Sanctions' in *MPEPIL* (2013) [65]; Paparinskis, 'Countermeasures' (n5) 269. On 'retorsion': Ruys (n94) 5; Dawidowicz (n195) 349-350; Dawidowicz (n416) 27-31; White/Abass (n194) 544; also Alland (n1922) 1131; Dupont, 'Unilateral' (n2020) 41-42;45-46.

[2021] Criddle (n57) 584-586; similarly Happold, 'Targeted Sanctions and Human Rights' in Happold/Eden, *Economic Sanctions* (n2020) 90; *infra*.Pt.(B)(i)-(ii). Non-asset freeze sanctions, including travel bans, are not considered: see, e.g., ibid.96-98; Milanovic, 'Sayadi: The Human Rights Committee's Kadi' *EJIL:Talk!* (29.Jan.2009).

[2022] ILC 'Draft conclusions on identification of customary international law, with commentaries' [2018] 2(2) ILCYB 122, Conc.8.

[2023] ibid. Conc.2, 124-125; Conc.9-10, 138-142.

[2024] Authorities *infra*.n2183. Generally Dawidowicz (n416) 240-255.

[2025] Generally Pellet/Miron (n2020) [7]; Ruys (n94) 1-3; White/Abass (n194) 552-555; Gowlland-Debbas (n269) 4; Abi-Saab, 'The Concept of Sanction in International Law' in Gowlland-Debbas (n202) 30-33;39.

countermeasures taken by States outside of the UNSC framework.[2026] While UNSC sanctions are allowable under the UN Charter,[2027] other sanctions may potentially be justified as countermeasures.[2028] The argument here is that such countermeasures, in the form of asset freezes, are taken against States via a certain subset of individuals, who are not rightly regarded as "third parties" in this context.[2029]

(i) Sanctions in practice

As at 2018, a number of States had measures in place, vis-à-vis various international situations, generally described as 'sanctions'.[2030] The sanctions regimes that are, or have been, 'autonomous', in the sense of being imposed without UNSC resolutions,[2031] include those vis-à-vis situations in Crimea, Myanmar, Syria, Venezuela,

[2026] Noting use in this sense: e.g., *ARSIWA*, 168; Alland (n1922) 1134;cf.1134-1135; Pellet/Miron (n2020) [6]-[7],[62]-[65],cf.[8]-[10]; Ruys (n94) 1-2; Happold (n2021) 90-91; Ago (n1986) [78]-[79]; cf.[92]-[93]; Gowlland-Debbas (n269) 4; cf.6; Crawford, 'Relationship' (n202) 59-60;61; Crawford, *GP* (n2) 292; Sicilianos (n204) 1140; White/Abass (n194) 552-553;cf.553-554; Abi-Saab (n2025) 37-38; cf.32;36-39; also Zoller (n144) 107-108; cf.Dawidowicz (n416) 21-23. Generally on UNSC sanctions: e.g. Gowlland-Debbas (n269) 6-18; also Ruys (n94) 2-3; cf.Dopagne (n2020) 179-180;183.

[2027] See UNC, Arts.25;103; Lowenfeld, 'Unilateral versus Collective Sanctions' in Gowlland-Debbas (n202) 97-98; Gowlland-Debbas (n269) 16;18-19; White/Abass (n194) 556; cf.550; Ruys (n94) 15-16; Milanovic, 'Sayadi' (n2021). Cf.Happold (n2021) 87.

[2028] Authorities *infra*.nn2105ff, particularly *infra*.nn2113-2114; generally *ARSIWA*, Art.22. This thesis assumes States may employ third-party (Art.48) countermeasures, as explained Dawidowicz (n416); Dawidowicz (n195). Cf.*ARSIWA*, 302-305; Guilfoyle, 'Countermeasures' (n1927) 72; Pellet/Miron (n2020) [57]-[59].

[2029] Similarly authorities *infra*.n2071; *supra*.nn2013-2016; cf.*supra*.nn1998ff; Dawidowicz (n416) 324-328.

[2030] Generally, on various programmes discussed herein: e.g., Ullah, 'Global Sanctions Guide' (2016) <http://sanctionsguide.eversheds.com/>; 'SanctionsWiki' <http://www.sanctionswiki.org/Main_Page>; Lester and O'Kane, 'European Sanctions' <https://www.europeansanctions.com/> (excellent EU-related sanctions/practice summary); Pellet/Miron (n2020) [62]; Ruys (n94) 3; Dupont, 'Countermeasures' (n2019) 302;308-310; Happold (n2021) 91-92; Dupont, 'Unilateral' (n2020) 38-39;47-50; Human Rights First (2012) 'Syria Sanctions Fact Sheet' <https://www.humanrightsfirst.org/wp-content/uploads/pdf/Syria_Sanctions_Fact_Sheet.pdf>; Criddle (n57) 598;607;609-610; Dawidowicz (n195) 392-397; Dawidowicz (n416) 195-200;216-220;204-209;222-229;233-237. For sanctions, mostly lifted, vis-à-vis Belarus: ibid.211-216.

[2031] Ruys (n94) 3;22; Happold (n2021) 91; Pellet/Miron (n2020) [62]-[63].

Yugoslavia, and Zimbabwe.[2032] Others are partially 'autonomous', including vis-à-vis Libya, Iran, and North Korea.[2033]

Sanction-imposing States include the 27 EU Member States, the US, Switzerland, Canada, Australia, and Japan.[2034] Other States, including EEA/EFTA States, Turkey, and those of the former Yugoslavia, often 'align' with EU sanctions and impose similar measures.[2035] Importantly, as Dawidowicz observes, the 22-Member League of Arab States imposed asset freezes vis-à-vis Syrian officials,[2036] while the 'Group of Friends of the Syrian People' has endorsed asset freezes vis-à-vis régime members, at conferences

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[2032] E.g., Australia describes as 'autonomous sanctions' those vis-à-vis Yugoslavia/Myanmar/Ukraine/Syria/Zimbabwe. North Korea/Iran/Libya are listed under 'autonomous' and 'UNSC': <https://dfat.gov.au/INTERNATIONAL-RELATIONS/SECURITY/SANCTIONS/SANCTIONS-REGIMES/Pages/sanctions-regimes.aspx>. Further: Ruys (n94) 3 (Crimea); generally Dawidowicz (n416) 195-200;216-220;204-209;222-229;233-237; *infra*.nn2040ff.

[2033] Australia, *supra*.n2032; also Pellet/Miron (n2020) [63]; Criddle (n57) 607;609-610 (Libya); Dupont, 'Countermeasures' (n2019) 317-321 (Iran); Dupont, 'Unilateral' (n2020) 47-50; *EU Sanctions Map*: <https://www.sanctionsmap.eu/#/main>.

[2034] Generally authorities *supra*.n2030; *infra*.nn2040ff. See: <https://dfat.gov.au/international-relations/security/sanctions/pages/about-sanctions.aspx>(Australia); <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/current-actuelles.aspx?lang=eng>(Canada); <https://www.consilium.europa.eu/en/policies/sanctions/> (EU); <https://www.treasury.gov/resource-center/sanctions/programs/pages/programs.aspx> (US).

[2035] E.g., Crimea: EU.PR 8937/1/14REV1 (11.Apr.2014) (Montenegro/Iceland/Albania/Norway/Ukraine 'align[ed] themselves'); similarly 'Declaration' (18.Mar.2018) <https://eeas.europa.eu/delegations/council-europe/41858/declaration-high-representative-federica-mogherini-behalf-eu-autonomous-republic-crimea-and_en> (Albania/Andorra/Georgia/Iceland/Liechtenstein/Monaco/Montenegro/Norway/FYR.Macedonia/Moldova/Ukraine); Myanmar: EU.PR 10387/10 (3.Jun.2010) (Croatia/FYR.Macedonia/Albania/Bosnia-Herzegovina/Montenegro/Iceland/Liechtenstein/Norway/Moldova/Armenia/Georgia); 'Declaration' (18.Jul.2018) <https://www.consilium.europa.eu/en/press/press-releases/2018/07/18/declaration-by-the-high-representative-on-behalf-of-the-european-union-on-the-alignment-of-certain-countries-with-concerning-restrictive-measures-against-myanmar-burma/> (Turkey/Macedonia/Montenegro/Albania/Bosnia-Herzegovina/Iceland/Liechtenstein/Norway/Moldova); Syria: EU.PR 11533/1/13REV1 (24.Jun.2013) (Croatia/Macedonia/Montenegro/Iceland/Serbia/Albania/Liechtenstein/Norway/Moldova/Georgia); Zimbabwe: EU.PR 7168/11 (2.Mar.2011) (Turkey/Croatia/Macedonia/Montenegro/Iceland/Albania/Bosnia-Herzegovina/Liechtenstein/Norway/Moldova/Armenia), quoted 'EU Third Countries' in 'SanctionsWiki' (n2030) and see ibid. for comprehensive overview. Similarly Dawidowicz (n416) 185;195;205;223.

[2036] Dawidowicz (n416) 225, referencing LAS Min.Res./7442 (27.Nov.2011); similarly UNSG, 'Unilateral Economic Measures as a Means of Political and Economic Coercion against Developing Countries' UN.Doc.A/72/307 (9.Aug.2017), 20 (Syria).

where up to 83 States were represented.[2037] Various other States appear to have been supportive of different sanctions régimes.[2038]

These sanctions purport (or purported) to respond to States' internationally wrongful conduct.[2039] Sanctions concerning Crimea focus primarily on alleged Russian violations of Ukraine's sovereignty and territorial integrity.[2040] Sanctions vis-à-vis Iran;[2041] Libya;[2042] Myanmar;[2043] North Korea;[2044] Syria;[2045] Venenzuela;[2046]

[2037] See references Dawidowicz (n416) 229-231;243.

[2038] ibid.244-245 (protest largely policy-based); 191 (UNSC vis-à-vis FRY); 201-202 (vis-à-vis Myanmar: Costa Rica/Singapore support; Russia/China policy objections); 210 (UNSC vis-à-vis Zimbabwe); also 244 (NAM/SADC 'humanitarian grounds' criticism). Cf.*infra*.n2108.

[2039] *Infra*.nn2040ff. Generally: ibid.192-193;195-196;198-199;201-202;220;221-222;232-233;263-264; Dawidowicz (n195) 392-397; see *supra*.n1972. This is not undermined by additional other reasons for action: Dawidowicz (n416) 294-297; Tzanakopoulos (n151) 188.

[2040] US: E.O.13661 (16.Mar.2014) ('actions and policies of [Russia]…[*i.a.*] threaten [Ukraine's] peace, security, stability, sovereignty, and territorial integrity; and contribute to…misappropriation of its assets…'); E.O.13662 (20.Mar.2014) ('actions and policies of [Russia], including…purported annexation of Crimea and…use of force in Ukraine…'); E.O.13685 (19.Dec.2014) ('Russian occupation'); cf.E.O.13660 (6.Mar.2014); EU: EU.Dec.2014/145/CFSP (17.Mar.2014) [1] ('violation of Ukrainian sovereignty and territorial integrity by [Russia]'); Canada: <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/russia-russie.aspx?lang=eng> ('Russia's violation of [Ukraine's] sovereignty and territorial integrity'); SEMRR, s.2(a); Japan: MFA Japan, 'Statement on the Additional Measures' (28.Jul.2014) <http://www.mofa.go.jp/press/release/press2e_000003.html> [1] ('Russia's…actions which violate [Ukraine's] sovereignty and territorial integrity'), [3] ('annexation'); similarly MFA Japan, 'Statement on the Sanctions against Russia over the Situation in Ukraine' (29.Apr.2014) <http://www.mofa.go.jp/press/release/press4e_000281.html> [1]; Australia: ASR, s.6.,It.9; <http://dfat.gov.au/international-relations/security/sanctions/sanctions-regimes/Pages/crimea-and-sevastopol.aspx> ('Russian threat to [Ukraine's] sovereignty and territorial integrity'); Dawidowicz (n416) 232-233; Ruys (n94) 4; Pantaleo, 'Sanctions Cases in the European Courts' in Happold/Eden, *Economic Sanctions* (n2020) 171.

[2041] EU: <http://www.consilium.europa.eu/en/policies/sanctions/iran/> ('to persuade Iran to comply with its international obligations…serious human rights violations'); EU.Reg.2011/235/CFSP (12.Apr.2011), Art.2 ('human rights abuses'), recently renewed: EU.PR 187/18 (12.Apr.2018); US: E.O.13553 (28.Sept.2010), s.1(a)(ii)(A); E.O.13846 (6.Aug.2018), s.7.

[2042] EU: EU.Dec.2011/137/CFSP (28.Feb.2011), Art.6(1) ('serious human rights abuses'); US: E.O.13566 (25.Feb.2011), Preamble ('wanton violence against…civilians'); s.1; Australia: ASR, s.6.,It.5 (read with UNSCRs 1970/1973); see <https://dfat.gov.au/international-relations/security/sanctions/sanctions-regimes/Pages/libya.aspx> ('violence against [Libyan] people'); Criddle (n57) 607; Dawidowicz (n416) 220.

[2043] US: E.O.13310 (28.Jul.2003), Preamble ('repression of…democratic opposition'); similarly E.O.13464 (30.Apr.2008); E.O.13448 (18.Oct.2007), s.1(b)(ii) ('human rights abuses'); E.O.13619 (11.Jul.2012), s.1(a)(ii); USDOT, 'Treasury Sanctions Commanders and Units of the Burmese Security Forces for Serious

Yugoslavia;[2047] and Zimbabwe;[2048] respond – at least in part – to the State's alleged human rights abuses.[2049] Sanctions vis-à-vis North Korea and Iran additionally relate to those States' allegedly wrongful nuclear proliferation.[2050] Certain sanctions vis-à-vis

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Human Rights Abuses' (17.Aug.2018) <https://home.treasury.gov/news/press-releases/sm460>, discussed Wong, 'US Imposes Sanctions on Myanmar Over Rohinga Atrocities' *NYT* (17.Aug.2018); E.O.13818 (21.Dec.2017), s.1(a); EU: EU.Dec.2010/232/CFSP (26.Apr.2010) [3] (human rights/democracy concerns); similarly EUCP.2006/318/CFSP (27.Apr.2006) [3]; EU.Dec.2018/655(CFSP) (26.Apr.2018) [2] ('grave human rights violations'); similarly EU.Dec.2018/900(CFSP) (25.Jun.2018) [2]; Canada: <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/myanmar.aspx?lang=eng> (human rights); Australia: <https://dfat.gov.au/international-relations/security/sanctions/sanctions-regimes/Pages/myanmar.aspx> ('repression'; 'human rights abuses'); Dawidowicz (n416) 193-196;198-199;201-202.

[2044] E.O.13687 (2.Jan.2015) ('serious human rights abuses'); E.O.13810 (20.Sept.2017).

[2045] E.g., US: E.O.13572 (29.Apr.2011) ('Syria's human rights abuses'); similarly E.O.13573 (18.May.2011) ('Syria's…violence against [Syrian] people'); EU: EU.Dec.2011/273/CFSP (9.May.2011) [1],[3] ('violent repression'; 'arbitrary detentions'); EU.Dec.2011/782/CFSP (1.Dec.2011) [2] ('repression of…civilian population'); Canada: <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/syria-syrie.aspx?lang=eng> (*i.a.* 'violent crackdown'; arbitrary detention; 'summary executions…torture'); Australia: ASR, s.6.,It.7 ('human rights abuses'); Dawidowicz (n416) 222-226.

[2046] US: E.O.13692 (8.Mar.2015) ('human rights violations'); EU: EU.Reg.2017/2063 (13.Nov.2017) [2] ('serious human rights violations'), discussed Soussan, 'EU Adopts Initial Set of Sanctions Against Venezuela' *Steptoe Int.Compliance.Blog* (14.Nov.2017) <https://www.steptoeinternationalcomplianceblog.com/2017/11/eu-adopts-initial-set-of-sanctions-against-venezuela/>; Canada: <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/venezuela.aspx?lang=eng> ('government's systematic erosion of…democratic institutions…grave human rights abuses').

[2047] EU.Reg.1294/1999 (15.Jun.1999) [1] (UNSCR/human rights/IHL violations); EU.Reg.2488/2000 (10.Nov.2000) [1] (human rights/IHL); also ASR (Australia), s.6.,It.2 (offences); further: Dawidowicz (n416) 181-185;189-193. Cf.E.O.13219 (26.Jun.2001).

[2048] US: E.O.13288 (6.Mar.2003) (*i.a.* 'politically motivated violence'); E.O.13469 (25.Jul.2008) ('human rights abuses…public corruption'); Australia: ASR, s.6.,It.8 (*i.a.* human rights); Canada: <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/zimbabwe.aspx?lang=eng> (*i.a.* 'human rights violations'). Further: Pantaleo (n2040) 171 ('persistent violations of fundamental rights'); Dawidowicz (n416) 204-205;208-209;211.

[2049] Generally Dawidowicz (n416) 192-193 (FRY); 195-202 (Myanmar); 204-209;211 (Zimbabwe); 218-220 (Libya); 221-223 (Syria). See *supra*.nn2039;2041ff.

[2050] DPRK: E.O.13810, Preamble (proliferation/UNSCR breaches); EU.Reg.1283/2009 (22.Dec.2009) [2], Art.1(5); similarly EU.Dec.2010/800/CFSP (22.Dec.2010) Art.5(1)(b)-(c); EU.Dec.2017/667(CFSP) (6.Apr.2017); ASR (Australia), s.6., It.1; Iran: EU.Reg.267/2012 (23.Mar.2012) Art.23(2); EU.Reg.2015/1861 (18.Oct.2015) Art.1(13); E.O.13846, Preamble ('financial pressure' vis-à-vis *i.a.*, 'Iran's proliferation'), also *infra*.n2091; *Alleged violations of the 1955 Treaty of Amity (Iran v US)* ICJ.Pleadings, Application, <https://www.icj-cij.org/files/case-related/175/175-20180716-APP-01-00-EN.pdf> [25]-[28],[39]ff (challenging legality); ASR (Australia) s.6., It.4; SEMIR (Canada), s.2; Dupont, 'Unilateral' (n2020) 40; cf.55-58; Dupont, 'Countermeasures' (n2019) 311; cf.325-329, cited Ruys (n94) 4; Pantaleo (n2040) 171.

Crimea, Iran, Libya, Myanmar, Venezuela and Zimbabwe also respond in part to alleged corruption,[2051] which is in violation of accepted norms of international law.[2052]

Importantly, even while responding to *State* conduct,[2053] the sanctions vis-à-vis every situation noted above include asset freezes,[2054] measures 'targeted' at *individuals*,[2055] which restrict an individual's use of property.[2056] States are thus taking a similar approach to the UNSC,[2057] which has recognised the necessity of not imposing

[2051] E.g. Crimea: E.O.13660, s.1(a)(i)(C) ('misappropriation'); Iran: E.O.13846, s.7 ('corruption'); Libya: E.O.13566, Preamble; EU.Dec.CFSP/2015/1333 (31.Jul.2015), Art.9(2)(c)-(d); Myanmar: E.O.13448, s.1(b)(iii); Venezuela: E.O.13692 ('public corruption'); Zimbabwe: E.O.13469, s.1(a)(v). Further: Criddle (n57) 587.

[2052] E.g., Corruption Convention, Arts.4-12;16-27;30-31.

[2053] See Pantaleo (n2040) 177; *supra*.nn2039ff. E.g., *Rotenberg v Council*, Case T-720/14 (30.Nov.2016) (EGC) [92] ('measures…reaction to…policies and activities of…Russian authorities'),[176]; *Rosneft* (n1508) [157] ('objective…not to penalise certain entities…but to impose economic sanctions on [Russia]'); *Al Assad v Council*, Case T-202/12 (12.Mar.2014) (EGC) [99] ('reaction to…violent repression of…civil population by…authorities of [Syria]'); also Dupont, 'Unilateral' (n2020) 40-41; Criddle (n57) 598-599; Lester/O'Kane (2030) for references to relevant case law. Cf.*infra*.n2092.

[2054] E.g. E.O.13660, s.1(a) ('All property and interests in property...are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in'); similarly E.O.13661, s.1(a); E.O.13662, s.1(a); E.O.13685, s.2(a) (Crimea); E.O.13687, s.1(a) (DPRK); E.O.13310, s.1(b); E.O.13464, s.1 (Myanmar); E.O.13572, s.1; E.O.13573, s.1; E.O.13606 (22.Apr.2012), s.1(a) (Syria); E.O.13692, s.1(a) (Venezeula); E.O.13288, s.1; E.O.13469, s.1 (Zimbabwe); EU.Dec.2014/145/CFSP, Art.2(1) ('All funds and economic resources belonging to, owned, held or controlled...shall be frozen'); EU.Dec.2014/475/CFSP (18.Jul.2014), Art.1; EU.Dec.2014/499/CFSP (25.Jul.2014), Art.1(2) (Crimea); EU.Reg.2011/235/CFSP, Art.2(1) (Iran); EU.Dec.2011/273/CFSP, Art.4; EU.Dec.2012/739/CFSP (29.Nov.2012), Art.25; EU.Dec.2013/255/CFSP (31.May.2013), Art.28(1) (Syria); EU.Reg.1294/1999, Art.3; EU.Dec.2011/101/CFSP (15.Feb.2011), Art.5 (Zimbabwe); SEMRR (Canada), s.3; SEMIR (Canada), s.3; SEMBR (Canada), s.3; SEMSR (Canada), s.3; SEMZR (Canada), s.6; ASR (Australia), ss.6;14-15; MFA Japan, 'Additional' (n2040) [3](1) (Crimea); MFA Japan, 'Implementation of Measures to Freeze the Assets of President Bashar Al-Assad and His Related Individuals and Entities in Syria' (9.Sept.2011) <http://www.mofa.go.jp/announce/announce/2011/9/0909_02.html>, quoted 'Syria' in 'SanctionsWiki' (n2030); Dawidowicz (n416) 191 (FRY); 195-201 (Myanmar, including Switzerland); 205-208 (Zimbabwe, including Switzerland); 217-218 (Libya, including Switzerland); 222-226 (Syria, including Switzerland/LAS/Turkey); 233;236 (Crimea).

[2055] Happold (n2021) 87;89-90; Pantaleo (n2040) 171-172; Ruys (n94) 3; Criddle (n57) 586. Making this same point: Pantaleo (n2040) 177, see *infra*.n2071. On economic sanctions generally: e.g., Criddle (n57) 591-592; White/Abass (n194) 551-552; Ruys (n94) 5-8; Elagab (n1190) 196-212; Lowenfeld (n2027) 96.

[2056] See *Kadi (GC)* (n1371) [92],[101], discussed *infra*.nn2121ff; also Happold (n2021) 89; Criddle (n57) 586.

[2057] Similarly Pantaleo (n2040) 177. Indeed, compare UNSCR.1970 (26.Feb.2011), recit.1-2;[15],[17],[22] with EU.Dec.2011/137/CFSP, Art.6(1), *infra*.n2060; see Criddle (n57) 607; Dawidowicz (n416) 218-219.

country-wide economic sanctions but of 'modify[ing] and target[ing] sanctions more accurately on those who are really responsible – the leaders of the regimes, or non-State actors responsible'.[2058]

In particular, the practice reveals that the following categories of persons tend to be covered by such non-UN asset freezes:

- Individuals *responsible* for, or *implementing*, the relevant wrongful acts;[2059]
- Individuals *responsible* for, *engaging* in, *involved* in, or *complicit* in, the relevant acts;[2060]

[2058] White/Abass (n194) 558; also Pellet/Miron (n2020) [34]-[35]; Happold (n2021) 88-89. Thus, it 'usually tries to adopt so-called "intelligent" sanctions…measures targeted at political elites or at the "trouble-makers"': Sicilianos (n204) 1141; also Ruys (n94) 3; Gowlland-Debbas, 'Responsibility and the United Nations Charter' in Crawford/others, *Responsibility* (n6) 130; Bothe, 'Security Council's Targeted Sanctions against Presumed Terrorists' (2008) 6 JICJ 541, 544; also Tams, 'Terrorists' (n1927) 376-377; ESCR Committee 'General Comment 8' (1997) UN.Doc.E/C.12/1997/8 [3],[4] ('governing élite'),[16], cited White/Abass (n194) 546;557. This avoids 'comprehensive sanctions…affect[ing], sometimes very heavily, the innocent civilian population': Sicilianos (n204) 1141; similarly Pantaleo (n2040) 196; also Dawidowicz (n416) 333-340; Lowenfeld (n2027) 103.

[2059] Crimea: EU.Dec.2014/499/CFSP, Art.1(2) ('responsible for, actively supporting or implementing, actions or policies which undermine or threaten [Ukraine's] territorial integrity, sovereignty and independence'); EU.Dec.2014/475/CFSP, Art.1; similarly EU.Dec.2014/145/CFSP, Art.2(1); EU.Dec.2014/265/CFSP (12.May.2014), Art.1(2); DPRK: EU.Reg.1283/2009, Art.1(5) ('responsible for' nuclear/WMD/missile programmes); similarly EU.Dec.2010/800/CFSP, Art.5(1)(b)-(c); EU.Dec.2017/667(CFSP) [2]; E.O.13722 (15.Mar.2016), s.2(iii) ('engaged in, facilitated…responsible for…human rights [violations]'); Iran: EU.Reg.2011/235/CFSP, Art.2 ('responsible for serious human rights violations'); similarly Myanmar: EU.Dec.2018/655(CFSP), Art.1(5); Syria: EU.Dec.2013/255/CFSP, Art.28 ('responsible for…violent repression against…civilian population'); similarly EU.Dec.2011/782/CFSP, Art.4; EU.Dec.2012/739/CFSP, Art.25(1); EU.Dec.2011/273/CFSP, Art.4; ASR (Australia), s.6., It.7 ('responsible for human rights abuses'); Venezeula: EU.Reg.2017/2063, Art.8(3) ('responsible for serious human rights violations'). See *supra*.nn2014-2016.

[2060] E.g. Crimea: E.O.13660, s.1(a) (*i.a.* 'responsible for or complicit in, or...engaged in…actions or policies that undermine democratic processes or institutions', 'threaten [Ukraine's] peace, security, stability, sovereignty, or territorial integrity', involve 'misappropriation of state assets' or 'asserted governmental authority'); ASR (Australia), s.6.,It.9 ('responsible for, or complicit in, the threat to [Ukraine's] sovereignty and territorial integrity'); MFA Japan, 'Additional' (n2040) [3](1) ('directly involved in…annexation…and destabilization'); Iran: EU.Reg.267/2012, Art.23(2)(a) ('engaged in, directly associated with…providing support for' proliferation); similarly EU.Reg.2015/1861, Art.1(13); E.O.13553, s.1(a)(ii)(A) ('responsible for…complicit in', 'ordering, controlling or otherwise directing…serious human rights abuses'); E.O.13846, s.7; DPRK: ASR (Australia), s.6., It.1 ('associated with' WMD/missile programmes); Libya: EU.Dec.2011/137/CFSP, Art.6(1) ('involved…complicit in ordering, controlling…directing…serious human rights abuses'); E.O.13566, s.1(b)(iii) ('responsible for…complicit in', 'ordering, controlling…directing, or…participated in…human rights abuses'); Myanmar: E.O.13448, s.1(b)(ii)-(iii)

- Individuals *assisting*, *supporting*, or *faciliating* such persons and/or acts;[2061]
- Individuals *benefiting* from such acts;[2062]
- Individuals who are *associates* of such persons,[2063] sometimes expressly including family members;[2064]
- Individuals who are *owned*, *controlled*, or *act on behalf of* such persons;[2065] and

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('responsible for…participat[ing] in human rights abuses'; 'facilitating public corruption'); E.O.13619, s.1(a)(ii); Syria: E.O.13572, s.1(b)(i) ('responsible for or complicit in, or responsible for ordering, controlling…directing, or to have participated in…human rights abuses in Syria'); Venezuela: E.O.13692, s.1(a)(ii) ('responsible for', 'complicit in', 'ordering, controlling…directing…participat[ing] in' *i.a.* human rights abuses/corruption); SEMVR (Canada), s.2(a) ('engaged in…undermin[ing]…democratic institutions'); Yugoslavia: E.O.13219, s.1(a)(ii) ('violence…threatening the peace'); E.O.13304 (28.May.2003), s.1 (indictees); Zimbabwe: E.O.13469, s.1(a)(iv)-(v) ('responsible for…participated in, human rights abuses'; 'engaged in…facilitating public corruption'); EU.Dec.2011/101/CFSP, Art.5 ('whose activities seriously undermine democracy…human rights'); EUCP.2002/145/CFSP (18.Feb.2002), Art.4; similarly ASR (Australia), s.6.,It.8; SEMZR (Canada), s.2(e). Further: Criddle (n57) 598-599;607; Pantaleo (n2040) 171-172; Dawidowicz (n416) 218-220;233.

[2061] E.g. Crimea: EU.Dec.2014/499/CFSP, Art.1(2) ('supporting, materially or financially, actions which undermine or threaten [Ukraine's] territorial integrity, sovereignty and independence'; 'actively supporting, materially or financially, or benefiting from, Russian decision-makers responsible for [Crimean] annexation'); similarly *supra*.n2059; EU.Dec.2014/475/CFSP, Art.1; E.O.13660, s.1(a)(iv) ('materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of…activity...or…person'); similarly E.O.13661, s.1(a)(ii)(D); E.O.13662, s.1(a)(ii); E.O.13685, s.2(a)(iv); SEMRR (Canada), s.2(a) ('engaged in activities…directly or indirectly facilitate, support, provide funding for or contribute to…violation or attempted violation of [Ukraine's] sovereignty or territorial integrity'); DPRK: EU.Reg.1283/2009, Art.1(5) (funding); EU.Dec.2010/800/CFSP, Art.5(1)(c); ASR (Australia), s6., It.1 ('assisting' UNSCR 'evasion'); Iran: EU.Reg.267/2012, Art.23(2) (support/assisting law evasion); E.O.13846, ss1;7; ASR (Australia). s.6., It.4 ('contributing to…nuclear or missile programs'; 'assisting' UNSCR violation); SEMIR (Canada), s.2 (proliferation: facilitating/supporting/funding/potentially contributing); Iran/Syria: E.O.13606, s.1(a)(ii)(A)-(B) (operating/directing 'technology…that could assist…or enable serious human rights abuses'; providing 'goods, services, or technology…likely to be [so] used'); similarly Libya: E.O.13566, s.1(b)(iv); ASR (Australia), s.6.,It.5 ('assisting' UNSCR 'violation'); Myanmar: E.O.13448, s.1(b)(iv); E.O.13619, s.1(a)(v); Syria: E.O.13572, s.1(a)(iii) (assistance/support); similarly E.O.13573, s.1(a)(iii); E.O.13606, s.1(a)(ii)(C); EU.Dec.2013/255/CFSP, Art.28 ('supporting…regime'); EU.Dec.2012/739/CFSP, Art.25(1); ASR (Australia), s.6.,It.7; Yugoslavia: ibid. s.6.,It.2 (support/assistance); Zimbabwe: E.O.13469, s.1(a)(vii) (assistance/support).

[2062] Crimea: EU.Dec.2014/499/CFSP, Art.1(2), *supra*.n2061; similarly EU.Dec.2014/265/CFSP, Art.1(2); Syria: EU.Dec.2013/255/CFSP, Art.28; EU.Dec.2011/782/CFSP, Art.4; EU.Dec.2012/739/CFSP, Art.25(1).

[2063] EU.Dec.2014/499/CFSP, Art.1(2) ('associated' 'persons, entities or bodies'); similarly EU.Dec.2014/475/CFSP, Art.1; EU.Dec.2014/145/CFSP, Art.2(1); EU.Dec.2012/739/CFSP, Art.25(1); EU.Dec.2010/232/CFSP, Art.10(1); EUCP.2006/318/CFSP, Art.5(1); EU.Dec.2018/655(CFSP), Art.1(5); EUCP.2004/161/CFSP (19.Feb.2004), Art.5(1); EU.Dec.2013/255/CFSP, Art.28; EU.Dec.2011/273/CFSP, Art.4; EU.Reg.2017/2063, Art.8(4); SEMRR (Canada), s.2(c); SEMIR (Canada), s.2(c); SEMBR (Canada), s.2(b); SEMSR (Canada), s.2(b); SEMVR (Canada), s.2(d); SEMZR (Canada), s.2(b); ASR (Australia), s.6., Its.5-6.

[2064] SEMRR (Canada), s.2(c); SEMIR (Canada), s.2(c); SEMBR (Canada), s.2(b); SEMSR (Canada), s.2(b); SEMVR (Canada), s.2(d); SEMZR (Canada), s.2(b); E.O.13566, s.1(b)(i)-(ii),(vi); E.O.13448, s.1(b)(vi); E.O.13469, s.1(a)(vi); ASR (Australia), s.6.,It.6.

- Occasionally, individuals who are involved in particular relevant *sectors*,[2066] or *operating* in given areas.[2067]

State or government officials are often expressly included,[2068] sometimes identified as persons in 'positions of authority'.[2069] However, lists of sanctioned individuals demonstrate that they are, in any event, captured in other categories.[2070]

[2065] E.g. E.O.13660, s.1(a)(v) ('owned or controlled by, or…acted or purported to act for or on behalf of, directly or indirectly, any [relevant] person'); similarly E.O.13661, s.1(ii)(a)(C); E.O.13662, s.1(a)(iii); E.O.13685, s.2(a)(iii); E.O.13310, s1(b)(iii); E.O.13288, s.1(b); SEMBR (Canada), s.2(c)-(d); SEMIR (Canada), s2(d); SEMSR (Canada), s.2(b); SEMRR (Canada), s.2(d); SEMVR (Canada), s.2(e); SEMZR (Canada), s.2(c)-(d); ASR (Australia), s.6., It.5 (Libya); EU.Dec.2011/137/CFSP, Art.6(1); E.O.13566, s.1(b)(v); EU.Reg.1283/2009, Art.1(5); EU.Dec.2010/800/CFSP, Art.5(1)(b)-(c); EU.Dec.2017/667(CFSP); E.O.13572, s.1(a)(iv), also (b)(ii) (entities' official); E.O.13573, s.1(a)(ii) ('by [government] or…official'),(iv); similarly E.O.13469, s.1(a)(ii); E.O.13606, s.1(a)(ii)(D); also E.O.13660, s.1(a)(iii) ('leader'); *infra*.n2078.

[2066] Crimea: E.O.13661, s.1(a)(ii)(B) ('arms or related materiel sector'); E.O.13662, s.1(a)(i) ('sectors…such as financial services, energy, metals and mining, engineering…defense and related materiel'); Iran: EU.Reg.267/2012, Art.23(2)(e) (shipping); E.O.13846, ss.1-2 (shipping/automotive/petroleum); DPRK: E.O.13551 (1.Sept.2010), s.1 (*i.a.* arms; taken 'in view of' UNSCRs, but with 'additional steps': Preamble); E.O.13722, s.2(a)(i)-(ii)(industry); see Preamble ('in view of' UNSCR.2270, but seemingly extending beyond: Preamble (cf.UNSCR.2270 [32])); similarly E.O.13810, s.1(a).

[2067] E.O.13685, s.2(a)(i) ('operate in…Crimea'), also (ii) ('leader' thereof).

[2068] E.g. Crimea (Russia): E.O.13661, s.1(a)(ii)(A); SEMRR (Canada), s.2(b) (former/current 'senior official'); Iran: EU.Reg.267/2012, Art.23(c)-(d); E.O.13553, s.1(a)(ii)(A); SEMIR (Canada), s.2(b); DPRK: E.O.13687, s.1(i)-(iii) (cf.Preamble: 'in view of' UNSCRs); Libya: E.O.13566, s.1(b)(i); Myanmar: E.O.13310, s1(b)(i); E.O.13448, s.1(b)(i); also E.O.13464, s.1(b)(i)-(ii); EU.Dec.2010/232/CFSP, Art.10(1); EUCP.2006/318/CFSP, Art.5(1); SEMBR (Canada), s.2(a); ASR (Australia), s.6,.It.6; Syria: E.O.13572, s.1(a)(Annex); E.O.13573, s.1(b)(i); SEMSR (Canada), s.2(a) (former/current 'senior official'); Venezuela: E.O.13692, s.1(ii)(C); SEMVR (Canada), s.2(a)-(b); Yugoslavia: EU.Reg.2488/2000, Art.1; Zimbabwe: E.O.13288, s.1(a)(Annex); E.O.13469, s.1(a) ('senior official'); EU.CP.2004/161/CFSP, Art.5(1) ('[government] members'); EU.Dec.2011/101/CFSP, Art.5; EU.CP.2002/145/CFSP, Art.5(Annex); SEMZR (Canada), s.2(a) (former/current 'senior official'); also Dawidowicz (n416) 197;208;217;222;224-226;233.

[2069] See Canada: <https://international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/myanmar.aspx?lang=eng> ('officials…occup[ying] positions of authority during…military operations').

[2070] E.g. consolidated lists: <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx> (US); <https://data.europa.eu/euodp/data/dataset/consolidated-list-of-persons-groups-and-entities-subject-to-eu-financial-sanctions/resource/3a1d5dd6-244e-4118-82d3-db3be0554112> (EU); <https://dfat.gov.au/international-relations/security/sanctions/Pages/consolidated-list.aspx> (Australia); also MFA Japan, 'Implementation' (n2054), quoted 'SanctionsWiki' (n2030); also Dawidowicz (n416) 197;208;217;222;224-226;233.

It does not appear from the practice that these individuals are regarded as "third parties" vis-à-vis the relevant State.[2071] Importantly, as was expressly acknowledged vis-à-vis one State's Zimbabwean sanctions, these individuals are apparently instead targeted *because* of their 'connection' with the allegedly wrongdoing State.[2072] In some cases, this is immediately apparent from the wording of the sanctions: EU asset freezes vis-à-vis Yugoslavia, for instance, covered the relevant governments' property,[2073] but 'Government' was defined to include those 'acting or purporting to act for or on behalf of' the governments,[2074] who were thus individually subject to sanctions.[2075] In other cases, sanctions identify individuals as State officials,[2076] as figures of State authority,[2077] or as 'acting on behalf of',[2078] or supporting,[2079] a particular State.

[2071] See Pantaleo (n2040) 177 ('reasons justifying…designation…connected with [person's] role…in the contested State's conduct'); *supra*.nn2013-2016; *infra*.nn2092;2095; cf. discussion Dawidowicz (n416) 326, referencing *i.a.* ILC, '52nd' (n340) 273 (Pellet) ('utterly reject[ing]…idea that individuals could be "third parties" in…context of inter-State responsibility'); similarly Paparinskis, 'Countermeasures' (n5) 333. Cf.vis-à-vis UNSC: Pellet/Miron (n2020) [36]-[38]; Ruys (n94) 15;17; Happold (n2021) 89.

[2072] OFAC, 'Zimbabwe Sanctions Program' (18.Dec.2013) <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/zimb.pdf>, 4 ('persons…targeted…on the basis of their connection to…Government'); similarly Canada: <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/syria-syrie.aspx?lang=eng> ('members of…Syrian regime'; those 'associated'); Pantaleo, *supra*.n2071; Criddle *supra*.n2016.

[2073] EU.Reg.1294/1999, Art.3. Further Dawidowicz (n416) 183-185;191-193.

[2074] EU.Reg.1294/1999, Art.1(1)-(2).

[2075] ibid. Art.2(1);Ann.I.

[2076] *Supra*.n2068.

[2077] *Supra*.n2069.

[2078] E.g. E.O.13553, s.1(a)(ii)(A) ('acting on behalf of…[Iranian] Government'); similarly SEMBR (Canada), s.2(d); SEMSR (Canada), s.2(d); SEMZR (Canada), s.2(d).

[2079] EU.Dec.2013/255/CFSP, Art.28 ('supporting [Syrian] regime'); EU.Dec.2012/739/CFSP, Art.25; ASR (Australia), s.6., It.7; E.O.13606, s.1(a)(ii)(A)-(B) ('assist…enable serious human rights abuses by…on behalf of [Syrian/Iranian] Government'); E.O.13469, s.1(a)(vii) (supporting 'Government…any senior official').

More generally, the ECJ explained in *Kadi* that the relevant EU treaty provisions allowing for the imposition of sanctions 'concern the adoption of measures *vis-à-vis third countries*, since that concept *may include the rulers of such a country and also individuals and entities associated with or controlled, directly or indirectly, by them*.'[2080] It held, similarly, vis-à-vis Syrian sanctions that:

> regarding restrictive measures *applying to a third country* ... the categories of natural persons at whom restrictive measures may be directed include those whose connection with the third country concerned is quite obvious, namely the leaders of third countries and individuals associated with them.[2081]

In determining who is thus covered, EU courts require 'a set of indicia sufficiently specific, precise and consistent to establish that there is a sufficient link between the person subject to a measure freezing his funds and the Syrian regime'.[2082] Measures cannot simply 'be directed at persons … present in a third country or associated with one'.[2083]

The courts have accepted that persons in 'senior posts' would be covered by such requirements,[2084] as would persons supporting the relevant regime in an economic

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[2080] *Kadi (GC)* (n1371) [166] (emphasis added), also [172] (not covering 'persons…in no way linked to…governing regime of…third country'). Now cf.*Tomana v Council*, Case.C-330/15P (28.Jul.2016) (ECJ) [45]. Most case law discussed in this Part is referenced in Lester/O'Kane (n2030).

[2081] *Assad* (n2053) [92] (emphasis added), referencing *Tay Za v Council*, Case.C-376/10P (13.Mar.2012) (ECJ, GC) [68]; similarly *Tomana* (n2080) [76].

[2082] *Akhras v Council*, Case.C-193/15P (7.Apr.2016) (ECJ) [61], citing *Anbouba v Council*, Case.C-630/13P (21.Apr.2015) (ECJ, GC) [53]. Vis-à-vis Zimbabwe: *Tomana* (n2080) [82]; also *Tay Za* (n2081) [61]-[63], referencing *Kadi (GC)* (n1371) [166]-[168], *supra*.n2080. On required evidence: e.g. *Hassan v Council*, Case.T-572/11 (16.Jul.2014) (ECG) [86]-[93]; *Rotenberg* (n2053) [74]-[95]. Generally Pantaleo (n2040) 177-178;191-194.

[2083] *Tay Za* (n2081) [61].

[2084] *Tomana* (n2080) [84], also [85]-[87].

sense,[2085] or through specific forms of facilitation.[2086] Persons responsible for given acts have been regarded as 'associates' of a regime,[2087] while a family member's inclusion was explained, in the Syrian context, as based on their being 'connected with the Syrian leaders ... particularly as the existence in that country of a tradition of the exercise of power by a family is a well-known fact'.[2088] It could therefore be presumed 'that [the individual] profits from the Syrian regime and is associated with it'.[2089] Even sanctions vis-à-vis individuals *benefiting* from persons or acts have been explained in terms of support, the EGC holding that 'recipients of those benefits cannot be unaware of the involvement of [the relevant] decision-makers' in the conduct at issue, 'and can expect their resources, derived at least in part from those benefits, to be targeted … with the aim of preventing them from being able to support the decision-makers in question'.[2090] The targeting of particular *sectors* in Iran is likewise justified on the basis of their 'facilitating' proliferation.[2091]

[2085] *Akhras (ECJ)* (n2082) [62] ('[businessman's] position…important offices…providing economic support to…Syrian regime or benefitting from it'); also *Akhras v Council*, Case.T-579/11 (12.Feb.2015) (EGC) [104] ('significant roles…in…Syrian business world…links with…person principally responsible for…repression…support…to the regime'),[115]-[119],[127]-[133]; *Mayaleh v Council*, Cases T-307/12;T-408/13 (5.Nov.2014) (EGC) [141]-[142],[148] (financial institution head 'in…position of power and influence' regarding 'financial support of…Syrian regime'); *Anbouba* (n2082) [52] ('position in Syrian economic life...important functions...relations with…member of [President's] family'); also Pantaleo (n2040) 192.

[2086] E.g., *Rotenberg* (n2053) [120]-[124] (construction),[128] ('public relations'); *R (Bredenkamp) v Sec.State for FCA* [2013] EWHC 2480 (Admin) [4] ('assisting…Mugabe regime'), discussed Lester/O'Kane (n2030). Control of another suffices: *Syrian Lebanese Commercial Bank v Council*, Cases.T-174/12;T-80/13 (4.Feb.2014) (EGC) [101]-[114]; also *Mayaleh* (n2085) [148].

[2087] *Tomana* (n2080) [48] ('persons whose activities seriously undermine [*i.a.*]…human rights' 'constitute…particular category of…associates [of government members]').

[2088] *Assad* (n2053) [96].

[2089] ibid.[97], also [99] ('leaders can easily circumvent…measures' through 'relatives and associates'). Cf.*Tay Za* (n2081) [61]-[71], discussed therein; Pantaleo (n2040) 191.

[2090] *Rotenberg* (n2053) [91]. Similarly Pantaleo (n2040) 193.

[2091] See USIFCPA, s.1244(a)(1) ('sectors…facilitating…nuclear proliferation activities'); similarly *Council v Kala Naft*, Case.C-348/12P (28.Nov.2013) (ECJ) [83] ('trading in key equipment and technology for…gas and oil industry' potentially 'support for…nuclear activities'), discussed Pantaleo (n2040) 193-194. Cf., not

The important point which emerges is that, in the practice considered, the assets of individuals are frozen *because* those individuals are *not* regarded as third parties vis-à-vis the relevant State's allegedly wrongful conduct.[2092] In respect of certain persons, this is unexceptional: as noted in Chapter I, States can 'only act through the institutions and agencies of the state, its officials and employees'.[2093] The rules of attribution discussed above exist precisely to treat individuals acting for the State as synonymous with it for State responsibility purposes.[2094] Other persons are identified as *supporting* the State.[2095] These categories might generally be described in terms of "complicity", meaning 'participation in wrongdoing committed by another',[2096] or providing 'aid or assistance' or 'means to enable or facilitate' an act.[2097] Indeed, the term 'complicity' is sometimes

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vis-à-vis asset freezes, *Rosneft* (n1508) [157] (can target economic sectors important to country),[160]-[163],[205].

[2092] Similarly, distinguishing measures where 'no connection…with a third country' and 'inter-State smart sanctions': Pantaleo (n2040) 174-175;177ff; quote *supra*.n2071; also Criddle *supra*.nn2014-2016; *supra*.nn2013;2071. Certain countries apparently aim certain sanctions at individuals, without State involvement: e.g., Magnitsky Act, s.1263; E.O.13818, s.1(a)(ii)(A); JVCFOA, discussed <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/victims_corrupt-victimes_corrompus.aspx?lang=eng>; Portela, 'The Power of the Blacklist: The European Parliament's Proposed Magnitsky Act' *ECFR* (19.Jul.2018) <https://www.ecfr.eu/article/commentary_power_of_blacklist_european_parliament_magnitsky_act> (UK/Latvia/Lithuania/Estonia); *Tomana* (n2080) [45]; cf.*Kadi (GC)* (n1371) [167],[180]. These cannot be countermeasures, which must be directed against States: *supra*.nn1972-1973, particularly Paparinskis, 'Countermeasures' (n5) 332-334; *Corn Products* (n14) [146]; Ruys (n94) 13; cf.Pellet/Miron (n2020) [22]. Cf.*Dames* (n1059) 677.

[2093] *Oppenheim's* (n73) 540; further authorities *supra*.n73.

[2094] *Supra*.nn73-77;1974-1980. Similarly Criddle, *supra*.nn2014-2016; also *infra*.n2095.

[2095] *Supra*.nn2061;2079;2085ff. Similarly distinguishing 'leadership' and 'private' support-based sanctions: Happold (n2021) 91. Although some describe attribution as holding States 'responsible for acts…sufficiently linked to it' (Stern (n71) 202; similarly Jackson (n73) 178), resembling discussion of 'sufficient link' *supra*.n2082, complicity is insufficient for attribution: ibid.178-179; *infra*.nn2340-2341. See also *infra*.n2390.

[2096] Jackson (n73) 10; discussion 11;17-31. Further Chinkin (n2) 297; *infra*.n2341.

[2097] *Bosnian Genocide* (n697) [419]-[420] (former referencing *ARSIWA*, Art.16), case cited Tams, 'Terrorists' (n1927) 387.

expressly used in sanctions,[2098] and was used in one sanctions-related case,[2099] while another employed the terminology of 'collusion'.[2100] Here too, however, the relevant individuals do not appear to be treated as third parties: it is their 'connection' with the State that determines whether they are covered by the sanctions régime.[2101]

(ii) Sanctions as countermeasures

The foregoing is, of course, only relevant to the third-party rights approach if these sanctions are countermeasures.[2102] This requires that the actions respond to a State's allegedly wrongful conduct, as outlined above,[2103] but also that they would themselves otherwise be unlawful.[2104] Freezes of nationals' assets, which are our present concern, have long been regarded as a standard form of countermeasure,[2105] and it would certainly appear that the freezes in these sanctions programmes might violate international law.[2106]

[2098] *Supra*.n2060.

[2099] Albeit UNSC: *Sayadi* (n1636) 31 (Diss.Op.Wedgewood).

[2100] *Tomana* (n2080) [81].

[2101] *Supra*.nn2072;2081;2092; generally *supra*.nn2080-2092 and authorities *supra*.nn2071;2092;2095. Cf.*Georg K v Interior Ministry* (1972) 71 ILR 284 (Adm.Ct.Austria) 290-291 (individual's conduct more likely affecting interstate relations where in authority); *Rosneft* (n1508) [208] (can affect those 'in no way responsible').

[2102] *Supra*.nn1994;2012.

[2103] *Supra*.nn1972;2020;2039-2053.

[2104] Authorities *supra*.nn1922;2020.

[2105] Elagab (n1190) 106-109;111; McNair, *The Law of Treaties* (1961) 578 ('blocking of [nationals'] banking accounts'), quoted Elagab (n1190) 109; Arangio-Ruiz (n182) [37],[83], cited Borelli/Olleson (n197) 1180; Crawford, 'SecondRep' (n1078) [368]; also Criddle (n57) 595-597;cf.586; Zoller (n144) 100;102; Paparinskis, 'Countermeasures' (n5) 277-278; ILC, '52nd' (n340) 265-266;285; White/Abass (n194) 549;cf.540 (States); Dopagne (n2020) 181;193; Dawidowicz (n195) 387; Dawidowicz (n416) 113;254.

[2106] E.g., Ruys (n94) 10; Dupont, 'Unilateral' (n2020) 42;44 (investment/immunities); Dawidowicz (n195) 394-398; cf.Dawidowicz (n416) 113;205;222;233 (apparently regarding freezing of officials' assets as relevant only vis-à-vis jurisdictional immunities); 233 (retorsion vis-à-vis lower-level officials); Criddle

In a 2017 report concerning 'unilateral economic measures', the UNSG collated responses from multiple States indicating that they generally regarded such measures, which included asset freezes,[2107] as internationally unlawful.[2108] For its part, the EU expressly acknowledges that its sanctions may breach international obligations, including vis-à-vis trade law.[2109] The ILC apparently regarded early iterations of the EU's Myanmar sanctions, which included freezing of officials' assets, as countermeasures,[2110] and the HRC's Special Rapporteur on the negative impact of unilateral coercive measures regards countermeasures as the appropriate framework for evaluating such sanctions.[2111] While focusing on illegality vis-à-vis jurisdictional immunities,[2112] Dawidowicz emphasises that the practice vis-à-vis Syria is 'indicative of a willingness of a very large number of States to adopt *prima facie* unlawful unilateral coercive measures for which the justification can seemingly only be explained in legal terms by reference to third-party

(n57) 591-593 (non-intervention/investment); Dupont, 'Countermeasures' (n2019) 312-314 (investment/immunities); authorities *infra*.nn2113-2115;Pt.IV(B)(ii)(a)-(b).

[2107] UNSG (n2036) [12], also 11-13;19.

[2108] ibid.6 (Belarus/Cuba); 9-11 (Guatemala);15 (Senegal/Sri Lanka/Syria). Further, vis-à-vis Venezuela, South American State criticisms noted Ruys (n94) 6.

[2109] EU Council, 'Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions)' (4.May.2018) <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf> [10]-[12], earlier version cited Dawidowicz (n416) 25. On legality of trade measures under EU-Russia PA/GATT: *Rosneft* (n1508) [165]. The EU apparently 'dismissed the legal characterization of [its] sanctions as countermeasures': Jazairy, 'Report of the Special Rapporteur on His Mission to the EU', UN.Doc.A/HRC/39/54/Add.1 (17.Jul.2018) [18]. But, particularly given the acknowledgement above, as the SR noted, 'they require…legal justification' as countermeasures: ibid.[18]-[19]; similarly Ruys (n94) 21 (if 'unlawful').

[2110] As noted Dawidowicz (n416) 195 (fn.523), citing DARIO, 96.

[2111] Jazairy (n2109) [18]-[20].

[2112] *Supra*.n2106.

countermeasures'.[2113] Other scholars similarly regard such measures as at least purporting to be countermeasures.[2114]

Because this thesis is concerned with overlapping individual-interstate claims, and presently with whether countermeasures may preclude claims for breach of individuals' (third-party) rights, we must specifically establish that these sanctions could violate obligations founding individual claims. Accordingly, in line with recent scholarship, this section briefly considers potential resulting violations of human rights and investment law.[2115]

(a) Human rights

Case law concerning asset freezes and human rights establishes that fair trial, effective remedy, and property rights are particularly relevant.[2116] The former are found in

[2113] Dawidowicz (n416) 231.

[2114] Criddle (n57) 595-599;609; Dupont, 'Investments' (n1960) 209; Dupont, 'Unilateral' (n2020) 40-41;51;cf.54-61; Dopagne (n2020) 181;193 (EU-FRY); Aaken (n1927) 1-2; cf.Dupont, 'Countermeasures' (n2019) 321-334; also Sicilianos (n204) 1146 (FRY); Ruys (n94) 11-14;23-26.

[2115] Similarly, e.g., Ruys (n94) 10-11;17; Aaken (n1927) 1 (FET/expropriation); Criddle (n57) 584;592 (investment); Dupont, 'Investments' (n1960); Dupont, 'Unilateral' (n2020) 42 (investment); Dupont, 'Countermeasures' (n2019) 312-313 (investment); Arangio-Ruiz (n182) [83]; Elagab (n1190) 104-111. Cf.*supra*.nn1994ff and particularly Criddle, *supra*.n2016.

[2116] Happold (n2021) 94-96 (property); 98-109 (reputation/access/fair trial/remedy); Borelli/Olleson (n197) 1186 (property); Pantaleo (n2040) 173 (fair trial/remedy);175-177; *infra*.nn2120ff. Further: *Sayadi* (n1636) [10.13] (reputation).

most multilateral human rights instruments,[2117] while the last is found in certain instruments, including the ECHR,[2118] and both exist under EU law.[2119]

In the well-known *Kadi* case,[2120] the ECJ held that a UNSCR-implementing asset freeze[2121] violated 'rights of defence', 'the principle of effective judicial protection',[2122] and the 'fundamental right to respect for property'.[2123] The subjects could not, without having the relevant evidence, 'make their point of view … known' or 'defend their rights … in satisfactory conditions'.[2124] Moreover, notwithstanding that the asset freeze was 'temporary', it 'entail[ed] a restriction of the exercise of [the] right to property' that was 'considerable, having regard to [its] general application …. and the fact that it ha[d] been applied' for some seven years.[2125] The Court accepted that proportionate interferences in the 'public interest' were allowable,[2126] observing that, in pursuing the aim of fighting

[2117] Generally Happold (n2021) 99; see ICCPR, Arts.2(3);14 (effective remedy/fair trial); similarly ECHR, Arts.6;13; AmCHR, Arts.8;25; ACHPR, Art.7 (fair trial); Musial, 'The Right to an Effective Remedy under the African Charter on Human and Peoples' Rights' (2006) 6 AHRLJ 441.

[2118] ECHR.Prot.1, Art.1; generally Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (2013) 228-237; Ruzza, 'Expropriation and Nationalization' in *MPEPIL* (2013) [16]; Elagab (n1190) 109-110.

[2119] *Kadi (GC)* (n1371) [335]-[336],[355]-[356]. Cf.Barnes, 'United States Sanctions: Delisting Applications, Judicial Review and Secret Evidence' in Happold/Eden, *Economic Sanctions* (n2020) 202ff.

[2120] Generally Happold (n2021) 99-100;91 (with further authorities); Pantaleo (n2040) 174; White/Abass (n194) 558.

[2121] *Kadi (GC)* (n1371) [14].

[2122] ibid.[353].

[2123] ibid.[371].

[2124] ibid.[348]-[349].

[2125] ibid.[358].

[2126] ibid.[355].

terrorism,[2127] sanctions 'might, in principle, be justified.'[2128] However, the lack of procedural safeguards rendered them otherwise.[2129]

As Happold explains, 'asset freezes … can[not] be said, in general, to infringe substantive human rights, at least when targeted at persons who actually fit the criteria established for the measures' imposition and provided the criteria themselves are not too widely drawn.'[2130] However, questions of proportionality arise, including where the person's 'activities do not directly facilitate' the relevant wrongs,[2131] as well as regarding sanctions' 'compatibility with procedural rights'.[2132]

(b) Investment law

BITs are in force as between numerous sanction-imposing and sanction-subject States, generally defining 'investment' as any asset invested in the former's territory.[2133] It is accordingly plausible that nationals of sanction-subject States parties to such BITs

[2127] ibid.[363].

[2128] ibid.[366].

[2129] ibid.[368]-[370]. Generally Happold (n2021) 100.

[2130] Happold (n2021) 92-93.

[2131] ibid.99, referencing *Tay Za* (n2081), see [63]-[72].

[2132] Happold (n2021) 99; also Paparinskis, *FET* (n2118) 237; generally 231-237; Pantaleo (n2040) 177ff. E.g., *Akhras (EGC)* (n2085) [71]-[72] (reasons).

[2133] E.g., Canada-Russia (1989), Art.I(b); Germany-Russia (1989), Art.1; Japan-Russia (1998), Art.1; UK-Russia (1989), Art.1; Denmark-DPRK (1996), Art.1; Germany-Iran (2002), Art.1; France-Syria (1977), Art.1; Germany-Syria (1977), Art.1; Switzerland-Syria (2007), Art.1; Turkey-Syria (2004), Art.1(2); UK-Venezuela (1995), Art.1; Zimbabwe-Germany (1995), Art.1; Zimbabwe-Netherlands (1996), Art.1; Switzerland-Zimbabwe (1996), Art.1. Generally Aaken (n1927) 1; Escarcena, *Indirect Expropriation in International Law* (2014) 119-121; Dolzer and Schreuer, *Principles of International Investment Law* (2nd edn, 2012) 60ff; Ruzza (n2118) [17]-[20]; Douglas (n301) Ch.5.

have had such "investments" frozen in sanction-imposing States.[2134] Those BITs tend to contain provisions regarding non-expropriation,[2135] fair and equitable treatment,[2136] and the free flow of funds.[2137]

Expropriation involves taking property,[2138] though it suffices that the action 'depriv[e] the owner of the substantial benefits of its ownership' ('indirect' expropriation).[2139] Expropriation is generally lawful if non-discriminatory, for a 'public purpose', and compensated.[2140] Asset freezes are, at the least, not compensated.[2141] Nonetheless, international law accepts that States have 'regulatory powers that, by pursuing public needs, may legitimately justify restrictions of property rights without

[2134] See particularly Aaken (n1927) 1 (while 'sole bank account may not count as…"investment"', 'in most cases, especially if firms are targeted…satisfaction of this requirement…unproblematic'); Dupont, 'Investments' (n1960) 200-203; also Ruys (n94) 10-11; Criddle (n57) 592-593.

[2135] E.g., Canada-Russia (1989), Art.VI; Germany-Russia (1989), Art.4; Japan-Russia (1998), Art.5; UK-Russia (1989), Art.5; Denmark-DPRK (1996), Art.5; Germany-Iran (2002), Art.4(2); France-Syria (1977), Art.5; Germany-Syria (1977), Art.4(2); Switzerland-Syria (2007), Art.7; Turkey-Syria (2004), Art.4; UK-Venezuela (1995), Art.5; Zimbabwe-Germany (1995), Art.4(2); Zimbabwe-Netherlands (1996), Art.6; Switzerland-Zimbabwe (1996), Art.6.

[2136] E.g., Canada-Russia (1989), Art.III; Japan-Russia (1998), Art.3(3); UK-Russia (1989), Art.2(2); Denmark-DPRK (1996), Art.3(1); Germany-Iran (2002), Art.2(3); France-Syria (1977), Art.3; Germany-Syria (1977), Art.2; Turkey-Syria (2004), Art.2(2); Switzerland-Syria (2007), Art.4; UK-Venezuela (1995), Art.2(2); Zimbabwe-Germany (1995), Art.2; Zimbabwe-Netherlands (1996), Art.3(1); Switzerland-Zimbabwe (1996), Art.4.

[2137] E.g. Canada-Russia (1989), Art.VII; Germany-Russia (1989), Art.5; Japan-Russia (1998), Art.8; UK-Russia (1989), Art.6; France-Syria (1977), Art.6; Germany-Syria (1977), Art.5; Switzerland-Syria (2007), Art.6; Turkey-Syria (2004), Art.5; Denmark-DPRK (1996), Art.7; Germany-Iran (2002), Art.5; UK-Venezuela (1995), Art.6; Zimbabwe-Germany (1995), Art.5; Zimbabwe-Netherlands (1996), Art.5; Switzerland-Zimbabwe (1996), Art.5. Generally on all kinds of BIT provisions potentially relevant to this context: Criddle (n57) 592; also Ruys (n94) 10-11; Aaken (n1927) 1; Dupont, 'Investments' (n1960) 203-207.

[2138] Dolzer/Schreuer (n2133) 101; Ruzza (n2118) [10].

[2139] Ruzza (n2118) [13]; also [11]; similarly Dolzer/Schreuer (n2133) 101; Dupont, 'Investments' (n1960) 203.

[2140] Ruzza (n2118) [2]; Escarcena (n2133) 117; Dolzer/Schreuer (n2133) 99-100; Dupont, 'Investments' (n1960) 203.

[2141] Similarly Dolzer/Schreuer (n2133) 100 (for 'indirect expropriation, illegality…the rule, since…no compensation'); cf.Dupont, 'Investments' (n1960) 203.

compensation' in certain circumstances.[2142] In distinguishing such actions from indirect expropriation,[2143] of relevance is, *inter alia*, the effects[2144] – including on the investor's control,[2145] and how long a measure lasts[2146] – and its 'nature',[2147] including whether it is proportionate.[2148]

Asset freezes like those considered here might, depending on the circumstances, have a legitimate purpose.[2149] However, commentary suggests that '[w]henever [the economic] effect is substantial and lasts for a significant period of time, it will be assumed prima facie that a taking of the property has occurred.'[2150] Measures such as those under discussion have been described as 'draconian',[2151] placing 'considerable' restrictions on property rights,[2152] and may be long-lasting: certain Syria and Zimbabwe-related asset freezes have, for instance, been in place for eight and fifteen years respectively.[2153] Admittedly, as noted above, certain courts applying human rights norms

[2142] Ruzza (n2118) [8], also [14]; Criddle (n57) 593. Sanctions are not criminal: *Sayadi* (n1636) [10.11]; cf.White/Abass (n194) 558.

[2143] Potentially difficult: Ruzza (n2118) [8],[14]; Dolzer/Schreuer (n2133) 102.

[2144] Kolo, 'Investor Protection vs Host State Regulatory Autonomy during Economic Crisis: Treatment of Capital Transfers and Restrictions under Modern Investment Treaties' (2007) 8 JWIT 457, 487; Dupont, 'Investments' (n1960) 203; Dolzer/Schreuer (n2133) 112-115.

[2145] Dolzer/Schreuer (n2133) 117-118; also Kolo (n2144) 491-493.

[2146] Dolzer/Schreuer (n2133) 124-125; also Kolo (n2144) 492-493.

[2147] Kolo (n2144) 487; similarly Escarcena (n2133) 121.

[2148] Dolzer/Schreuer (n2133) 123; Kolo (n2144) 487; Escarcena (n2133) 121.

[2149] E.g., *Akhras (EGC)* (n2085) [146]-[147]; *Assad* (n2053) [116]; *Rotenberg* (n2053) [176].

[2150] Dolzer/Schreuer (n2133) 112.

[2151] Barnes (n2119) 198, referencing *Ahmed* (n1371), see [5],[60],[192], also [38]-[39],[147].

[2152] *Kadi (GC)* (n1371) [358], *supra*.n2125; also Kolo (n2144) 489-490 (freeze arguably 'indirect expropriation' where 'deprived of any ability to use, enjoy or dispose of…investment'), referencing Hober.

[2153] See Zimbabwe: E.O.13288 (2003); EU.Reg.314/2004 (19.Feb.2004); Syria: E.O.13572 (2011); generally *supra*.n2054 and cf.*supra*.n2125. Similarly Dawidowicz (n416) 277.

have considered that freezes would be allowable where proportionate.[2154] However, as one investment tribunal outlined, while human rights apply to all persons, it 'does not seem extraordinary' that foreign investors would be granted 'a higher standard of protection than nationals', given that investment treaties 'contain undertakings which are explicitly designed to induce foreigners to make investments in reliance upon them', who should not bear the same 'burden' in achieving 'regulatory objectives for the benefit of [that] national community'.[2155] Accordingly, investment tribunals have been unprepared to afford States the same 'margin of appreciation' in implementing measures, including asset freezes, as the ECtHR.[2156] There is therefore a good case that, as Criddle suggests, and dependent on the circumstances, asset freezes 'deprive investors of the right to manage, use, and effectively control their property', and thus amount to expropriation.[2157]

'Fair and equitable treatment' ('FET') obligations, which 'may offer redress where the facts do not support a claim for expropriation'[2158] and provide greater protection than the right to property,[2159] have been described as 'concerned ... essentially with the host State's decision-making process',[2160] encompassing due process.[2161] FET

[2154] See *supra*.n2126; generally *supra*.nn2130-2131;2080ff.

[2155] *Quasar de Valores v Russia (Award)* SCC.Case-No.24/2007 (20.Jul.2012) [21]-[23]. See Paparinskis, *FET* (n2118) 230; *supra*.n679.

[2156] *Valores/Russia* (n2155) [125]-[128],[158], also referencing *RosInvest v Russia (Award)* SCC.Case-No79/2005 (12.Sept.2010) [567],[574]. See Paparinskis, *FET* (n2118) 230 (fn.101). Cf.Peters (n1) 447.

[2157] Criddle (n57) 592. Similarly Dupont, 'Investments' (n1960) 203; Aaken (n1927) 1; Ruys (n94) 10-11; Dupont, 'Countermeasures' (n2019) 313; Kolo (n2144) 489-491; also Paparinskis, 'Countermeasures' (n5) 278.

[2158] Dolzer/Schreuer (n2133) 132; also Kolo (n2144) 496.

[2159] See Paparinskis, *FET* (n2118) 229-231. Further: *supra*.n679.

[2160] Angelet, 'Fair and Equitable Treatment' in *MPEPIL* (2011) [2].

[2161] See ibid.[16],[21]-[22],[35]; Criddle (n57) 592; Dolzer/Schreuer (n2133) 100;154-156; Kolo (n2144) 497;500-501; also Paparinskis, 'Countermeasures' (n5) 329 (fair trial).

also requires 'weighing' an investor's 'legitimate … expectations' against the State's 'legitimate regulatory interests'.[2162] Given the procedural concerns already noted above regarding asset freezes,[2163] similar circumstances might violate FET standards.[2164] Indeed, Iran has alleged FET breach in its ICJ suit concerning US sanctions.[2165]

Finally, Ruffert remarks that 'clauses guaranteeing the free flow of capital are among the most important rules within [BITs]',[2166] allowing investors to transfer funds to varying degrees.[2167] Some, but not all, such provisions include restrictions,[2168] or exceptions for domestic law or necessary measures.[2169] Subject to such provisions, sanctions involving asset freezes 'impos[e] restrictions upon the transfer of capital' of those targeted,[2170] and could thus violate such protections.[2171] Subject to any additional

[2162] *Saluka v Czech Republic (Part.Award)* PCA.Case-2001-04 (17.Mar.2006) [306], cited Kolo (n2144) 479; also 493-494;498-499; Dolzer/Schreuer (n2133) 149;145-149.

[2163] *Supra*.nn2122ff;2132.

[2164] Dupont, 'Investments' (n1960) 204; Criddle (n57) 592-593; cf.593; Aaken (n1927) 1; Ruys (n94) 10-11.

[2165] *Iran/US (2017) Pleadings* (n2050) App.[40]-[41].

[2166] Ruffert, 'Capital, Free Flow Of' in *MPEPIL* (2014) [25]; also Dolzer/Schreuer (n2133) 212; Kolo (n2144) 471.

[2167] Kolo (n2144) 471-474; Dolzer/Schreuer (n2133) 214.

[2168] Dolzer/Schreuer (n2133) 214. Cf.*Continental* (n1666) [237]-[245].

[2169] Kolo (n2144) 471-474; also Dolzer/Schreuer (n2133) 214-215; Aaken (n1927) 1.

[2170] Ruffert (n2166) [27] (vis-à-vis UNSC terrorism sanctions).

[2171] Criddle (n57) 592-593; also Kolo (n2144) 471-485. E.g., *Iran/US (2017) Pleadings* (n2050) App.[42]-[43]. Similarly Ruys (n94) 10, referencing Dupont, 'Countermeasures' (n2019) 312-316.

defences in the relevant BIT itself,[2172] asset freezes may thus violate various BIT obligations.[2173]

(iii) Conclusion: countermeasures, individuals and third-party rights

States are generally presumed not to act intentionally in violation of international law,[2174] and indeed sanction-imposing States sometimes expressly assert their compliance therewith.[2175] Nonetheless, at least certain asset freezes may be inconsistent with the imposing States' international obligations, including, importantly, in the fields of human rights and investment law.[2176] If rightly considered countermeasures, these sanctions therefore affect individuals in fields in which individuals are commonly viewed as holding rights.[2177] Under the 'third-party rights approach', countermeasures taken against a State could not justify infringement of those rights, and individuals could continue to invoke responsibility for breach thereof.[2178] The better view is, as suggested above, that States do not consider certain individuals having a 'connection' with, or complicit in, the State's wrongdoing as "third parties" at all.[2179] Given that only third-party rights cannot

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[2172] Dupont, 'Investments' (n1960) 211-213; Criddle (n57) 593; Ruys (n94) 11; Aaken (n1927) 1; Dupont, 'Countermeasures' (n2019) 313. E.g., *Continental* (n1666) [200]-[205] (necessity clause covered bank freeze); *Rosneft* (n1508) [178],[180] (exception clauses covered trade measures).

[2173] Similarly authorities *supra*.nn2115;2157;2164;2171.

[2174] E.g. *Immunities* (n39) [138] ('good faith…presumed'); similarly Dupont, 'Countermeasures' (n2019) 313.

[2175] E.g., <http://www.consilium.europa.eu/en/policies/sanctions/> ('[EU] measures…fully compliant with obligations under international law, including…pertaining to human rights', emphasis removed); 'EU Guidelines' (n2109) [9]. Further Dawidowicz (n416) 254; Dupont, 'Investments' (n1960) 214; Dupont, 'Unilateral' (n2020) 43; Dupont, 'Countermeasures' (n2019) 313; UNSG (n2036) 9.

[2176] *Supra*.Pt.IV(B)(ii).

[2177] *Supra*.nn675;2003-2011 and see Criddle, *supra*.n2016.

[2178] *Supra*.n2012; see *supra*.n1994ff.

[2179] *Supra*.nn2971-2072;2080-2081;2092-2101. Similarly Criddle, *supra*.nn2014-2016; Peters/Roberts, *supra*.n2013; Pantaleo, *supra*.nn2071;2092. Cf.*Greece v Vulkan Werke* (1926) 3 ILR 19 (Graeco-German

be violated by countermeasures,[2180] countermeasures against States could therefore also justify infringement of these individuals' rights,[2181] and preclude any resulting claims.[2182] Admittedly, not all States employ asset freezes in the manner discussed, but, as noted above, a significant number have.[2183] There is, on the other hand, limited practice suggesting that *all* individuals should be regarded as 'third parties' for countermeasures purposes.[2184]

Nonetheless, even if this approach is correct, the ARSIWA underscore that countermeasures cannot 'affect … fundamental human rights',[2185] and cases suggest that procedural violations are inexcusable.[2186] As Chapter II outlined, human rights obligations are owed *erga omnes* (*partes*) to all or a group of States,[2187] and *States* are clearly 'third parties' in the countermeasures context.[2188] Countermeasures would, accordingly, be precluded from affecting such obligations not because individual rights

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MAT) 20 (State 'national' where acting as 'private person'), cited Shany (n4) 42; also 135; Schreuer, 'IA' (n243) 301; Peters (n1) 330.

[2180] *Supra*.nn1998-2000.

[2181] Cf.*supra*.nn1998ff; similarly: Criddle (n57) 609-610; *supra*.n2013.

[2182] Cf.*supra*.nn218;1981-2011;2013-2016.

[2183] Similarly Dawidowicz (n416) 243-244;283; Dawidowicz (n195) 410-412; see *supra*.nn2034ff.

[2184] Excepting the three cases *supra*.nn2005-2010, the literature is scholarly: *supra*.nn2003ff. Cf.*ADM* (n232) [127];[5],[15] (Op.Rovine) (undisputed by Mexico), but cf.Losari/Ewing-Chow (n359) 289. Similarly: *supra*.n2013 (Peters/Roberts); *supra*.nn2014-2016;2071.

[2185] *ARSIWA*, Art.50(1)(b); also Dawidowicz (n416) 308-309;319-333; Aaken (n1927) 2. "Fundamental" is unclear: see Paparinskis, 'Countermeasures' (n5) 328-329; O'Keefe (n949) 1164; Dawidowicz (n416) 272;328-329; cf.DARIO, 94 (omitting).

[2186] *Supra*.n2132; e.g., *supra*.nn2122ff (*Kadi*); *Assad* (n2053) [53] (reasons/'substantive legality' separate).

[2187] *Supra*.nn415-420.

[2188] *Supra*.n2000.

are in issue (though they may be),[2189] but because the rights of *other* States would be violated.[2190] The same would not, however, apply to investment law,[2191] and it is therefore in this field that applying a different approach to countermeasures could be significant.[2192]

C. Self-defence: an accepted approach?

Like countermeasures, self-defence is a concept that has commonly been of relevance between States.[2193] In terms of whether *individual* conduct can enliven the defence against a State, as in respect of countermeasures, individual conduct that is attributable to the attacking State can certainly do so.[2194] What is less clear is whether, like countermeasures, self-defence can *only* be exercised against (i.e. in response to attacks by) States: as elaborated below, debates continue regarding whether States can respond to non-State actor attacks.[2195] *If* self-defence can respond to individual attacks,

[2189] Cf.discussion Dawidowicz (n416) 324-327, referencing *i.a.* Crawford, 'ThirdRep' (n144) [312]; ILC, '52nd' (n340) 266;270-273;293-294;297-299, particularly 270 (Simma); cf.also Paddeu, *Justification* (n53) 278-279.

[2190] Dawidowicz (n416) 309-312;326-333; Paparinskis, 'Countermeasures' (n5) 330-331;cf.332-334; Borelli/Olleson (n197) 1185-1186; also Rivier (n168) 745; presentations BIICL Seminar, 'Sanctions, Countermeasures and Human Rights' (London, 12.Jun.2014); cf.Paddeu, *Justification* (n53) 278-279.

[2191] *Supra*.n362.

[2192] Similarly Criddle (n57) 598-599.

[2193] See Brownlie, *Force* (n1916) 375;278-279; Paddeu, 'Force' (n1940) 94; Moir, 'Action Against Host States of Terrorist Groups' in Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (2015) 720; Corten, *War* (n1935) 126;172-174; Greenwood, 'International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq' (2003) 4 SDILJ 7, 16; Greenwood, 'Self-Defence' (n1935) [17]; Gray, *Force* (n1935) 134-135;207; Crawford, 'Relationship' (n202) 67.

[2194] See, e.g., Greenwood, 'Self-Defence' (n1935) [16]; Trapp, 'Can Non-State Actors Mount an Armed Attack?' in Weller, *Force* (n2193) 680; Ruys (n1959) 371-372;408; Lubell (n10) 38; also 26; generally *infra*.n2340ff.

[2195] See authorities *infra*.Pts.(C)(i);(iii); generally Lubell (n10) 25-36; Corten, *War* (n1935) 405-406; Jackson (n73) Ch.8.3; Tams, 'The Use of Force against Terrorists: A Rejoinder' (2009) 20 EJIL 1057, 1059; Paddeu, 'Force' (n1940) 95-97; Greenwood, 'Self-Defence' (n1935) [15]ff; Bethlehem, 'Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 AJIL 769, 773; Deeks (n10) 492-493. Cf.*supra*.nn1973;1980.

this thesis assumes that it could then, like other CPWs,[2196] operate to preclude claims of those individuals that might have arisen, as outlined above.[2197] Whether such an invocation of self-defence could *also* preclude an overlapping interstate claim apparently depends, as Paddeu sets out, on whether self-defence can, *unlike* countermeasures, justify third-party rights violations,[2198] a matter – as will be seen – of some debate.[2199]

In terms of the effect of State conduct on individual claims, it appears that a State acting in self-defence against another will not be responsible to the latter for *damage* thereby caused to its nationals.[2200] It should follow that, as for countermeasures, individuals' claims could also be precluded insofar as they invoke obligations owed between the relevant States.[2201] However, should individuals make claims invoking their own rights,[2202] then – as in the countermeasures context – the same question will arise whether self-defence can justify third-party rights violations, and thereby preclude an individual's overlapping claim.[2203]

[2196] See *infra*.nn2264-2268;2360;2362 (necessity).

[2197] *Supra*.nn1949-1962.

[2198] See Paddeu, 'Force' (n1940) 100;105-106;110-115 and discussion *infra*.nn2222-2224;2228-2268;2376 and authorities. Cf.*supra*.nn1994ff.

[2199] *Infra*.Pt.IV(C)(i)-(iv), particularly *infra*.nn2219;2222-2224.

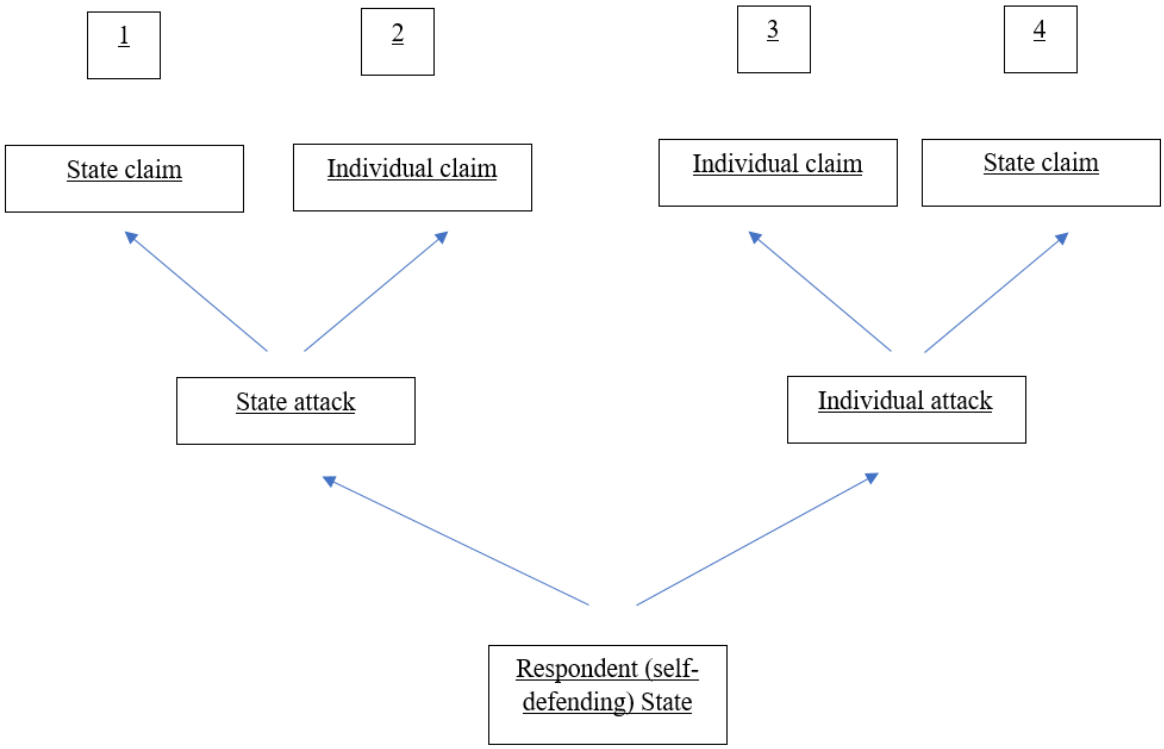
[2200] E.g. the EECC held Eritrea breached Art.2(4) and Ethiopia acted in self-defence: *Claims 1-8* (n1954) [14]-[19]. Eritrea was subsequently held liable for all damage 'proximately caused' thereby (*Ethiopia* (n428) [291]), including partially consequent on *Ethiopia's* conduct (ibid.[293]-[296],[299],[303]-[305]), and by actions not violating IHL: ibid.[311]. Apparently, Ethiopia (acting in self-defence) was not responsible for damage it had caused. Further: Murphy/Kidane/Snider (n266) 115-119;133-151; Houtte/Delmartino/Yi (n266) 237-238. For cases suggesting no compensation is due to nationals of neutrals during war: *Eastern Extension, Australasia and China Telegraph* (1923) 2 ILR 415 (UK-USCT) 417-418; Orakhelashvili, 'Overlap and Convergence: The Interaction between Jus Ad Bellum and Jus in Bello' (2007) 12 JC&SL 157,186-187 and authorities therein. On neutrality and its relevance to self-defence: *infra*.nn2240ff. Cf.*supra*.n1981-1993.

[2201] Cf.*supra*.n1981ff.

[2202] *Supra*.nn2003ff.

[2203] See Paparinskis, 'Countermeasures' (n5) 342; *infra*.Pt.IV(C)(ii)-(iv) and authorities; cf.*supra*.nn1994ff.

We are thus concerned with four scenarios in which self-defence might potentially operate in the overlapping individual-interstate claims context, two vis-à-vis attacks by individuals and two vis-à-vis attacks by States:



Scenario (1) provides a clear case in which self-defence can operate. The question is whether self-defence can operate in the other three.[2204] Self-defence's operation in scenario (3) depends on whether States can invoke self-defence in response to non-State actor attacks.[2205] Scenarios (2) and (4) represent overlapping claims made by non-attacking entities. Insofar as the claims invoke those entities' rights, they can apparently only be precluded if self-defence can justify third-party rights violations.[2206] In the

[2204] Cf.Brownlie, *Force* (n1916) 375.

[2205] See *infra*.Pt.(C)(i);(iii) and authorities.

[2206] See *supra*.nn2198-2199;2202-2203.

absence of case law, recent debates regarding self-defence against non-State actors will form the starting-point, because they provide an pertinent overview of the issues (subsection (i)).[2207] Subsection (ii) considers principles concerning the law of self-defence and third-party rights more generally.[2208] Subsection (iii) returns to practice concerning self-defence against non-State actors to elucidate whether self-defence can respond to non-State actor attacks and justify consequent violations of State rights.[2209] Subsection (iv) concludes.

(i) Self-defence: ongoing debates

Non-State actors, including terrorist groups, now have available the means to cause widescale damage and destruction.[2210] With the UNSC not always functioning to address the threat, States are resorting to self-defence in response.[2211] Certain scholars nonetheless suggest that self-defence is exercisable only in response to State attacks.[2212] Article 51 of the Charter, it is said, operates 'as an exception to the … *inter-state* use of

[2207] Generally authorities *supra*.n2195; *infra*.nn2212ff.

[2208] Similarly authorities *infra*.n2229.

[2209] Cf.authorities *infra*.nn2212-2219;2222-2224.

[2210] Paddeu, 'Force' (n1940) 93-94; Greenwood, 'Self-Defence' (n1935) [18]; Ruys and Verhoeven, 'Attacks by Private Actors and the Right of Self-Defence' (2005) 10 JCSL 289, 289;310; Ruys (n1959) 368-369, 488; Moir (n2193) 720.

[2211] See Tams, 'Terrorists' (n1927) 365-367;373-378;392; also Wood, 'The Law on the Use of Force: Current Challenges' (2007) 11 SYBIL 1, 14; Peters and Marxsen, 'Editors' Introduction: Self-Defence in Times of Transition' (2017) 77 ZfaöRV 3, 6; *infra*.Pt.C(iii).

[2212] E.g. Corten, 'A Plea Against the Abusive Invocation of Self-Defence as a Response to Terrorism' *EJIL:Talk!* (14.Jul.2016) and authorities *infra*.n2298; discussion Tams, 'Terrorists' (n1927) 367-369;383-385; also Trapp, 'The Use of Force against Terrorists: A Reply to Christian J. Tams' (2010) 20 EJIL 1049, 1049-1050; Jackson (n73) 180-181; Ruys/Verhoeven (n2210) 290-291.

force' in Article 2(4), and thus only envisages "armed attacks" by States.[2213] Even in attacking a non-State actor, force is used against the State where the attacker is located, violating the prohibition on the use of force vis-à-vis that State,[2214] and its territorial sovereignty.[2215] Proponents of an 'inter-state reading of self-defence'[2216] require the attack to be attributed to that State because the consequent violation of an 'innocent'[2217] State's sovereignty cannot otherwise be excused.[2218]

There are two potential arguments here against self-defence's being available vis-à-vis non-States,[2219] both of which are relevant to the overlapping claims scenarios outlined above.[2220] The first is that individuals are unable to engage in "armed attacks"

[2213] Tams, 'Terrorists' (n1927) 385; similarly Corten, *War* (n1935) 162-164;169; Tams, 'Note Analytique-Swimming with the Tide or Seeking to Stem It?' (2005) 18 Rev.Queb.DDI 275, 278-279; Trapp, 'Attack' (n2194) 680; Keinan, 'Humanising the Right of Self-Defence' (2017) 77 ZfaöRV 57, 57.

[2214] Tams, 'Terrorists' (n1927) 364; Ruys (n1959) 377; Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors' (2007) 56 ICLQ 141,145-146; Lubell (n10) 26-29; Gray, *Force* (n1935) 210; Corten, *War* (n1935) 171-172.

[2215] See Wilmshurst (ed), *Principles of International Law on Self-Defence* (Chatham House 2005) 12 ('The right of states to defend themselves against ongoing attacks, even by private groups of non-state actors, is not generally questioned. What *is* questioned is the right to take action against…state that is…presumed source of such attacks, since…an attack against a non-state actor within a state will inevitably constitute…use of force *on* the territorial state'), quoted Tams, 'Terrorists' (n1927) 365; similarly 367-368;374;385; Corten, 'Has Practice Led to an "Agreement Between the Parties" Regarding the Interpretation of Article 51 of the UN Charter?' (2017) 77 ZfaöRV 15, 15-16; Trapp, 'Basics' (n2214) 144-146; Trapp, 'Attack' (n2194) 680; Ruys (n1959) 377; Paddeu, *Justification* (n53) 178;219; Paddeu, 'Force' (n1940) 95;99; Trapp, 'Reply' (n2212) 1049-1050; Tams, 'Rejoinder' (n2195) 1059; Corten, *War* (n1935) 172-173; Deeks (n10) 491; Gray, *Force* (n1935) 137;226. Cf.*infra*.n2239.

[2216] For the terminology, e.g. Tams, 'Terrorists' (n1927) 383; similarly Jackson (n73) 179; Trapp, 'Attack' (n2194) 680;694; Trapp, 'Reply' (n2212) 1049.

[2217] E.g. Bowett (n69) 10;171; Bothe, 'The Law of Neutrality' in Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, 2013) 559; discussion Lieblich, 'Self-Defence Against Non-State Actors and The Myth of the Innocent State' (2.Apr.2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3364163>, 4ff.

[2218] Trapp, 'Reply' (n2212) 1049-1050, discussing Tams, 'Terrorists' (n1927) 385; similarly Trapp, 'Attack' (n2194) 680; Trapp, 'Basics' (n2214) 146; also Gray, *Force* (n1935) 207;210;226; Paddeu, *Justification* (n53) 178; Keinan (n2213) 57-58.

[2219] Similarly Oellers-Frahm, 'Article 51 - What Matters Is the Armed Attack, Not the Attacker' (2017) 77 ZfaöRV 49, 49; Lubell (n10) 29-42.

[2220] *Supra*.nn2195ff.

within the meaning of Article 51.[2221] The second, echoing the position vis-à-vis countermeasures,[2222] contends that self-defence only justifies violating the rights of an entity having committed an attack:[2223] responding to non-State actors cannot justify violating a third State's territorial sovereignty.[2224] The disputed question of whether self-defence can be relied upon in response to non-State actors is considered below.[2225] That the second should not prevent States exercising self-defence, is – it is suggested – demonstrable through less contentious propositions,[2226] with important implications at least for scenario (2) above.[2227]

(ii) Self-defence and third-party rights

Unlike countermeasures, which cannot justify third-State rights violations,[2228] as Paddeu observes, the law of self-defence envisages possible third-party impacts.[2229] The obligation prohibiting use of force is, for instance, owed *erga omnes*.[2230] Consequently,

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[2221] *Supra*.n2213; see *infra*.Pt.IV(C)(iii); cf.*infra*.n2276.

[2222] *Supra*.nn1994ff.

[2223] See, e.g., O'Brien, 'Reprisals, Deterrence and Self-Defense in Counterterror Operations' (1990) 30 Virg.JIL 421, 422, referencing Bowett, 'Reprisals Involving Recourse to Armed Force' (1972) 66 AJIL 1, 3. Cf.*infra*.nn2229ff;2264-2268.

[2224] *Supra*.nn2215;2218; also Lubell (n10) 36ff; Paddeu, *Justification* (n53) 220-221; Paddeu, 'Force' (n1940) 97; cf.104-105;107;110.

[2225] *Infra*.Pt.IV(C)(iii).

[2226] The argument that follows is made by Paddeu, 'Force' (n1940) 104-105;110-114. Cf.Lieblich (n2217) 12ff.

[2227] *Supra*.n2206.

[2228] *Supra*.nn1994ff.

[2229] Paddeu undertakes a similar analysis of self-defence effects on third-party rights, including vis-à-vis self-defence against non-State actors, and including discussion of neutrality: Paddeu, 'Force' (n1940) 103-106;110-114; also Paddeu, *Justification* (n53) 178;180.

[2230] E.g. *ARSIWA*, 278, citing *Barcelona Traction* (n69) [33] (aggression); Chinkin (n2) 293-294.

any invocation of self-defence will necessarily excuse a use of force that would otherwise violate obligations owed to *every* other State.[2231] "Innocent" States thus necessarily have *these* rights affected when a State exercises self-defence, regardless of the target.[2232] Self-defence is, as noted above, better considered excluded from that prohibition.[2233] Indeed, scholars rarely object to self-defence being exercised against non-State actors outside State territory[2234] as violating the use of force prohibition.[2235] However, such actions might *also* constitute prohibited uses of force,[2236] suggesting that sovereignty is the real concern.[2237]

[2231] See *supra*.nn194-203;2190. Cf.Paddeu, *Justification* (n53) 221; also 178;193-197; Paddeu, 'Force' (n1940) 100-102;106-107; Crawford, 'Relationship' (n202) 63-64, discussing *supra*.n202; Crawford, 'Multilateral' (n74) 443-444; cf.*von Pezold, infra*.n2266.

[2232] Similarly Paddeu, *Justification* (n53) 178;219; Paddeu, 'Force' (n1940) 102;106-107; cf.*supra*.nn2214;2217.

[2233] *Supra*.n1940. See Paddeu, 'Force' (n1940) 102;106-107; Paddeu, *Justification* (n53) 177;194-197.

[2234] On this possibility: Tams, 'Terrorists' (n1927) 365; 362, referencing Davis, 'The Phantom of the Neo-Global Era: International Law and the Implications of Non-State Terrorism on the Nexus of Self-Defense and the Use of Force' in Miller and Bratspies (eds), *Progress in International Law* (2008) 637 (fn.19) (self-defence in 'high seas, Antarctica…outer space'); Ruys (n1959) 377; Corten, *War* (n1935) 170; Bowett (n69) 21;66-86; Dinstein (n1937) [570],[572]; Brownlie, *Force* (n1916) 305;375;433; see sources *supra*.n2215; cf.Ruys/Verhoeven (n2210) 309 (necessity).

[2235] Tams considers using force 'against individuals or groups [is] *as such* not sufficient to violate the prohibition', citing Art.2(4)'s reference to 'international relations': Tams, 'Terrorists' (n1927) 365; also 362;374;385; similarly Ruys/Verhoeven (n2210) 309; Ruys (n1959) 377; also 500-501; Milanovic, 'Self-Defense and Non-State Actors' *EJIL:Talk!* (21.Feb.2010) (self-defence must violate sovereignty); Corten, *War* (n1935) 162-163;169; also 127-128;140. Similarly, noting Art.2(4)'s banning force vis-à-vis 'territorial integrity or political independence': Trapp, 'Reply' (n2212) 1049-1050; Trapp, 'Basics' (n2214) 145-146; Trapp, 'Attack' (n2194) 680; see also Ruys/Verhoeven (n2210) 309; Corten, *War* (n1935) 170; Gray, *Force* (n1935) 210;cf.226; Kammerhofer, 'The Resilience of the Restrictive Rules on Self-Defence' in Weller, *Force* (n2193) 643. However, these terms do not limit the prohibition: e.g., Ruys (n1959) 56-57; Guilfoyle, 'Countermeasures' (n1927) 79; Brownlie, *Force* (n1916) 267; Lubell (n10) 27-29; Tams, 'Terrorists' (n1927) 364; Corten, *War* (n1935) 149-151. Cf.Bowett (n69) 149-152.

[2236] *Infra*.n2251 (ships); *supra*.nn768;795 (aircraft/ships), also Corten, *War* (n1935) 403; Dawidowicz (n416) 149-150; and vis-à-vis attacks on certain State organs: Greenwood, 'Self-Defence' (n1935) [21]; Greenwood, 'Historical Development and Legal Basis' in Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, 2008) 6; Dinstein (n1937) [574]; Ruys (n1959) 199-204;cf.500; Gray, *Force* (n1935) 121;204-205; Franck, *Recourse to Force* (2002) 66; also Corten, *War* (n1935) 403-404. Additionally, claims that attacks on nationals enliven self-defence cannot be ignored: e.g., *Oppenheim's* (n73) 422;440-442; Bowett (n69) Ch.V; Dinstein (n1937) [575]-[577],[723]-[733]; Greenwood, 'Development' (n2236) 6; Greenwood, 'Self-Defence' (n1935) [24]; Brownlie, *Force* (n1916) 289;296-301; Gray, *Force* (n1935) 165-169; Ruys (n1959) 213-249. Cf.Jessup (n2) 158;169-172; Tams, 'Terrorists' (n1927) 385.

[2237] See authorities *supra*.nn2215;2218 and *infra*.nn2276-2277. Similarly Oellers-Frahm (n2219) 50.

The legality of violating, in self-defence, rights *other* than those concerning use of force, including rights to territorial sovereignty, must be considered, as Paddeu explains, vis-à-vis self-defence as a CPW,[2238] even if some scholars apparently elide use of force and territorial violations.[2239] In this respect, the ARSIWA commentary acknowledges that exercising self-defence might affect third parties, including under the law of neutrality.[2240] Neutrality law allows States to restrict navigation through establishing blockades and inspecting neutral vessels 'suspected of carrying contraband',[2241] as well as to attack and destroy neutral vessels in certain circumstances.[2242]

As Paddeu observes, States have, in the post-Charter era, invoked self-defence to justify such impacts on navigation.[2243] No State disputed, for instance, vis-à-vis an early

[2238] *Supra*.nn1942-1943. Explaining why the violations must be considered separately: Paddeu, 'Force' (n1940) 99-105; Paddeu, *Justification* (n53) 178;192-198.

[2239] Similarly Paddeu, *Justification* (n53) 178; see *supra*.n2235. Self-defence may not require territorial violations: *Oppenheim's* (n73) 419; Dinstein (n1937) [558],[565]-[571]; authorities *supra*.nn1959;2234-2236.

[2240] *ARSIWA*,167; similarly DAEAC, 118, also Art.17. See Paddeu, 'Force' (n1940) 104-105;110 and, considering neutrality's relevance to third-party issues in self-defence: 110-114; cf.*infra*.n2249; and see sources *infra*.nn2346-2347. Generally Ago (n1666) 34-36; Borchard (n319) 113-114;271-272; Cheng (n73) 77-83; Bowett (n69) 167-174; *Nuclear Weapons* (n1951) 501;516-517 (Diss.Op.Weeramantry, vis-à-vis non-belligerents); cf.Thouvenin, 'Self-Defence' in Crawford/others, *Responsibility* (n6) 464; Paddeu, *Justification* (n53) 175.

[2241] Seger, 'The Law of Neutrality' in Clapham/Gaeta, *Armed Conflict* (n1953) 258-259; also IIHL, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Doswald-Beck ed, 1995) [93],[118],[125]; Klein, *Maritime Security and the Law of the Sea* (2012) 289-295; Bothe, 'Neutrality' (n2217) 571-572; Guilfoyle, 'The Proliferation Security Initiative' (2005) 29 MULR 733, 744-747. Neutrality law continues in existence post-1945: see Seger (n2241) 251-252;261-262;268; Bothe, 'Neutrality' (n2217) 551-554; Greenwood, 'The Concept of War in Modern International Law' 36 ICLQ 283, 299; also Gardam, 'Role for Proportionality in the War on Terror' (2005) 74 Nord.JIL 3, 21-22, referencing Chinkin (n2), see particularly 302-303; Deeks (n10) 497.

[2242] Klein (n2241) 289; *SRM* (n2241) [67],[70],[151]; Bothe, 'Neutrality' (n2217) 571; von Heinegg, 'Maritime Warfare' in Clapham/Gaeta, *Armed Conflict* (n1953) 167;178-180; generally Paddeu, 'Force' (n1940) 112; Bowett (n69) 168.

[2243] Paddeu, 'Force' (n1940) 112, referencing Klein (n2241) 275. Explaining need to view law through Art.51 framework: Orakhelashvili (n2200) 192; also Greenwood, 'War' (n2241) 298; Guilfoyle, 'PSI'

post-1945 invocation of self-defence by Egypt, that third States' rights of freedom of navigation for their vessels in the Suez Canal could have consequently been impaired, only that, given an armistice regime, the requirements of self-defence were not met.[2244] States have invoked self-defence to justify measures impacting neutrals since then, including vis-à-vis the Malvinas/Falklands and Iran-Iraq conflicts in the 1980s.[2245] Significantly, the UN Panel of Inquiry concerning the 2010 *Mavi Mamara* flotilla incident accepted that a blockade – necessarily affecting navigational freedoms vis-à-vis third-States' vessels[2246] – was a justifiable measure of self-defence.[2247]

Neutrality law also allows States to target enemies on neutral territory, where the neutral State is 'unable or unwilling' to prevent attacks from that territory.[2248] Some, including Paddeu, consider that, post-Article 2(4), forcible action can only be taken against neutral States themselves engaging in an 'armed attack'.[2249] However, blockades

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(n2241) 743-744. Generally: Bowett (n69) 71-75;167-168; Cheng (n73) 77-83; also Paddeu, *Justification* (n53) 358-359.

[2244] See *RPUNO* (1945–1954), vol.2, 432-433; Supp.No.1 (1954–1955), vol.1, 360-361; UNYB (1951) 297-299; Greenwood, 'War' (n2241) 287-288;292; Bowett (n69) 191; also *Oppenheim's* (n73) 422-423 (fn.21). Generally vis-à-vis ships: Cheng (n73) 77-83;94, citing *The Ralph* (1904) 39 US.Ct.Cl. 204, 207-208; Bowett (n69) 71-75.

[2245] See Paddeu, 'Force' (n1940) 112-113 and references; Gardam (n2241) 22-23; Guilfoyle, 'PSI' (n2241) 743;748.

[2246] *Supra*.nn2241;2243.

[2247] *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident* (2011) <https://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf> [72],[160]. Doubts concerning the blockade's factual legality do not undermine the point: see discussion Guilfoyle, 'The Palmer Report on the Mavi Marmara Incident and the Legality of Israel's Blockade of the Gaza Strip' *EJIL:Talk!* (6.Sept.2011); also Klein (n2241) 275.

[2248] Cheng (n73) 95-96, referencing *Caroline*, *infra*.nn2303ff; also 84;87-88;91-92; Deeks (n10) 499; Guideu (n1946) 222-224;238. Similarly Bowett (n69) 167-174 (necessity where no breach); Alston (n1947) [35]; also Brownlie, *Force* (n1916) 309-316; sources *infra*.nn2346-2347 (relevance to non-State actors). Cf.*infra*.n2249.

[2249] Bothe, 'Neutrality' (n2217) 558-559, endorsed Paddeu, 'Force' (n1940) 111; also Kretzmer, 'US Extra-Territorial Actions Against Individuals: Bin Laden, Al Awlaki, and Abu Khattalah—2011 and 2014' in Ruys, Corten and Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (2018) 778, referencing Kress (n1953), see 248;251-252.

are a form of aggression,[2250] and attacks on neutral vessels a use of force.[2251] If such measures may, under neutrality law, acceptably impact third States,[2252] then the Article 2(4) use of force prohibition cannot rule out the application of other rules of neutrality.[2253] Indeed, the *San Remo Manual*, widely considered as reflecting custom,[2254] recognises that States may use 'strictly necessary' force within a neutral State's sovereign waters where a belligerent poses 'a serious and immediate threat'.[2255] Certain field manuals continue to explicitly endorse the acceptability of striking enemy forces on neutral territory where the State is 'unable or unwilling' to prevent their attacks.[2256]

Other third-party impacts outside the law of neutrality could also be envisaged if, for instance, self-defence were invoked against civilian aircraft,[2257] implicating violations of the Chicago Convention,[2258] or to justify breach of environmental obligations,[2259] often

[2250] Klein (n2241) 295, referencing Definition of Aggression, GA.Res.3314 (XXIX) (1974), Art.3(c); *Flotilla Report* (n2247) [160].

[2251] Greenwood, 'Development' (n2236) 6; Greenwood, 'Self-Defence' (n1935) [22]-[23]; Guilfoyle, 'Countermeasures' (n1927) 79-81; *Guyana/Suriname* (n1882) [446]; *Oil Platforms* (n183) [61],[72], discussed Gray, *Force* (n1935) 150-153; Dinstein (n1937) [574]; Brownlie, *Force* (n1916) 382 (fn.3);305; Ruys (n1959) 199-200;204-213; Klein (n2241) 290; Greenwood, 'War' (n2241) 299; Bothe, 'Neutrality' (n2217) 571.

[2252] *Supra*.nn2240ff.

[2253] Indeed, see *infra*.nn2346-2347.

[2254] Klein (n2241) 286 and references.

[2255] *SRM* (n2241) [22], cited von Heinegg (n2242) 173. The 'neutral waters' referenced (internal/archipelagic waters/territorial sea: [14]) are sovereign: UNCLOS, Art.2. Further: Greenwood, 'War' (n2241) 299.

[2256] UKMOD, 'Manual of the Law of Armed Conflict' (2004) [1.43], cited Seger (n2241) 256; similarly USDOD, 'Law of War Manual' (2015) [13.3.1],[15.4.2], referencing also Australia/Canada/Germany; similarly Deeks (n10) 500; also Brownlie, *Force* (n1916) 309. On US attacks in neutral Cambodia (1970s): Chinkin (n2) 308-309; Guideu (n1946); Deeks (n10) 526;528.

[2257] See *Oppenheim's* (n73) 426-427 (though mistaken); Trapp, 'Uses of Force against Civil Aircraft' *EJIL:Talk!* (28.Jun.2011). Civilian aircraft might nonetheless pose threats: see Zemanek, 'Armed Attack' in *MPEPIL* (2013) [21], discussing 9/11 (*infra*.nn2330-2331).

[2258] Trapp, 'Aircraft' (n2257).

owed *erga omnes*.[2260] The important point is, as Paddeu rightly concludes, that, at least in certain contexts, and outside the controversies concerning non-State actors,[2261] self-defence envisages 'impairment of the rights of third states'.[2262] Self-defence does not, apparently, therefore always operate according to the third-party rights approach outlined above vis-à-vis countermeasures.[2263] CPWs need not so operate: necessity, for instance, is 'not dependent on the prior conduct of the injured State',[2264] and, within 'strict' confines,[2265] allows whatever is required to protect a State's 'essential interests'.[2266] Necessity itself cannot involve the use of force.[2267] But it is at least possible that exercising self-defence is likewise 'not dependent upon any prior breach of international law', including (as will become relevant below) 'by the state in the territory of which defensive force is used'.[2268] Indeed, certain domestic systems recognise the possibility of using force against 'an innocent' where necessary in self-defence.[2269]

[2259] *Nuclear Weapons* (n1951) 242; also Gardam (n2241) 24.

[2260] See *ARSIWA*, 277.

[2261] *Infra*.Pt(C)(iii).

[2262] Paddeu, 'Force' (n1940) 113 (vis-à-vis navigation); cf.111 (not accepting force against neutral territory). Cf, vis-à-vis territory: Deeks (n10) 497 and *infra*.nn2346-2347.

[2263] *Supra*.nn1994ff. Similarly Paddeu, 'Force' (n1940) 109-110. Cf.Bowett (n69) 6-7;9;11.

[2264] *ARSIWA*, 178; also Paddeu, *Justification* (n53) 87; Ago (n1666) 53; similarly in self-defence context: Wilmshurst (n2215) 12; Bowett (n69) 173-174; also Elagab (n1190) 4; cf.Ruys (n1959) 379-382 and authorities *infra*.nn2268;2349-2354.

[2265] Ago (n1666) 19; *ARSIWA*, 178; also Ruys/Verhoeven (n2210) 309; Heathcote (n1666) 492;495-499; Crawford, *GP* (n2) 306.

[2266] *ARSIWA*, Art.25 (though other States' 'essential interest[s]' must not be impaired); generally Paddeu, *Justification* (n53) 389;397;399-400;401-413; *supra*.n1666. Cf.*von Pezold v Zimbabwe (Award)* ICSID Case-ARB/10/15 (28.Jul.2015) [648]-[657] (*erga omnes* obligations not violable, apparently equating with *jus cogens*), discussed Paddeu, *Justification* (n53) 408-409.

[2267] See Ruys (n1959) 380-382; Ruys/Verhoeven (n2210) 309; Corten, 'Necessity' in Weller, *Force* (n2193) 863-867; Corten, *War* (n1935) Ch.4; Ago (n1666) 21;39;cf.39-42;44; cf.also Bowett (n69) 56; Dinstein (n1937) [767] and summaries Ruys (n1959) 379-381; Ruys/Verhoeven (n2210) 308-309. Further: *Torrey Canyon*, *infra*.n2374 (though cf.Ruys (n1959) 381 (fn.65): no Art.2(4) breach).

[2268] Wilmshurst (n2215) 12; also Thouvenin (n2240) 464-465; Lubell (n10) 40; authorities *infra*.nn2349-2354. Rejecting: Ago (n1666) 15;53; Corten, 'Necessity' (n2267) 868; Bowett (n69) 9-11; but cf.10

Putting to one side questions of violating sovereignty in response to non-State actor attacks,[2270] if self-defence may thus justify *other* third-party rights violations, then it may apparently apply in scenario (2): taken in response to a State attack, self-defence would additionally operate – unlike countermeasures – to preclude wrongfulness vis-à-vis individual claims that might arise,[2271] even if for violation of individual (third-party) rights.[2272] Given the likelihood of individuals being harmed when a State exercises self-defence,[2273] this could prove significant for self-defence's operation as a CPW.

(iii) Self-defence against non-State actors

Whether self-defence may be exercised in scenarios (3) and (4) above depends on whether self-defence may respond to individual attacks, and in a way that justifies violating State rights.[2274] In fact, as foreshadowed above,[2275] the critical issue here is not

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(necessity excuses 'innocent' State violation in self-defence); generally authorities *supra*.nn2223-2224; *infra*.n2298. The original ILC definition required prior breach (see Alexandrov, *Self-Defense Against the Use of Force in International Law* (1996) 182), but Art.21 does not: Paddeu, 'Force' (n1940) 105;110; Thouvenin (n2240) 464; cf.Corten, *War* (n1935) 188.

[2269] Bowett (n69) 173 and authorities (drawing same 'parallel'). Discussing jurisdictions not apparently requiring force only against aggressors, see Chapters in Heller and Dubber (eds), *The Handbook of Comparative Criminal Law* (2011) 67-68 (Australia); 115-116 (Canada); 191-192 (Egypt); 224-225 (France); 270-271 (Germany); 300-301 (India); 376-377 (Israel); 404 (Japan); 470 (Sth.Africa); 542 (UK); also 509-510 (Spain); cf.154 (China); 427 (Russia); *Henwood v People* 54 Colo 188 (1913) 194 (if not careless), discussed Henderson and Cavanagh, 'Self-Defence, Collateral Damage and Precautions in Attack' *Op.Jur.* (9.Jul.2014); cf.Corten, *War* (n1935) 420-421;473. For philosophical discussion: Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* (1994) 67-82;162-168;177;188-189;191-192;216-217;229-230; Lieblich (n2217) 15-27; cf.Paddeu, *Justification* (n53) 178;220-221.

[2270] *Supra*.nn2215;2218; *infra*.Pt(C)(iii).

[2271] With caveats *supra*.n1952.

[2272] Cf.*supra*.nn1994ff.

[2273] *Supra*.n1947.

[2274] *Supra*.nn2198;2224.

really whether non-State actors can be the 'source' of an attack,[2276] because the same concerns regarding violations of third-State sovereignty would arise if a *State* attack came from a third (including neutral) State's territory.[2277] Nonetheless, particularly in the absence of case law, the practice relating to non-State actors must be addressed, because it is extensive and provides insights into how self-defence operates vis-à-vis the two questions of relevance to these overlapping claims scenarios.[2278]

(a) Article 51 of the UN Charter

As a textual matter, Article 51 of the UN Charter does not exclude that non-State actors could mount an 'armed attack'.[2279] The *travaux prèparatoires* imply, if anything, the contrary interpretation.[2280] Moreover, that self-defence excuses a violation of Article 2(4) of the Charter (among others[2281]) does not dictate that *only* an interstate breach of Article 2(4) can give rise to its exercise.[2282]

[2275] See authorities *supra*.nn2215;2234-2237.

[2276] Using such terminology: e.g. Greenwood, 'Self-Defence' (n1935) [15]-[18]; Wilmshurst (n2215) 11; also Ruys (n1959) 368ff; Tams, 'Analytique' (n2213) 275-276; Trapp, 'Attack' (n2194) 679; Lubell (n10) 30-31; Corten, *War* (n1935) 126; Wood (n2211) 6. Making same point for different reasons: Tams, 'Terrorists' (n1927) 385;392; and particularly Corten, 'Practice' (n2215) 15 ('largely irrelevant'), making point *infra*.n2316.

[2277] See Deeks (n10) 497;503;517; Lubell (n10) 41-42; Kress (n1953) 251-252; Lieblich, (n2217) 23; also Brownlie, *Force* (n1916) 314-315; *supra*.nn2248-2256 and authorities *infra*.nn2346-2347.

[2278] *Supra*.nn2219-2224. Cf.Paddeu, *Justification* (n53) 178.

[2279] Lubell (n10) 31-32; Greenwood, 'Development' (n2236) 6; Greenwood, 'Self-Defence' (n1935) [17]; Tams, 'Terrorists' (n1927) 369, referencing *Wall* (n1421) 215 (Sep.Op.Higgins); Ruys (n1959) 369; Moir (n2193) 720; Trapp, 'Attack' (n2194) 684; Dinstein (n1937) [634]; Tams, 'Analytique' (n2213) 278; Ruys/Verhoeven (n2210) 290-291;311; Gray, *Force* (n1935) 137;207; Wilmshurst (n2215) 11. Cf.Corten, *War* (n1935) 162-164. The attack must meet the required 'intensity': Tams, 'Terrorists' (n1927) 370;387-389; Kress (n1953) 249; similarly Greenwood, 'Self-Defence' (n1935) [13]; generally e.g. Gray, *Force* (n1935) 153-155; Dinstein (n1937) [550]-[553]; Ruys (n1959) 139ff;499-500.

[2280] Zemanek (n2257) [16]. The words 'by a State' after 'attack' were removed, without explanation: Trapp, 'Attack' (n2194) 684-685; Ruys (n1959) 369; cf.369-370.

[2281] *Supra*.nn1940-1945.

[2282] Milanovic, 'Indeterminacy' (n2235); Keinan (n2213) 58; similarly Ruys (n1959) 369-370; Wood (n2211) 7; Dinstein (n1937) [634].

Scholars nonetheless suggest that the ICJ, in *Nicaragua*, 'effectively restricted self-defence to the inter-State context',[2283] in holding that Nicaragua's support to non-State actors was not an 'armed attack' warranting self-defence being exercised against it.[2284] Moreover, in the *Wall Case*, the Court famously observed that Article 51 'recognizes the … inherent right of self-defence in the case of armed attack *by one State against another State*'.[2285] In *Armed Activities*, the Court considered that Uganda could not exercise self-defence against the DRC where certain non-State actor attacks were not attributable to the latter.[2286]

However, as Trapp observes, in *Nicaragua* and *Armed Activities*, the Court was faced, factually, with situations in which actions in purported self-defence were aimed *at a State*, not non-State actors, and the emphasis on non-State actor attacks needing to be attributed to the State might be considered accordingly.[2287] Indeed, in *Armed Activities*, the Court indicated that it was not ruling on whether self-defence could generally be

[2283] Tams, 'Terrorists' (n1927) 369, also referencing *Wall* (n1421) 215 (Sep.Op.Higgins); 229-230 (Sep.Op.Koojimans); also Corten, *War* (n1935) 188;466-467; Jackson (n73) 179-180; cf.Trapp, 'Attack' (n2194) 686-687.

[2284] *Nicaragua (Merits)* (n1664) [229]-[238], also [126],[130],[195]; discussion Tams, 'Terrorists' (n1927) 368-369; Gray, *Force* (n1935) 136-139; Ruys (n1959) 406-419; Trapp, 'Attack' (n2194) 687-688.

[2285] *Wall* (n1421) [139] (emphasis added), discussed, e.g., Tams, 'Terrorists' (n1927) 384; Lubell (n10) 31-32; Trapp, 'Basics' (n2214) 143-144; Ruys (n1959) 473-476; Trapp, 'Attack' (n2194) 688; Jackson (n73) 180; Tams, 'Analytique' (n2213) 283-284; Ruys/Verhoeven (n2210) 304-305; Greenwood, 'Self-Defence' (n1935) [16].

[2286] *Armed Activities* (n342) [146]-[147], discussed, e.g., Trapp, 'Attack' (n2194) 688-689; Trapp, 'Basics' (n2214) 144; Tams, 'Terrorists' (n1927) 384; Ruys (n1959) 481-485; Tams, 'Analytique' (n2213) 285; Lubell (n10) 33; Corten, *War* (n1935) 193;468-469; Kammerhofer (n2235) 630-631.

[2287] Trapp, 'Attack' (n2194) 687-689; Trapp, 'Reply' (n2212) 1052; Trapp, 'Basics' (n2214) 142-145; see *Nicaragua (Merits)* (n1664) [156],[227]-[228],[237]; *Armed Activities* (n342) [118],[147],[153]. Further: Ruys (n1959) 495-496; Lubell (n10) 32;40; generally 36 ('force *in* a state but not *against* that state'); Moir (n2193) 723; Franck (n2236) 61-62. Cf.Tams, 'Rejoinder' (n2195) 1060. Observing such a 'distinction' has '[s]ubstantial support…in State practice': Ruys (n1959) 494; generally 493-496; also Bowett (n69) 56.

exercised in response to non-State actors.[2288] In the *Wall Case*, the Court did not conclude that self-defence applied '*only* in the case of an armed attack by one state against another,'[2289] but that self-defence was of 'no relevance'.[2290] With the territory in question occupied and no other State in the picture, the Court did not apparently consider Article 2(4) 'engage[d]'.[2291] However, as noted above, when other States' ships were affected by an Israeli naval blockade,[2292] a UN Panel of Inquiry found that Israel did indeed have a right of self-defence.[2293]

(b) Customary international law

It is appropriate, then, to turn to States' 'inherent right' of self-defence, referenced in Article 51, as reflected in customary international law,[2294] to see whether custom provides insights for scenarios (3) and (4). State practice vis-à-vis self-defence against non-State actors, particularly in recent decades, has been extensively studied in the literature.[2295] No justice can be done here to the resulting analysis, nor the sharp divisions

[2288] *Armed Activities* (n342) [147], discussed Tams, 'Terrorists' (n1927) 384; Trapp, 'Reply' (n2212) 1052; Tams, 'Analytique' (n2213) 285-286; Trapp, 'Basics' (n2214) 141;144-145; Trapp, 'Attack' (n2194) 688-689; Lubell (n10) 33; Gray, *Force* (n1935) 209. Cf.Ruys (n1959) 482-485; Corten, *War* (n1935) 193-195;468-469; Jackson (n73) 181.

[2289] Gray, *Force* (n1935) 142; also 209. Further: Trapp, 'Attack' (n2194) 688. Cf.Ruys (n1959) 475-476.

[2290] *Wall* (n1421) [139]; also Tams, 'Analytique' (n2213) 283. Cf.Corten, *War* (n1935) 147;189-190.

[2291] Trapp, 'Attack' (n2194) 688; also Trapp, 'Basics' (n2214) 144; Tams, 'Analytique' (n2213) 283; Ruys (n1959) 476-478; Gray, *Force* (n1935) 209; Corten, *War* (n1935) 147;190-192; Dinstein (n1937) [648]; see *Wall* (n1421) [86]-[87]. Cf.*supra*.Pt.(C)(ii).

[2292] *Supra*.nn2246-2247.

[2293] *Flotilla Report* (n2247) [71]-[72],[160]. See *supra*.n2247.

[2294] *Nicaragua (Merits)* (n1664) [176], referenced Dinstein (n1937) [526]; Ruys (n1959) 59; cf.515; *Oppenheim's* (n73) 418; also Bowett (n69) 185;187-188. Cf.Kammerhofer (n2235) 639-646; Tams, 'Analytique' (n2213) 279-280 (subsequent practice); 289; Corten, 'Practice' (n2215) 15-17.

[2295] See references *infra*, particularly *infra*.nn2318ff.

in conclusions.[2296] This thesis shares the view, with significant scholarly support, that customary international law allows self-defence to be exercised in response to attacks by non-state actors.[2297] It cannot, however, engage in a far-reaching defence of that position, and accepts that others disagree.[2298] It will therefore limit itself to a few brief points in response to the widespread view that, from 1945, custom disallowed self-defence vis-à-vis individuals,[2299] and modification, if any, is recent (particularly post-9/11).[2300]

First, it is not abundantly clear that this reflects the initial post-1945 position.[2301] Pre-Charter, States commonly pursued non-State actors across their borders, in violation

[2296] E.g. on 'expansionists' versus 'restrictivists': Peters/Marxsen (n2211) 8; also 12; similarly: Corten, *War* (n1935) 6-27 ('extensive' versus 'restrictive' approaches); Kammerhofer (n2235) 628;633; Bethlehem (n2195) 773; Corten, 'Plea' (n2212); Lieblich (n2217) 3; authorities *infra*.nn2297-2298.

[2297] E.g. Greenwood, 'Pre-Emptive' (n2193) 17; Tams, 'Analytique' (n2213) 290; Lubell (n10) 31 ('plentiful evidence…provid[ing] solid support for…contention'); Bethlehem (n2195) 774 ('reasonably clear and accepted'); Wilmshurst (n2215) 12; Wood (n2211) 6-7; Deeks (n10) 493; Kammerhofer (n2235) 629;633; *Oppenheim's* (n73) 387;419-421; Tams, 'Terrorists' (n1927) 381-382; Moir (n2193) 736; Jackson (n73) 189; Franck (n2236) 67; Bowett (n69) 10;56;58; Kretzmer (n2249) 771; Dinstein (n1937) [644],[759],[763]; also Brownlie, *Force* (n1916) 374-375;434; Ruys (n1959), *infra*.nn2355-2356.

[2298] E.g. Gray, *Force* (n1935) 210;226-227;243-244;248; Corten, *War* (n1935), particularly 161;461-466; Corten, 'Plea' (n2212); also Ruys (n1959) 454-455; discussion Paddeu, 'Force' (n1940) 94-95; Peters/Marxsen (n2211) 8;12. Cf.Dawidowicz (n416) 239;282.

[2299] E.g., Corten, 'Practice' (n2215) 17; Corten, *War* (n1935) 460;493-494; Kammerhofer (n2235) 629 ('perceived pre-2001 orthodoxy'); Tams, 'Terrorists' (n1927) 363-364 ('restrictive'); 368;378;381; Paddeu, 'Force' (n1940) 94-95; Trapp, 'Basics' (n2214) 149; Ruys/Verhoeven (n2210) 291;298;312. However, similarly challenging this view: Greenwood, 'Self-Defence' (n1935) [17]-[18]; Dinstein (n1937) [644]; Tams, 'Embracing the Uncertainty of Old: Armed Attacks by Non-State Actors Prior to 9/11' (2017) 77 ZfaöRV 61, 61-63; Tams, 'Analytique' (n2213) 289 ('[c]ontrary to common perceptions…claims…to exercise self-defence against non-state attacks are…not revolutionary'); Trapp, 'Attack' (n2194) 681; Moir (n2193) 720-721;724 ('unclear'); Kress (n1953) 248; Lubell (n10) 34-35; *infra*.n2357.

[2300] E.g. Paddeu, 'Force' (n1940) 94-95; Tams, 'Terrorists' (n1927) 378; Tams, 'Analytique' (n2213) 280-281; Trapp, 'Basics' (n2214) 149-150 (post-1985); Ruys/Verhoeven (n2210) 298-299;310; Kammerhofer (n2235) 629ff, particularly 633-635;646; Kretzmer (n2249) 771; Gray, *Force* (n1935) 200-202;206-207; cf.Dinstein (n1937) [644]-[645]. Reviewing various positions: Ruys (n1959) 438-439;442-443;454-455;486; Ruys/Verhoeven (n2210) 310-317; Gray, *Force* (n1935) 200-202;206-209. Cf.Corten, *War* (n1935) 444;460;493-494 and authorities *supra*.nn2298;2299.

[2301] Cf.Tams, 'Embracing' (n2299) 61-64; also Kammerhofer (n2235) 629;632;634 (fn.33); 646 (and authorities); Greenwood, 'Pre-Emptive' (n2193) 25; Lubell (n10) 34 (discussing *Caroline*); Greenwood, 'Self-Defence' (n1935) [17]; Gray, *Force* (n1935) 242 (US position); authorities *supra*.n2299; *infra*.n2357.

of other States' sovereignty.[2302] In the *Caroline* incident, Britain famously invoked self-defence in response to non-State actors,[2303] the US ultimately accepting that a violation of sovereignty would be allowable where 'the necessity of self-defence' was 'instant, overwhelming, leaving no choice of means, and no moment for deliberation'.[2304] Self-defence could therefore apparently respond to individual conduct, and allowed necessary violations of third-party rights.[2305] Post-Charter scholars relied on *Caroline* as reflecting the law of self-defence,[2306] as did the Nuremburg Tribunal,[2307] while States invoked self-

[2302] See Ago (n1666) 39-40 (necessity); Bowett (n69) 38-41; Jessup (n2) 166;168.

[2303] Greenwood, 'Self-Defence' (n1935) [17]; Greenwood, 'Development' (n2236) 6; Lubell (n10) 34-35; Greenwood, 'Pre-Emptive' (n2193) 17; also 12; Bowett (n69) 58-60; *Oppenheim's* (n73) 420-422; Deeks (n10) 502-503; Paddeu, 'Force' (n1940) 93. Generally Gray, *Force* (n1935) 157-158; Ago (n1666) 39; Dinstein (n1937) [775].

[2304] *Caroline Correspondence*, reproduced Heinze and Fitzmaurice, *Landmark Cases in Public International Law* (1998) 1254; cf.ibid.1264 (disagreement whether met); further: 1246;1250-1251;1253-1254;1256;1258-1261; Ago (n1666) 39-40 (fn.117); Crawford, *GP* (n2) 310; Greenwood, 'Pre-Emptive' (n2193) 13; Brownlie, *Force* (n1916) 42-43; Paddeu, *Justification* (n53) 352-353; also 356;359; Cheng (n73) 87. The case is properly self-defence (Paddeu, *Justification* (n53) 353-357; also Cheng (n73) 87), though commonly considered necessity: e.g. Crawford, *GP* (n2) 309-310 (fn.208); Ago (n1666) 39;61-62; Ruys/Verhoeven (n2210) 308-309; Bowett (n69) 58-60; also 10;56 (self-defence against non-State; necessity vis-à-vis State). Self-defence was then 'a corollary of the right of self-preservation': Paddeu, *Justification* (n53) 363; generally 346-363; Cheng (n73) Ch.2. Necessity as a CPW emerged later: Paddeu, *Justification* (n53) 364-368;382;388; generally 363-414. See *infra*.nn2349ff.

[2305] Greenwood, 'Pre-Emptive' (n2193) 25; Bowett (n69) 58-60; also Greenwood, 'Self-Defence' (n1935) [17]-[18] and authorities *supra*.n2268; *infra*.nn2350ff. Cf.Tams, 'Terrorists' (n1927) 368-369; Corten, *War* (n1935) 194; authorities *supra*.n2267.

[2306] E.g. Lauterpacht, *Oppenheim's International Law*, vol.1 (8th edn, 1955) 298-299; Brierly, *The Law of Nations* (5th edn, 1955) 315-316; Jessup (n2) 163-164;166;168; cf.Ruys (n1959) 370; Ruys/Verhoeven (n2210) 291. For State invocation: Corten, *War* (n1935) 438; cf.409-410; O'Brien (n2223) 453 (fn.160). Criticisms of employing *Caroline* vis-à-vis imminence are not relevant here: see Corten, *War* (n1935) 409-411;416-418; Bothe, 'Terrorism and the Legality of Pre-Emptive Force' (2003) 14 EJIL 227, 232-233; also Tams, 'Terrorists' (n1927) 370-371.

[2307] *In re Goering et al* (1946) 13 ILR 203 (IMT) 210; also Greenwood, 'Pre-Emptive' (n2193) 13; Bowett (n69) 60;142-144; Cheng (n73) 87; cf.Corten, *War* (n1935) 416-418.

defence in response to non-State actors soon after 1945,[2308] with apparently limited objections.[2309]

Second, scholars suggest that debates leading to the adoption of the Definition of Aggression in 1974 reflect a stricter attitude.[2310] Certain States did indeed propose that aggression be limited to State action,[2311] and suggest that self-defence was only available vis-à-vis attacks by States.[2312] However, as Trapp outlines, other States argued that self-defence *could* respond to non-State actors.[2313] With the definition of aggression ultimately adopted, taken as indicative of an 'armed attack',[2314] including so-called 'indirect

[2308] See particularly Tams, 'Embracing' (n2299) 62, discussing, *i.a.*, India/Pakistan-1948 (see UNYB (1947-1948) 387); also Bowett (n69) 189; Ruys (n1959) 394-399 (Israel/Egypt-1956; Lebanon/UAR-1958); cf.Corten, *War* (n1935) 456.

[2309] Generally Tams, 'Embracing' (n2299) 62; Ruys (n1959) 394-399. The India/Pakistan discussion focused on Jammu/Kashmir: UNYB (1947-1948) 387-399, with Pakistan to 'secure…withdrawal…of…[its] nationals': ibid.396-397. Israel's actions were considered disproportionate: Franck (n2236) 55; Ruys (n1959) 395. For Lebanon/UAR: ibid.397; *infra*.n2333.

[2310] E.g. Ruys (n1959) 389;418, generally 382ff; Corten, *War* (n1935) 164;445-450;469; also Tams, 'Embracing' (n2299) 63; Gray, *Force* (n1935) 207; cf.Trapp, 'Attack' (n2194) 681-683.

[2311] See UN.Doc.A/AC.134/L.16, cited Ruys (n1959) 383; Trapp, 'Attack' (n2194) 681-682; Corten, *War* (n1935) 448. Further: Ruys (n1959) 392-393 (vis-à-vis self-determination).

[2312] See Ruys (n1959) 383, citing UN.Doc.A/AC.134/L.16; 384-385, with authorities; Corten, *War* (n1935) 447-449, also with authorities; e.g., UN.Doc.A/7620[29],[62]; UN.Doc.A/8419[56]; UN.Doc.A/AC.134/SR.52-66, 32;117 (Uruguay); 55 (Ecuador); 57;cf.113 (Colombia); 86 (Mexico); 90;cf.119 (Cyprus); also 37 (Norway); UN.Doc.A/AC.134/SR.67-78, 112-113 (Uruguay).

[2313] Trapp, 'Attack' (n2194) 682, with authorities; also Ruys (n1959) 383-384, with authorities; e.g., UN.Doc.A/7620[65]; UN.Doc.A/8419[27]-[28]; UN.Doc.A/AC.134/SR.52-66, 40-41 (Japan); 66;68;150-151 (US); also 20-21(Italy); 115;154 (Indonesia/DRC); apparently 52 (USSR); UN.Doc.A/AC.134/SR.67-78, 7;114-115 (Japan/US); also Corten, *War* (n1935) 138-139. See UN.Doc.A/AC.134/L.17 (aggression through '[o]rganizing, supporting or directing' non-State activities), cited Ruys (n1959) 383; Corten, *War* (n1935) 448; see also Trapp, 'Attack' (n2194) 683.

[2314] *Nicaragua (Merits)* (n1664) [195], cited, e.g. Ruys (n1959) 407; Trapp, 'Attack' (n2194) 683; Ruys/Verhoeven (n2210) 303 and see, e.g. Gray, *Force* (n1935) 137;207 (supporting). But see, on States not equating 'armed attack' with 'aggression': Trapp, 'Attack' (n2194) 682-683; similarly Ruys/Verhoeven (n2210) 302-303; and see UN.Doc.A/8419[38]; UN.Doc.A/AC.134/SR.67-78, 5-6;6-7;8-9 (UK/Japan/Australia). Generally on self-defence/aggression: Greenwood, 'Self-Defence' (n1935) [10]; Bowett (n69) 249-263; Corten, *War* (n1935) 404-405; Franck (n2236) 65.

aggression',[2315] States apparently contemplated that non-State actors could be the *direct* aggressors, engaging in "armed attacks".[2316] It is not clear that these debates definitively establish that self-defence was considered unavailable vis-à-vis non-State actors, rather than that the question was controversial.[2317]

Third, many States, across all geographic regions, have in fact invoked self-defence vis-à-vis non-State actors in other States' territory since as early as the late 1940s, and consistently since.[2318] Most recently, numerous States invoked self-defence vis-à-vis ISIS within Syria,[2319] Gray suggesting the existence of a 'broad coalition' of 60 States.[2320] Multiple States have also expressly endorsed the use of self-defence vis-à-vis non-State actors.[2321] These States must assume that consequent violations of interstate obligations,

[2315] Trapp, 'Attack' (n2194) 682; Ruys (n1959) 386-387; generally 371;387-390; Corten, *War* (n1935) 445-450. See GA.Res.3314(XXIX), Art.3(g) (States' 'sending' individuals 'which carry out acts of armed force against another State of such gravity as to amount to [aggression]' 'or…substantial involvement therein'), discussed e.g. Ruys (n1959) 387; Greenwood, 'Pre-Emptive' (n2193) 16; Corten, *War* (n1935) 445-450.

[2316] Corten, 'Practice' (n2215) 15 ('evident'); similarly Gray, *Force* (n1935) 137; sources *supra*.n2215; Trapp, 'Attack' (n2194) 683; Tams, 'Terrorists' (n1927) 368;385; Tams, 'Embracing' (n2299) 63; also Ruys (n1959) 387.

[2317] See Trapp, 'Attack' (n2194) 683 and particularly points *supra*.n2314; also discussion Ruys (n1959) 383-390, though differing conclusion: 389-390; cf.Corten, *War* (n1935) 447 and sources *supra*.n2310.

[2318] The practice is analysed extensively in the literature. See, e.g. Ruys (n1959) 152-153;157;202;379;394-405;422-472; Gray, *Force* (n1935) 128;143-149;163-164;183;191-195;200-205;207-208;218-229;237-248; Corten, *War* (n1935) 177-185;456-461; Ruys/Verhoeven (n2210) 290;292-298;314-315;317; Deeks (n10) 486-487;522;524;526-527;532;534ff;App.I.; Alexandrov (n2268) 168-171;174-181;184-186; Tams, 'Terrorists' (n1927) 367;372;378-380;391;393; *Oppenheim's* (n73) 423-426; Franck (n2236) 55-59;63-67; O'Brien (n2223) 427-428;430-435;446;448-449;454-457;460-462; Trapp, 'Basics' (n2214) 147-155; Jackson (n73) 181-187; Lubell (n10) 29-30;34;36-37; Trapp, 'Attack' (n2194) 690-694; Moir (n2193) 728;731-732;733-734; Corten, 'Necessity' (n2267) 869; Tams, 'Embracing' (n2299) 62; Greenwood, 'Pre-Emptive' (n2193) 21-22; Tams, 'Analytique' (n2213) 280-281; Greenwood, 'Self-Defence' (n1935) [17]; Wood (n2211) 6; Dinstein (n1937) [645]-[647],[770]-[773]. For early practice: *supra*.nn2308-2309. Noting the 'considerable' practice: Ruys (n1959) 486. Cf.Gray, *Force* (n1935) 125;226.

[2319] See Wright, 'The Modern Law of Self-Defence' *EJIL:Talk!* (11.Jan.2017). Ann.1; Paddeu, 'Force' (n1940) 94; Gray, *Force* (n1935) 191-193;237-243.

[2320] Gray, *Force* (n1935) 190.

[2321] For extensive discussion: Ruys (n1959) 443-446 (US (2002); Australia (2002) (cf.Jackson (n73) 184); Russia (2002-2005); Germany (2004); EU (2004); Netherlands (2005); African Union (2005) (cf.Corten, *War* (n1935) 167-168); France (2006)); Tams, 'Terrorists' (n1927) 380-381; also Brandis, 'The Right of

including vis-à-vis another State's territorial sovereignty, are justified,[2322] where, under normal attribution standards, the territorial State did not commit an "armed attack".[2323]

Admittedly, this practice was often subject to strenuous objection.[2324] However, when States dispute the legality of self-defence, they may do so for diverse reasons,[2325] including whether a response was necessary,[2326] or proportionate.[2327] Disagreements are also ongoing regarding how imminent an attack must be to justify self-defence.[2328] Given this, as Trapp highlights, a lack of objection to a given invocation of self-defence can be

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Self-Defence Against Imminent Armed Attack In International Law' *EJIL:Talk!* (25.May.2017); Wright (n2319); Akande, 'UK Parliamentary Inquiry into UK Policy on the Use of Drones for Targeted Killing' *EJIL:Talk!* (23.Dec.2015); Bethlehem (n2195) 771-772.

[2322] See *supra*.nn2214-2218;2224;2318-2321; and e.g., Ruys (n1959) 447; Franck (n2236) 64; Tams, 'Rejoinder' (n2195) 1061; Tams, 'Terrorists' (n1927) 367;378-383; O'Brien (n2223) 461; Corten, *War* (n1935) 185-186; also Dinstein (n1937) [650]. Cf.Gray, *Force* (n1935) 125;225-227.

[2323] See Ruys (n1959) 428;440;453-457;459; Ruys/Verhoeven (n2210) 313-314; Jackson (n73) 181;184;187; discussion Tams, 'Terrorists' (n1927) 379-381;385-387; Trapp, 'Reply' (n2212) 1050; Trapp, 'Basics' (n2214) 150; Greenwood, 'Pre-Emptive' (n2193) 24; Trapp, 'Attack' (n2194) 680;690; also Corten, 'Practice' (n2215) 16. Cf.Corten, *War* (n1935) 185-186 ('indirect...attack'). Generally on attribution in this context: ibid.450-454; Ruys (n1959) 408-414; Ruys/Verhoeven (n2210) 300-304; Gray, *Force* (n1935) 139-140; *infra*.nn2340ff.

[2324] See generally Ruys (n1959) 395-396;397-398;402-404;423-424;425-427;431-433;448-449;452-453;460; 463-464;467-468;486 (*infra*.n2355); Corten, *War* (n1935) 175;179;183;185;455-466; Gray, *Force* (n1935) 144-145;202-206;209-218;224-227;239-244; Tams, 'Terrorists' (n1927) 367-368; Franck (n2236) 66; authorities *infra*.nn2326ff. Alleging disagreement is being 'minimized': Corten, 'Plea' (n2212).

[2325] Ruys (n1959) 402-404;455; Franck (n2236) 55;67; Trapp, 'Attack' (n2194) 693-694; Gray, *Force* (n1935) 125;127 ('may be limited to…particular facts'). On political considerations: Trapp, 'Attack' (n2194) 690; Deeks (n10) 517-518; Ruys/Verhoeven (n2210) 293-294; Deeks (n10) 517; Ruys (n1959) 403-404;511-512; Tams, 'Terrorists' (n1927) 367-368; Trapp, 'Basics' (n2214) 153. On factual troubles: Gray, *Force* (n1935) 121-122;125;127.

[2326] E.g. actions criticised as reprisals: Tams, 'Terrorists' (n1927) 372 (fn.94) (US/Libya-1985); Ruys (n1959) 402 and authorities (Portugal/Israel/Sth.Africa); Corten, *War* (n1935) 456 (UK/Yemen-1964); generally 486; also Gray, *Force* (n1935) 205-206 (Israel/Lebanon-1968; Israel/Tunisia-1985; US/Sudan/Afghanistan-1998); 212 (Israel/Syria-2003); O'Brien (n2223) 436-437;448-449;453;471.

[2327] For examples: Tams, 'Terrorists' (n1927) 379 (Israel/Syria-2003; Israel/Lebanon-2006; Turkey/Iraq-2007); Ruys (n1959) 395 (Israel/Egypt-1956); 402 (Portugal/Israel/Sth.Africa); 453 (Israel/Lebanon-2006); Trapp, 'Basics' (n2214) 154-155 and Trapp, 'Attack' (n2194) 691 (Israel/Lebanon-2006); Gray, *Force* (n1935) 163;227-228 (Israel/Lebanon-2006); Corten, *War* (n1935) 457; O'Brien (n2223) 437;456;459;464.

[2328] E.g., Corten, *War* (n1935) 132;406-407;407-433; Greenwood, 'Self-Defence' (n1935) [41]-[51]; Tams, 'Terrorists' (n1927) 389-390; Gray, *Force* (n1935) 227;235-236;248-256; Wood (n2211) 7-9; Bethlehem (n2195) 771-773; Kretzmer (n2249) 774-777.

important.[2329] The near-universal approval of the US' exercise of self-defence against Al-Qaeda post-9/11[2330] therefore suggests that self-defence *can* be invoked against non-State actors where the circumstances warrant.[2331] There are other instances of practice where very few States (excepting the territorial State) apparently objected to such uses of force at all,[2332] or objected to the availability of self-defence vis-à-vis non-State actors as such.[2333] Accordingly, it is at least doubtful that States in other situations are 'rejecting a right to respond to un-attributable armed attacks *in principle*'.[2334] Indeed, clear statements

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[2329] Trapp, 'Attack' (n2194) 690;693-694. Similarly Ruys (n1959) 427. Generally authorities *infra*.nn2332-2333.

[2330] Gray, *Force* (n1935) 200-201;206; Tams, 'Terrorists' (n1927) 377-378; Tams, 'Analytique' (n2213) 280-281; Greenwood, 'Self-Defence' (n1935) [17]; Trapp, 'Attack' (n2194) 690; Greenwood, 'Pre-Emptive' (n2193) 17-18; Trapp, 'Basics' (n2214) 151;155-156; Jackson (n73) 184; Wood (n2211) 6; Lubell (n10) 34; Ruys/Verhoeven (n2210) 297; Dinstein (n1937) [645],[647]; Ruys (n1959) 434-437; Milanovic, 'Indeterminacy' (n2235); Corten, *War* (n1935) 460-461.

[2331] See Greenwood, 'Pre-Emptive' (n2193) 17-18; also 21-25; Greenwood, 'Self-Defence' (n1935) [11],[17]; Franck (n2236) 54;66; Moir (n2193) 724-728;cf.729; Trapp, 'Attack' (n2194) 690;694; Trapp, 'Basics' (n2214) 151; Dinstein (n1937) [645]; Ruys (n1959) 439-440;cf.441-442; Gray, *Force* (n1935) 206-207; cf.201-202;208-209; Corten, 'Practice' (n2215) 16; cf.Corten, *War* (n1935) 180-183;461-464.

[2332] E.g. Tams, 'Terrorists' (n1927) 380 (Iran/Iraq-1990s, though note US objection: Ruys (n1959) 432-433); also ibid.427 (US/Afghanistan-1998 (vis-à-vis NAM/LAS)); 431 (Turkey/Iraq-1995); cf.431-432; Corten, *War* (n1935) 179 (US/Afghanistan-1998); cf.460; Trapp, 'Basics' (n2214) 149-150 and Trapp, 'Attack' (n2194) 693-694 (US/Afghanistan-1998).

[2333] Generally, e.g.: Tams, 'Terrorists' (n1927) 379-380; Trapp, 'Basics' (n2214) 154; Jackson (n73) 185; Trapp, 'Attack' (n2194) 690-691; Ruys (n1959) 451-457; Moir (n2193) 733; Milanovic, 'Indeterminacy' (n2235); Gray, *Force* (n1935) 214; cf.229. Specifically, e.g.:

- Lebanon's uncontested 1958 assertion that Art.51 covered non-State attacks: Ruys (n1959) 396-398, discussing UN.Doc.S/PV.833[10]; cf.perhaps UN.Doc.S/PV.831[99]; also Corten, *War* (n1935) 456; Gray, *Force* (n1935) 182-183.

- General acceptance of self-defence's availability vis-à-vis Israel/Lebanon-2006: Ruys (n1959) 451-453; Trapp, 'Basics' (n2214) 154; Trapp, 'Attack' (n2194) 691; Gray, *Force* (n1935) 214;cf.215; Moir (n2193) 733; Jackson (n73) 185; cf.Corten, *War* (n1935) 464; Corten, 'Practice' (n2215) 16. Suggesting disapproval by China/Qatar/Ghana: Gray, *Force* (n1935) 214, with authorities; similarly Ruys (n1959) 451-452, and LAS/Iran/Cuba/Venezuela: ibid.452-453, with authorities. But these countries focused on humanitarian issues and disproportionality: UN.Doc.S/PV.5493, 20 (China); UN.Doc.S/PV.5493(Res.1), 8 (Ghana); 20 (Iran); 26-27 (LAS); 36-37 (Venezuela); 37-38 (Cuba); UN.Doc.S/PV.5498, 10-11 (Qatar/China).

- Lack of objection to Turkey/Iraq-2007: Ruys (n1959) 459-461;cf.462; Moir (n2193) 733-734; Jackson (n73) 185; cf.Corten, *War* (n1935) 184-185 ('no universal *opinio juris*…established').

[2334] Trapp, 'Attack' (n2194) 694. Similarly Ruys (n1959) 404; cf.462; also Gray, *Force* (n1935) 242; cf.127-128 (vis-à-vis UNSC);205-206. Generally on proof of custom: Dawidowicz (n195) 414-415.

to this effect appear to be uncommon.[2335] Even vis-à-vis controversial actions by Israel, Portugal, and South Africa in the 1960s-1970s,[2336] Ruys concludes that 'there is very little *opinio juris* explicitly dismissing self-defence in response to armed bands per se' (and nor, admittedly, in favour of such action).[2337] Many of the statements relied on in the literature more recently fail to distinguish different bases on which States might object to the exercise of self-defence.[2338]

[2335] E.g. *infra*.2337 and generally on difficulties in establishing *opinio juris*: Ruys (n1959) 404;427;447;455;462;486-487; Corten, *War* (n1935) 184-186;461-462;464. There are some such statements: e.g., Ruys (n1959) 425, referencing UN.Doc.S/PV/2680, 32 (Ghana); O'Brien (n2223) 464 (fn.245); authorities *supra*.n2312. Authors suggest condemnation of Israel/Tunisia-1985 was a rejection in legal terms: see, with authorities, Tams, 'Terrorists' (n1927) 393; Gray, *Force* (n1935) 203; also Trapp, 'Basics' (n2214) 149. But although condemned as aggression (e.g. UNYB (1985) 285-291), those authorities suggest (1) the alleged initial attack was on Israeli nationals in third-State territory (UNYB (1985) 285; invoking self-defence of nationals: UN.Doc.S/PV.2611, 6 (Israel); generally *supra*.n2236), and (2) many characterised Israeli bombing of alleged PLO locations as 'premeditated' (UNYB (1985) 286; also 289 (Tanzania/Egypt);UN.Doc.S/PV.2611, 8;13 (USSR/Pakistan); UN.Doc.S/PV.2613, 3;5 (Madagascar/Burkina Faso); UN.Doc.S/PV.2615, 8 (Indonesia)); reprisal (UNYB (1985) 288-289 (Turkey/Australia/Morocco)); UN.Doc.S/PV.2610, 4 (Kuwait); UN.Doc.S/PV.2611, 3;9;12 (Peru/Turkey/UK/Senegal); also UN.Doc.S/PV.2613, 3;11 (Madagascar/Morocco); UN.Doc.S/PV.2615, 8;19 (Indonesia/PLO)); disproportionate (UNYB (1985) 288-289 (Australia/Indonesia); UN.Doc.S/PV.2610, 4 (Kuwait); UN.Doc.S/PV.2611, 3;4;9 (Peru/Turkey/Thailand/UK); UN.Doc.S/PV.2615, 17), and undermining peace (UNYB (1985) 286;288-290 (Mongolia/Spain/Brazil/France/Tunisia/Pakistan/Madagascar/Bangladesh/Yugoslavia/Nigeria/Trinidad-Tobago/UK); UN.Doc.S/PV.2610, 6-7 (India/Egypt); UN.Doc.S/PV.2611, 2;4;9;13 (France/Turkey/UK/ Pakistan); UN.Doc.S/PV.2613, 11-12 (Morocco/Jordan); UN.Doc.S/PV.2615, 6;10;13 (Indonesia/Malta/ Bangladesh)) Cf.UN.Doc.S/PV.2615, 8 (Nicaragua; not explaining basis);16 (Tunisia: no 'armed attack'). Even the US abstained vis-à-vis a condemnatory UNSCR, despite supporting the self-defence principle: UNYB (1985) 287. Further Ruys (n1959) 423-424; O'Brien (n2223) 460-461.

[2336] Ruys (n1959) 399-405; also Corten, *War* (n1935) 144;146;456-457; Tams, 'Embracing' (n2299) 62.

[2337] Ruys (n1959) 404; also Ruys/Verhoeven (n2210) 293-294 (political). Apparently similarly: Corten, *War* (n1935) 457-458.

[2338] See generally on this point authorities *supra*.nn2325-2328. E.g.:

(1) 2008 Rio Group objection to Colombia exercising self-defence vis-à-vis FARC in Ecuador, affirming that territory 'cannot be the object of military occupation nor of other forceful measures by another State, directly or indirectly, whichever the reason, even if temporarily': as cited Gurmendi, 'State Practice Regarding Self-Defence against Non-State Actors: An Incomplete Picture' *Op.Jur.* (17.Oct.2018); similarly Corten, *War* (n1935) 185. This is largely a restatement of OAS Charter, Art.21: 'territory…may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever…' (cf.Gray, *Force* (n1935) 225; Deeks (n10) 539;545-546; Corten, *War* (n1935) 464-465). The Charter recognises self-defence as an exception: Art.22. Moreover, the OAS endorsed US self-defence post-9/11 (Ruys (n1959) 436), suggesting its objection to Colombia's actions were rather circumstance-specific: similarly Trapp, 'Attack' (n2194) 693-694. Cf.Ruys (n1959) 464; Corten, *War* (n1935) 185; Deeks (n10) 545-546; Gray, *Force* (n1935) 224. Indeed, Colombia apologised: Ruys (n1959) 463-464.

Before concluding that self-defence can respond to non-State actor attacks, and therefore that scenarios (3) and (4) are enlivened vis-à-vis this CPW, it must be acknowledged that some have proposed an alternative explanation for the practice,[2339] namely that action is actually taken against *States*, but under modified attribution standards.[2340] Self-defence can, it is said, justify infringing a State's rights where a non-State attack occurs with that State's 'complicity' under an attribution standard akin to 'aiding and abetting'.[2341] However, while States do commonly point to involvement in attacks by the State where the attackers are located,[2342] as Ruys highlights, they also often make clear that they are responding to attacks by non-State actors, not States.[2343] Perhaps more importantly, they often rely simply on another States' *failure* to prevent attacks as

(2) 2016 Non-Aligned Movement statement that Art.51 'is restrictive and should not be re-written or re-interpreted': Christakis, 'Challenging the "Unwilling or Unable" Test' (2017) 77 ZfaöRV 19, 20, referencing UN.Doc.S/PV.7621, 34; similarly Corten, 'Practice' (n2215) 17; also Gray, *Force* (n1935) 242. The UNSC statement nowhere discusses self-defence against non-State actors (similarly ibid.242 ('general terms')). It does dispute the 'doctrine of pre-emptive attack' (33), a separate issue: *supra*.n2328. Indeed, referencing similar NAM statements in *this latter* context: Corten, *War* (n1935) 432-434; see 455. Generally, on States' concerns regarding Art.51 covering 'imminent threats': ibid.413;426;435; examples 430-434.

(3) 2018 Brazilian presentation rejecting self-defence against non-State actors, discussed Moorehead, 'Brazil's Robust Defense of the Legal Prohibition on the Use of Force and Self Defence' *Just Security* (20.Apr.2018). The author admits the presentation was in a 'personal capacity': ibid. The official Brazilian statement discussed therein only mentions 'concerns' and suggests dialogue on these 'critical legal issues': ibid.

[2339] See similarly summary Gray, *Force* (n1935) 227; Paddeu, 'Force' (n1940) 107-110.

[2340] Tams, 'Terrorists' (n1927) 384-385; also Jackson (n73) 181;186-187; discussion Corten, *War* (n1935) 444ff; Milanovic, 'Indeterminacy' (n2235); Ruys (n1959) 490-493. Cf.Paddeu, 'Force' (n1940) 108-109 (complicity not attribution); Gray, *Force* (n1935) 247. For concerns regarding altering attribution standards: Ruys/Verhoeven (n2210) 299-300; Ruys (n1959) 491-493; Milanovic, 'Indeterminacy' (n2235); Jackson (n73) 187-188; Trapp, 'Reply' (n2212) 1054-1055; cf.Tams, 'Rejoinder' (n2195) 1062.

[2341] Tams, 'Terrorists' (n1927) 385-386; similarly Ruys/Verhoeven (n2210) 315-317; discussion Ruys (n1959) 489-491; Paddeu, 'Force' (n1940) 107-109; Condorelli/Kress (n73) 228; cf.Gray, *Force* (n1935) 226-227.

[2342] See Ruys (n1959) 394-395;396-397;398;399;399-402;426;428-429;432;435-436;440;447-448;450-451;453-454; Ruys/Verhoeven (n2210) 292-295;312; Gray, *Force* (n1935) 143-144; O'Brien (n2223) 461; Tams, 'Terrorists' (n1927) 385; Trapp, 'Basics' (n2214) 147-151; Corten, *War* (n1935) 463; also Paddeu, 'Force' (n1940) 96.

[2343] Ruys (n1959) 493; also Jackson (n73) 187; Gray, *Force* (n1935) 247.

justifying their action.[2344] Indeed, recent practice focuses on self-defence being taken in response to non-State actor attacks where a State is 'unwilling or unable' to prevent those attacks.[2345] Deeks has highlighted that the origin of the 'unwilling or unable' approach lies in the law of neutrality discussed above,[2346] law which already envisages a State exercising self-defence against another State where necessary to prevent third-State attacks.[2347] However, whether such failures violate States' obligations to prevent attacks occurring from their territory or not,[2348] what matters is that – as in the original conception of self-defence[2349] – they may render self-defence *necessary*, and thus justify another State breaching the former State's territorial sovereignty.[2350] The necessity of

[2344] See Gray, *Force* (n1935) 143-144; Ruys/Verhoeven (n2210) 292-293;294-296;317; Trapp, 'Attack' (n2194) 694-695; Ruys (n1959) 454;459; Trapp, 'Basics' (n2214) 149-150 (Israel/Tunisia-1985; US/Afghanistan/Sudan-1998);151-152 (US/Afghanistan-2001);153 (Russia/Georgia-2002);154-155(Israel/Lebanon-2006); *infra*.n2345; also Brownlie, *Force* (n1916) 375. Unawareness is insufficient for complicity: Tams, 'Terrorists' (n1927) 386; Ruys/Verhoeven (n2210) 316; *Nicaragua (Merits)* (n1664) [157]. Cf.Deeks (n10) 522-524.

[2345] See Deeks (n10) 485-487; Gray, *Force* (n1935) 236-241;247-248; Keinan (n2213) 57; Moir (n2193) 731; also 731-734; Paddeu, 'Force' (n1940) 96;98; Dinstein (n1937) [768]. For earlier examples: Deeks (n10) 486 ('century of state practice'); Ruys (n1959) 401 (Israel/Lebanon-1972);431 (US-1995);433; also 502-506. Supporting: Bethlehem (n2195) 776; Trapp, 'Basics' (n2214) 147; Deeks (n10) 487-488;504; also Wood (n2211) 7. Cf.Gray, *Force* (n1935) 243 (test 'controversial'); generally 236-248; similarly Christakis (n2338) 19-20; also Tams, 'Terrorists' (n1927) 385 ('radical'); Corten, 'Plea' (n2212). Cf.Corten, *War* (n1935) 170 (inability 'purely theoretical'); also 171-172; Kretzmer (n2249) 777-778. No particular test need be endorsed, as explained *infra*.n2350. Similarly Paddeu, 'Force' (n1940) 98. Cf.Gray, *Force* (n1935) 243-244; Deeks (n10) 488-489.

[2346] Deeks (n10), particularly 496-503; similarly Ruys (n1959) 503; Greenwood, 'Pre-Emptive' (n2193) 24-25; Lubell (n10) 41-42; also Cheng (n73) 91-92;95-96; *supra*.nn2240-2256.

[2347] *Supra*.nn2248-2256 and, applying to non-State actor scenario: Deeks (n10) 497, 503; Greenwood, 'Pre-Emptive' (n2193) 24-25; Lubell (n10) 41-42; Ruys (n1959) 503. Cf., doubting 'analogy': Kress (n1953) 267.

[2348] Trapp, 'Reply' (n2212) 1054-1055 (terrorism); also Lubell (n10) 38-40; Ruys/Verhoeven (n2210) 305-307; Paddeu, 'Force' (n1940) 109. These are 'due diligence' obligations: Ruys/Verhoeven (n2210) 305-306;318; Bowett (n69) 49;56; Christakis (n2338) 20. Generally Ruys (n1959) 374-377, also 454 (vis-à-vis Israel/Lebanon-2006).

[2349] *Supra*.nn2303ff and authorities and see Greenwood, 'Pre-Emptive' (n2193) 25; Greenwood, 'Self-Defence' (n1935) [17]; Paddeu, *Justification* (n53) 359;361;363; Lubell (n10) 34-35; Dinstein (n1937) [776]; Cheng (n73) 87;95-96. Cf.Ruys/Verhoeven (n2210) 309; Gray, *Force* (n1935) 206; Brandis (n2321).

[2350] Trapp, 'Reply' (n2212) 1053; Deeks (n10), particularly 493-495; Trapp, 'Basics' (n2214) 142;146;155; Trapp, 'Attack' (n2194) 695; Milanovic, 'Indeterminacy' (n2235); Lubell (n10) 40-42; Dinstein (n1937) [766]-[767],[778] and see particularly Greenwood, 'Self-Defence' (n1935) [18]:

violating a State's sovereignty will almost certainly be established where the State is complicit in non-State actor attacks,[2351] and may, depending on the circumstances, exist where the State is otherwise 'unwilling or unable' to act.[2352] This approach does not, contrary to criticism, use necessity to enlarge self-defence's operation.[2353] Rather, it assumes, as noted above, that third-party effects are possible, and uses necessity to limit these.[2354]

In sum, after a comprehensive review, Ruys considers that the 'restrictive' approach to Article 51 does not reflect current practice, even if that practice is 'far from coherent'.[2355] His restrained conclusion is that no standard has yet 'replac[ed] the traditional one', but that self-defence against non-State actors is nonetheless 'not

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> 'there is an understandable concern that a State…the victim of an attack by a group unconnected with any other State should not inevitably be free to take action against that group in the territory of other States…action in self-defence must be limited to what is necessary and proportionate…Only if the former State has shown itself to be unwilling (or, perhaps, unable) to act effectively against the group it can be said that military action in its territory…meets the criterion of necessity.'

Further: Brownlie, *Force* (n1916) 375; *Oppenheim's* (n73) 387;419-421; Bethlehem (n2195) 775-776; Wood (n2211) 6-7; Greenwood, 'Pre-Emptive' (n2193) 24-25; Cheng (n73) 87;95-96; also Wilmshurst (n2215) 11-12; Bothe, 'Terrorism' (n2306) 233; Battaglini, 'War Against Terrorism *Extra Moenia*, Self-Defence and Responsibility' in Ragazzi, *Responsibility* (n4) 145; even Corten, *War* (n1935) 171-172; cf.445-447. Cf.Gray, *Force* (n1935) 227;247-248; Paddeu, 'Force' (n1940) 107-109; Ruys/Verhoeven (n2210) 308-309;317-318.

[2351] Jackson (n73) 188-189; Trapp, 'Reply' (n2212) 1053; Trapp, 'Basics' (n2214) 147;150;155; Moir (n2193) 735; Trapp, 'Attack' (n2194) 695; Ruys (n1959) 493-496;502-506;509-510; Deeks (n10) 505; also Lubell (n10) 41-42; apparently Bethlehem (n2195) 776. Cf.Tams, 'Rejoinder' (n2195) 1061; Tams, 'Terrorists' (n1927) 385.

[2352] *Supra*.n2345; also *supra*.n2248; and see, e.g., Trapp, 'Basics' (n2214) 147; Greenwood, 'Self-Defence' (n1935) [18]; Lubell (n10) 41; Wilmshurst (n2215) 13; Moir (n2193) 735; generally *supra*.n.2350.

[2353] Cf.Paddeu, 'Force' (n1940) 108; Gray, *Force* (n1935) 246; Kretzmer (n2249) 778-779. See *supra*.nn2264-2268.

[2354] See Ruys (n1959) 505-506;509; also Kress (n1953) 250; Deeks (n10) 495;508, generally 506ff; Thouvenin (n2240) 464-465; cf.discussion Corten, *War* (n1935) 471-472. See *supra*.Pt.(C)(ii), particularly *supra*.n2268. Cf.*supra*.nn2249;2353.

[2355] Ruys (n1959) 485-486.

unambiguously illegal'.[2356] The position favoured herein certainly becomes stronger if one rejects the assumption that its advocates must prove the existence of a *new* rule.[2357] And objections based on third-party rights, including as to territorial sovereignty, are much less persuasive once one accepts that self-defence already justifies such violations outside of the non-State actor arena.[2358] If this is correct, and self-defence can both respond to non-State actor attacks and justify necessary violations of third-party rights, then self-defence may potentially be exercised in both scenarios (3) and (4) outlined above.

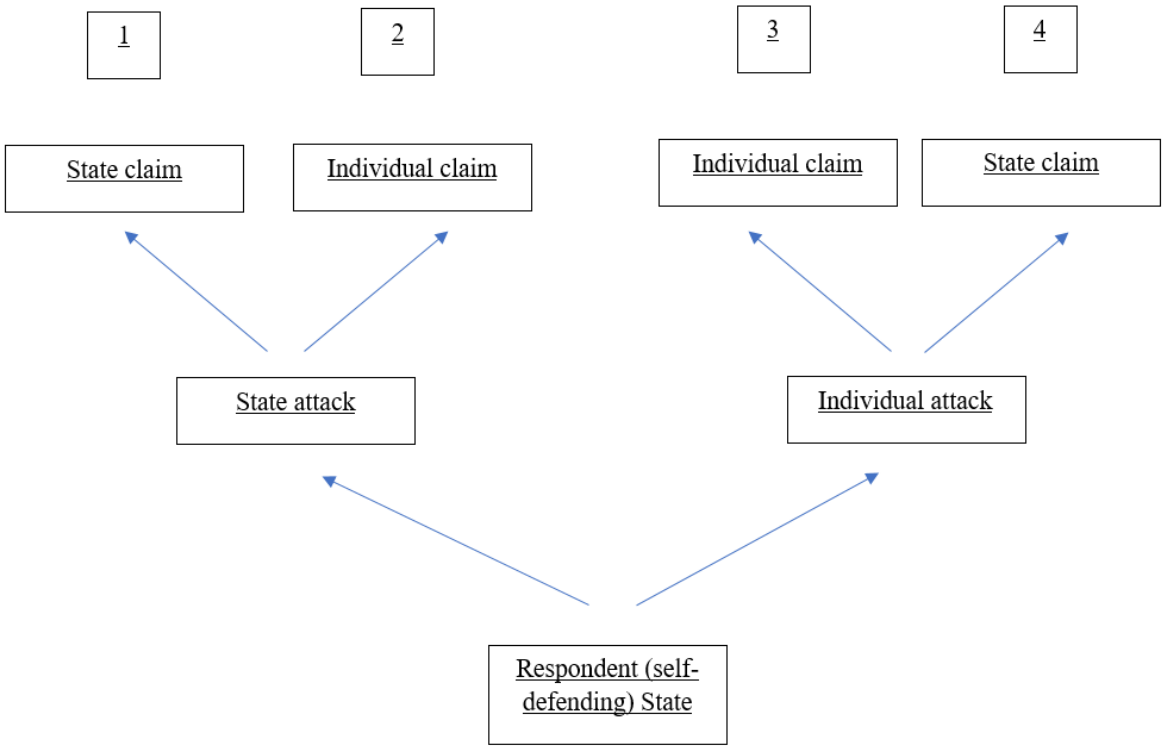
[2356] ibid.486-487. Cf.Paddeu, 'Force' (n1940) 95.

[2357] E.g. Corten, *War* (n1935) 161 ('new doctrine'); 175;185;455;461-463;465; Ruys (n1959) 486; also *Wall* (n1421) 230 (Sep.Op.Koojimans). Maintaining custom is unchanged: Greenwood, 'Pre-Emptive' (n2193) 25 (with authorities); Greenwood, 'Self-Defence' (n1935) [17] (must otherwise show 'practice…reflected widespread *opinio juris* that international law precluded resort to self-defence' against non-State actors); also Kammerhofer (n2235) 633;646; Tams, 'Embracing' (n2299) 63; generally *supra*.nn2299;2301ff.

[2358] *Supra*.Pt.(C)(ii); similarly Paddeu, 'Force' (n1940) 113.

(iv) Conclusion: self-defence, individuals and third-party rights

It bears returning to the original outline to establish where this leaves us in terms of overlapping claims:



Self-defence may operate in scenario (1). If, as suggested, self-defence can respond to individual attacks, then scenario (3) is enlivened, and (subject to violations which *cannot* be precluded[2359]), self-defence could apparently operate to preclude those individuals' claims.[2360] Apart from the one case noted above, self-defence does not appear to have been invoked in individual claims.[2361] Other CPWs have, however, been so invoked: numerous investment tribunals have accepted, for instance, that the invocation of

[2359] *Supra*.n1952.

[2360] Cf.Paddeu, *Justification* (n53) 407; Paparinskis, 'Countermeasures' (n5) 342-343.

[2361] *Supra*.n1946.

necessity as a CPW could operate to preclude individual claims.[2362] Self-defence, in response to an individual attack, would appear likewise able to preclude that individual's claims, where no question of third-party rights violations arise.[2363]

The possibility of self-defence operating to preclude claims in scenarios (2) and (4) depends on whether self-defence can, unlike countermeasures, justify third-party rights violations.[2364] Subsection (ii) argued that, even putting aside the issue of self-defence in response to non-State actors, the CPW does envisage at least certain third-party rights violations.[2365] This suggests that individual claims could be precluded, under scenario (2), even if individuals invoke their rights,[2366] where the violation is necessary for a State to exercise self-defence in response to another State's armed attack.[2367] More controversially, subsection (iii) argued that, based on practice, the same should apply when a State exercises self-defence in response to an individual attack, necessitating violation of another State's rights, including of territorial sovereignty.[2368] While invoking necessity as a CPW cannot involve the use of force,[2369] if self-defence can be exercised in

[2362] E.g., *Fenosa* (n581) [8.1]-[8.4],[8.37]-[8.62]; *Urbaser v Argentina (Award)* ICSID Case-ARB/07/26 (8.Dec.2016) [709]-[718]; *Pezold* (n2266) [624]-[668]; *EDF International v Argentina (Final Award)* ICSID Case-ARB/03/23 (11.Jun.2012) [493]-[499],[1163]-[1181]; *Impregilo (Award)* (n581) [336]-[359]; *Suez v Argentina (Liability)* ICSID Case-ARB/03/17 (30.Jul.2010) [235]-[243]; *National Grid v Argentina (Award)* UNCITRAL (3.Nov.2008) [254]-[262]; *LAFICO v Burundi* (1991) 96 ILR 279, 318-319, discussed Crawford, *GP* (n2) 312. Generally discussion, e.g., Tomka (n1962), with further authorities; Paddeu, *Justification* (n53) 404-409; Paparinskis, 'New' (n8) 632-635; Paparinskis, 'Countermeasures' (n5) 342-343.

[2363] Cf.*supra*.nn1994ff.

[2364] See authorities *supra*.nn2198;2203; cf.*supra*.Pt.IV(A).

[2365] *Supra*.nn2229ff, particularly *supra*.n2262.

[2366] Cf.*supra*.nn2003ff.

[2367] *Supra*.nn2349ff. Cf.Paparinskis, 'Countermeasures' (n5) 343.

[2368] *Supra*.Pt.C(iii)(b), particularly *supra*.nn2349ff.

[2369] *Supra*.n2267.

response to an armed attack but in a manner that can, like necessity, justify third-party rights violations,[2370] then it would appear that overlapping claims could be precluded.[2371] For instance, as Chapter I outlined, where individuals have claims so also must their State of nationality.[2372] Yet tribunals – while acknowledging the relevance of other States' interests – did not consider that the inevitable violation of the State of nationality's rights prevented reliance on necessity vis-à-vis individual investors.[2373] Similarly, the privately-owned ship *Torrey Canyon* was destroyed as posing an environmental threat, in circumstances of necessity,[2374] with neither the ship's owners, nor their State, protesting.[2375] And authors have suggested that a State of nationality would be unable to exercise diplomatic protection vis-à-vis an individual targeted in self-defence.[2376]

Accordingly, at least on the approach suggested herein, where self-defence is exercised against a State, any individual claim arising would be precluded equally as that of the State; and where self-defence is exercised against an individual (non-State actor), both that individual's claims, and those of States whose rights are violated, would be precluded.

[2370] *Supra*.nn2229ff;2349ff; and vis-à-vis necessity: *supra*.nn2264-2269.

[2371] E.g. authorities *infra*.n2376.

[2372] *Supra*.n217; also *supra*.nn348;380.

[2373] See *Suez (Liability)* (n2362) [239]; *Impregilo (Award)* (n581) [354]. Cf.*von Pezold*, *supra*.n2266.

[2374] Ago (n1666) 28; also *Oppenheim's* (n73) 417 (fn.2); Heathcote (n1666) 493. Similarly *Nachfolger*, discussed ibid.493-494; *Oppenheim's* (n73) 420 (fn.15). Cf.*supra*.n2667.

[2375] Ago (n1666) 28.

[2376] Bowett (n69) 58 (treating as necessity), referencing Schwarzenberger, 'The Fundamental Principles of International Law' (1955) 87 Rdc 191, 332

V. Conclusion

This Chapter addressed the application of two CPW – countermeasures and self-defence – vis-à-vis overlapping individual and interstate claims. Three important points may be highlighted in conclusion. First, the distinction between breach and damage, introduced in Chapter I, is important for the application of these rules, as it was in Part B. Both countermeasures and self-defence taken against a State can apparently preclude individual claims for *damage*.[2377] The controversy is whether they can preclude claims relying on breach of third-party (individual or State) rights.[2378]

However, second, just as the existence of separate State and individual rights does not, in and of itself, dictate the application of the rules considered in Chapters IV-VII, so this Chapter has suggested that they do not necessarily render these CPW inapplicable to individual claims and, consequently, to overlapping individual and interstate claims.[2379] In particular, this Chapter has suggested that at least certain individuals should not be treated as third parties when countermeasures are taken in response to the conduct of a State.[2380] Additionally, States may, in necessary responses to either individual or State attacks, violate third-party rights belonging to the other.[2381] The allowability of both such

[2377] *Supra*.nn1981-2002;2200.

[2378] *Supra*.nn2003ff;2198;2223-2224.

[2379] Cf.*infra*.n2456.

[2380] *Supra*.Pt.IV(B).

[2381] *Supra*.Pt.IV(C)(ii)-(iv).

scenarios may prove important in enabling these 'self-help' mechanisms[2382] to function in today's world.[2383]

Third, in determining *who* is liable to have their rights thus impacted in an overlapping individual-interstate claim scenario, the identity between the two entities may prove important.[2384] Thus, State practice suggests that interstate countermeasures can preclude both States and individuals from invoking responsibility, even if the individual possesses its own rights, at least where that individual is *complicit* in the State's unlawful conduct.[2385] Self-defence was argued to justify violation of third-party rights when this is necessary.[2386] Its operation vis-à-vis a State does not necessarily depend on any involvement in the relevant attack by that State – which may be simply 'unable' to act[2387] – but, as highlighted above, State involvement is common in cases in which self-defence is exercised vis-à-vis non-State actor attacks,[2388] leading some to suggest a standard of *complicity* in the individual's attacks.[2389] For both self-defence and countermeasures, then, the 'connection' between the individual and the State is likely to be relevant to the

[2382] *Supra*.nn1927;1937; Dawidowicz (n416) 20.

[2383] Similarly Bethlehem (n2195) 773-774; Deeks (n10) 509; cf.Gray, *Force* (n1935) 138, discussing *Nicaragua (Merits)* (n1664) 544-545 (Diss.Op.Jennings); Parlett (n5) 405 ('more nuanced approach…warranted in applying [ARSIWA] to investment treaty claims'); Peters/Roberts, *supra*.n2013; generally *supra*.nn2014-2016;2058;2211. Cf.Bothe, 'Terrorism' (n2306) 239-240; Ruys/Verhoeven (n2210) 290;310ff.

[2384] Cf.*supra*.nn2013-2016.

[2385] *Supra*.nn2096-2101.

[2386] *Supra*.nn2349ff.

[2387] *Supra*.n2352.

[2388] *Supra*.n2342.

[2389] *Supra*.n2341. This is not, however, relevant for scenario (2).

CPW's operation vis-à-vis overlapping claims.[2390] Finally, however, human rights deserve particular consideration, as neither CPW can be invoked to justify violation of such rights.[2391] Nonetheless, as has been seen, self-defence may be relevant to whether an individual's right to life has been violated.[2392]

In Chapters V and VII, this thesis considered whether secondary claims are available to individuals where a State's conduct has resulted in preclusion of their claim.[2393] The same question arises in respect of the CPWs considered in this Chapter.[2394] While domestic and international claims have been brought against sanction-imposing States,[2395] more pertinently, claims have also been brought against States where that State's wrongful conduct has resulted in *another State's* retaliatory action and consequent individual losses.[2396] One such claim was rejected, *inter alia* because individuals were aware that circumstances, including WTO retaliation, might affect their business.[2397]

[2390] *Supra*.nn2072;2081;2092;2101; cf.Lubell (n10) 36 ('connection' in a 'factual' sense); similarly Paddeu, 'Force' (n1940) 96; *ARSIWA*, 110 (individual-State 'factual relationship' for attribution). Cf.Crawford, *GP* (n2) 113 ('normative');113-115; similarly Condorelli/Kress (n73) 225-228.

[2391] *Supra*.nn1952;2185-2190.

[2392] *Supra*.nn1953-1955.

[2393] *Supra*.Chs.V;VII;nn1408ff;1910ff.

[2394] See *infra*.n2400.

[2395] Generally Jazairy (n441) [31]-[66]; e.g. *supra*.nn2080ff.

[2396] Bronckers and Goelen, 'Financial Liability of the EU for Violations of WTO Law - A Legislative Proposal Benefiting Innocent Bystanders' in Cremona/others, *Reflections* (n356) 173-189, referencing *i.a. FIAMM v Council* [2005] ECR II-5393 (CFI) (EU-law claims resulting from WTO retaliation); similarly Losari/Ewing-Chow (n359) 304-305; Roberts, 'Triangular' (n5) 402.

[2397] *FIAMM v Council* [2008] ECR 1-06513 (ECJ) [186].

Nonetheless, one can imagine similar cases being brought in the countermeasures context.[2398]

Additionally, a State or individual could potentially found a compensation claim on the rule in Article 27 of the ARSIWA, which provides that reliance on a CPW is 'without prejudice' to 'compensation for any material loss [thereby] caused'.[2399] While Article 27 was intended to cover third-party effects of countermeasures and self-defence,[2400] as Paddeu notes, the existence of an actual rule requiring payment of compensation in such circumstances is uncertain.[2401] While such a claim might therefore remain speculative,[2402] the rule has been recognised in certain cases concerning the impact of necessity as a CPW on individual claims.[2403] In any event, Article 27 is designed to prevent 'the burden of the defence' being borne by 'an innocent third State'.[2404] It is questionable whether it would, therefore, cover the circumstances of complicity described above.[2405]

[2398] Cf.Losari/Ewing-Chow (n359) 305; Bronckers/Goelen (n2396) 178-181. Indeed, the CFI had accepted the causal connection between the EU's conduct and the US' retaliatory action: *FIAMM* (n2396) [177]-[191], cf.[202]-[214].

[2399] *ARSIWA*, Art.27, see 189-190; generally Paddeu, *Justification* (n53) 77-94.

[2400] Paddeu, *Justification* (n53) 79;92-93; authorities *supra*.n226.

[2401] ibid.78-79;85-86;88;93-94;422. Similarly Bowett (n69) 174; Paparinskis, 'New' (n8) 633-634.

[2402] Paddeu, *Justification* (n53) 93-94; also *ARSIWA*, 190 (agreement).

[2403] E.g., *CMS Gas v Argentina (Award)* ICSID Case-ARB/01/8 (12.May.2005) [383],[388],[390]-[394]; also *LG&E v Argentina (Liability)* ICSID Case-ARB/02/1 (3.Oct.2006) [260]; *Sempra Energy v Argentina (Award)* ICSID Case-ARB/02/16 (28.Sept.2007) [394], cases cited UNLS, *Materials on the Responsibility of States for Internationally Wrongful Acts* (2012) ST./LEG/SER.B/25, 190-193; also Paddeu, *Justification* (n53) 78.

[2404] *ARSIWA*, 190; also Paddeu, *Justification* (n53) 89-90.

[2405] *Supra*.nn2060;2096-2101;2341;2351. Cf.Peters (n1) 331.

PART D: CONCLUSION

This thesis has addressed the relationship between overlapping individual and interstate claims, where both individuals and States are *prima facie* able to invoke the responsibility of the same respondent State for violations of international law arising in the same factual circumstances.[2406] This overlap is growing, with increasing use of international courts generally,[2407] individual claims mechanisms,[2408] and involvement of domestic courts in international legal issues.[2409]

The application of the law of State responsibility in circumstances of overlap between individual and interstate claims was left largely unaddressed by the ARSIWA.[2410] This thesis has narrowed this gap, outlining how rules of State responsibility relating to the invocation of responsibility, reparation, and breach – including certain CPWs – may be expected to operate vis-à-vis overlapping individual and interstate claims.

The analysis in Chapters IV-VIII has demonstrated that the conduct of both individuals and States can enliven rules that would preclude the successful invocation of responsibility by the other, where they could otherwise have brought an overlapping claim. Some of those rules only operate in one direction: only individuals can exhaust, or fail to exhaust, local remedies, and consent to arbitration for the purposes of Article 27 of ICSID, with potential impacts on a State's claim.[2411] By contrast, it is only State conduct

[2406] *Supra*.nn12-13;62-63.

[2407] Shany (n7) 5-7;77.

[2408] *Supra*.Ch.II(I);(III); ibid.74.

[2409] Authorities *supra*.nn34;36; generally *supra*.nn290ff.

[2410] *Supra*.n6.

[2411] *Supra*.nn464;539;559.

to which countermeasures may respond,[2412] and only States can take action under Article 222(c) of CARICOM with potential impacts on an individual's claim.[2413] Certain of the *res judicata*-like provisions discussed in Chapter III also restrict only individual claims.[2414] Every other rule has at least some potential to work in both directions, in response to the conduct of either a State or individual, and in order to preclude at least certain claims belonging to the other.

However, whether and to what extent the rules discussed herein might apply as between overlapping individual and interstate claims, depends largely on the *identity* between those claims.[2415] As in respect of *res judicata*, that identity may be categorised in three ways:[2416]

(1) *legal injury*, meaning whether both a State and individual are claiming for breach of the same *rights*;[2417]
(2) *factual injury*, meaning whether both a State and individual are claiming for the same *damage*;[2418]
(3) *party identity*, meaning whether the same entities are bringing the overlapping claims, and for breach of *their* rights.[2419]

[2412] *Supra*.nn1973;1980.

[2413] *Supra*.nn534;538.

[2414] *Supra*.n528.

[2415] Similarly Shany (n4) 3 ('required degree of similarity');114;125;131-132;617; Shany (n7) 22ff; Nollkaemper (n6) 251 and see *supra*.nn69;617;1448;2384.

[2416] Cf.*supra*.Ch.III(II)(A), particularly *supra*.nn518-520;Ch.VI(II)-(IV) (*res judicata*); similarly Shany (n4) 133ff ('same parties'/'same issues').

[2417] *Supra*.nn111ff; also *supra*.nn518-519.

[2418] *Supra*.nn108-110; also *supra*.nn518-519;607;Ch.VII(II).

Certain of the rules discussed depend on one kind of identity. The prohibition on double recovery requires only, for instance, that the *damage* in two claims be the same.[2420] Other rules appear, at least *prima facie*, to depend on identity of *persons*: rules concerning waiver, countermeasures, and, at least arguably, self-defence, cannot affect third-party rights, meaning that they cannot *prima facie* operate where States and individuals hold rights as distinct entities.[2421]

Yet other rules appear to require two or more identities. While there is no identity of *persons* vis-à-vis the overlapping individual and diplomatic protection claims to which the local remedies, ICSID and CARICOM rules discussed herein are relevant,[2422] authorities suggest that local remedy exhaustion requires the individual claim to be in 'essence' the same as the State's,[2423] seeking reparation for the same damage.[2424] For its part, *res judicata* requires *prima facie* identity across all three categories.[2425]

Being dogmatic in terms of this classification runs the risk, however, of underestimating the extent to which an entity's actions might affect the other's

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[2419] See *supra*.nn520;1456 and *supra*.Ch.VI(IV); *infra*.n2421.

[2420] *Supra*.n607; generally *supra*.Ch.III(III)(B);Ch.VII(II).

[2421] See, respectively, waiver: *supra*.Ch.III, nn482-483;619; *supra*.Ch.V, particularly *supra*.n1069;1219ff; countermeasures: *supra*.Ch.VIII, nn1994-2012; self-defence: *supra*.Ch.VIII, particularly nn2214-2218;2222-2224.

[2422] Nollkaemper (n12) 529; *supra*.Chs.III-IV, particularly *supra*.nn533;844.

[2423] *Supra*.nn556;843.

[2424] *Supra*.nn840ff. Cf.Shany (n4) 30 (no 'formal similarity').

[2425] *Supra*.Chs.III(II)(A), particularly *supra*.nn518-520;Ch.VI(II)-(IV).

overlapping claims.[2426] This was drawn out, in particular, by the analysis undertaken herein of the distinction between diplomatic protection and 'direct' claims. Usually discussed in the context of the local remedies rule,[2427] the analysis suggested far wider ramifications.[2428]

Seven important points were made: (1) all interstate claims are brought for violation of interstate obligations;[2429] and violation of separate obligations owed to individuals may, but need not, be present;[2430] (2) *any* such breach can potentially give rise to diplomatic protection;[2431] (3) diplomatic protection is an interstate claim for individual *damage*;[2432] (4) individual damage for these purposes means damage to an individual's property or person;[2433] (5) such individual damage may presuppose *domestic* rights;[2434] (6) State damage may consist in material damage to its property,[2435] or moral damage where the violation is an 'affront',[2436] including where significant numbers of nationals

[2426] Cf. authorities *supra*.nn1448;1466;1553;1756.

[2427] See *supra*.Ch.IV(I) and authorities.

[2428] Similarly Shany (n4) 139-140.

[2429] *Supra*.Ch.I(II)(D);Ch.VI(I)(A), particularly nn665;671-673;677-678.

[2430] *Supra*.nn680-681; also *supra*.nn1460-1463;2007.

[2431] *Supra*.Ch.IV(I)(B);(D), particularly nn852-857.

[2432] *Supra*.Ch.IV(I);Ch.IV(I)(C), particularly nn649;814-816;828ff;851.

[2433] *Supra*.nn140;817-836.

[2434] *Supra*.nn661-664;1083-1106.

[2435] *Supra*.nn110;138;897-899;909-921; generally Ch.VII(II)(C).

[2436] *Supra*.nn110;156;165;949;952-953.

are affected;[2437] and (7) a claim is for individual damage where responsibility is invoked, requiring – expressly or otherwise – reparation for that damage.[2438]

These conclusions have significant implications for the potential operation, vis-à-vis overlapping individual and interstate claims, of all of the rules considered in this thesis. First, because diplomatic protection claims can be brought for *any* violation of international law causing individual damage, the category of claims which may be potentially precluded via the local remedies rule, as well as those under ICSID and CARICOM, is much broader than those who focus on whose rights are violated,[2439] or the nature of that right,[2440] might acknowledge. There are, it is true, exceptions to the local remedies rule,[2441] and a test of what damage is 'preponderantly' invoked in 'mixed' claims,[2442] but properly applying those requires an analysis beginning from the correct premise.[2443]

Secondly, Chapter V demonstrated that the rights *to claim* considered herein belong to States and individuals, meaning they cannot be waived by the other.[2444] Nonetheless, establishing that interstate claims commonly depend on individual *damage*, including consequent on violation of *domestic* rights, gives rise to significant scope for

[2437] *Supra*.nn946-954.

[2438] *Supra*.Ch.IV(III)(B)(ii), particularly *supra*.nn975-986.

[2439] *Supra*.Ch.IV(I)(A), particularly *supra*.nn651ff.

[2440] *Supra*.nn684-689.

[2441] See particularly *supra*.nn1039-1042.

[2442] *Supra*.nn552;646;868;1022.

[2443] Similarly Wittich (n73) 136;142; *supra*.n1044.

[2444] *Supra*.Ch.V.

individual waivers to prevent a State establishing breach or damage in an interstate claim.[2445]

Thirdly, while the application of *res judicata* is more complicated, it has been suggested that it at least has the potential to apply where individuals and States are claiming for the same damage, resulting from similar violations, and in the same interest.[2446] Additionally, the prohibition on double recovery has almost certain application as between individual and interstate claims for the same damage.[2447] The extensive analysis of individual and State damage, across diplomatic protection, 'mixed', and 'direct' claims, undertaken in Chapters IV, VI and VII showed that interstate claims, for any violation of international law, may be based on individual damage.[2448] They remain so even where many persons are affected, States' other interests are involved, and limited sums are paid.[2449]

The resulting possibilities for States to preclude their nationals' claims, such as through settlements,[2450] and, by contrast, for individuals to interfere in their doing so, cannot be underestimated. This may result from the application of *res judicata*: against the State where individuals claim before the State for those individuals' damage;[2451] or

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[2445] *Supra*.Ch.V(I).

[2446] *Supra*.Ch.VI and authorities, particularly Ch.VI(IV)-(VI); similarly authorities *supra*.nn1448;1466;1553;1653;1656;1756;1760;1763.

[2447] *Supra*.Ch.VII.

[2448] See *supra*.Ch.IV(I)(C)-(D);(III)(B)(i);Ch.VI(V)(B);Ch.VII(II)(A)-(B).

[2449] See *supra*.Ch.VI(V)(B);Ch.VII(II)(B) and particularly *supra*.nn1661ff;1808ff;1849-1850;1857-1859;1867ff.

[2450] See particularly authorities *supra*.Ch.V(II);Ch.VII(II)(B).

[2451] See particularly authorities *supra*.nn1586-1588;1758-1760.

against the individual if the State claims for some or even all its citizens,[2452] something – as Chapter V demonstrated – States commonly purport to do in entering into lump-sum settlements.[2453] But even if *res judicata* does not operate to preclude a claim as such, the double recovery rule will preclude overlapping claims for reparation, regardless of which entity receives that reparation, and whether through settlement, or before a domestic or international tribunal.[2454]

The distinction between breach and damage is also important for CPWs, with self-defence and countermeasures taken against a State able to preclude individual claims for damage, at least where those individuals' rights are not at issue.[2455] Moreover, this thesis has suggested that the concentration on 'third-party' rights, including vis-à-vis the question of 'direct'/'derivative' rights in respect of countermeasures, has placed insufficient focus on *party identity* in determining when those CPW might operate.[2456]

Just as rules of attribution recognise that certain individuals are the State for State responsibility purposes,[2457] so, it has been suggested, should certain individuals not be regarded as 'third parties' for the purposes of countermeasures where they have a sufficient 'connection', through complicity, with the State's wrongdoing.[2458] In such

[2452] See particularly authorities *supra*.nn1745-1757.

[2453] See particularly authorities *supra*.Ch.V(II).

[2454] *Supra*.Ch.VII.

[2455] *Supra*.nn1981-2012;2200-2203.

[2456] See *supra*.nn2007-2016;2178-2184. Similarly suggesting moving beyond the 'direct'/'derivative' debate: Criddle, *supra*.nn2014-2016; Peters (n1) 329-331; Roberts, 'Triangular' (n5) 356;399-402.

[2457] *Supra*.nn73-77;1974-1980;2093-2094; and see the similarities drawn *supra*.nn2013-2016;2071;2095;2390.

[2458] *Supra*.Ch.VIII(IV)(B), particularly *supra*.nn2081-2101; *supra*.n2012 on 'third parties' and similarly authorities *supra*.nn2013-2016;2071.

circumstances, countermeasures may preclude individual claims, even where those individuals possess international rights.[2459]

For self-defence, this thesis suggested that a focus on 'third-party' rights is to misunderstand the nature of this CPW, which envisages the possibility of infringing such rights where necessary to respond to an 'armed attack'.[2460] With self-defence also encapsulating the possibility of responding to attacks by individuals,[2461] both State and individual claims may accordingly be precluded because of the conduct of the other.[2462] Again, however, as Chapter VIII highlighted, the relationship between those entities may prove important in determining how far the CPW can affect the claims of both.[2463]

In sum, the mere fact of individual claims mechanisms having been provided does not guarantee that individuals will be able to claim unimpeded.[2464] Not only does the conduct of States have the capacity to preclude individual claims through the operation of the rules of State responsibility that have formed the focus of this thesis, but also, as Chapter V discussed in detail, States retain significant capacity to preclude *domestic* claims brought for violations of international law (often achieved through waiver

[2459] *Supra*.Ch.VIII(IV)(B) and authorities, particularly *supra*.nn2013-2016;2092-2101.

[2460] *Supra*.Ch.VIII(IV)(C)(ii)-(iii), particularly authorities *supra*.nn2229ff;2350ff.

[2461] *Supra*.Ch.VIII(IV)(C)(iii).

[2462] *Supra*.Ch.VIII(IV)(C)(iv).

[2463] *Supra*.nn2387-2390.

[2464] Similarly Roberts, 'Hybrid' (n7) 28 and see *infra*.n2467.

clauses),[2465] and to alter *international* claims mechanisms throughout the claims process.[2466] Individuals remain reliant therefore, to a large extent, on State action.[2467]

At the same time, States have, in enabling individuals to bring claims under international law, both before international tribunals and before domestic courts, restricted their own ability to bring and conclusively settle disputes on the interstate level.[2468] On the one hand, individual conduct may often, by operation of the rules discussed, impact the State's ability to claim, including to claim reparation, on the interstate plane. The potential operation of certain rules in this context is not new: the local remedies rule has, for instance, existed for some time.[2469] But it increases in importance where responsibility can be more commonly invoked before domestic courts,[2470] and analysing its operation has provided important insights for the application of other rules affecting the State's dispute settlement role.[2471] On the other hand, this thesis has demonstrated that even where States can interfere with their nationals' claims, they may face secondary human rights, investment, or domestic law claims.[2472]

With overlapping individual and interstate claims only likely to increase in future, it is hoped that this thesis has provided some clarity as to when individual or interstate

[2465] *Supra*.Ch.V(II)(B).

[2466] *Supra*.Ch.V(II)(C).

[2467] Similarly Parlett (n1) 359-362;367;370-371; McCorquodale (n1) 284 ('participation…dependent on State consent'); cf.286;301; cf.Peters (n1) 409-435.

[2468] Similarly McCorquodale (n1) 301; Roberts, 'Hybrid' (n7) 28.

[2469] Amerasinghe (n14) 22-37.

[2470] Authorities *supra*.n34; generally *supra*.nn290ff.

[2471] Cf.*supra*.nn2;11.

[2472] *Supra*.Ch.V(II)(D);Ch.VII(III);Ch.VIII(V) and authorities therein.

claims are liable to be precluded, under the law of State responsibility, by the actions of the other. Whether States wish to act, such as through treaty alteration, to address such possibilities, or allow them to be addressed as circumstances arise,[2473] States and individuals will hopefully, at least, be in a more certain position going forward.

[2473] Cf.Paparinskis, 'Countermeasures' (n5) 351; Roberts, 'Triangular' (n5) 357-358;388; Shany (n7) Ch.7; generally discussion *supra*.Ch.V(II)(C)(vii) and authorities therein.

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