REVISITING THE CONCEPTS OF RIGHTS, OBLIGATIONS, AND INJURY IN THE INVOCATION OF STATE RESPONSIBILITY IN INTER-STATE ADJUDICATION*

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ABSTRACT

This Article delves into the two-tiered approach to standing presented by Articles 42 and 48 of the International Law Commission's Draft Articles on State Responsibility. Particularly, it highlights the issues brought about by the Articles, ranging from overbreadth, potential for abuse, desirability of distinction, and legal status. It also looks into the decisions of the International Court of Justice and observes that, while there may be practice from states in raising such a claim to standing, there is an absence of judicial recognition with regard to Article 48, thereby highlighting its status as *lex ferenda*. After highlighting the issues and the status of the two-tiered approach, the Article revisits the concepts of rights, obligations, and injury, and demonstrates the merits of the reunification of the two articles. *First*, the Article deals with the issue of the distinction between "rights" under Article 42 and "legal interests" used in Article 48. The Article seeks to eliminate this distinction by relying on "rights" alone as a basis for the invocation of state responsibility in inter-state adjudication. *Second*, it submits that international obligations, even *erga omnes partes* and *erga omnes*, could be "bilateralised," thereby

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eliminating the need for different approaches based on the nature of the obligations. *Third*, the Article addresses the issue of "injury" and notes that both classes of states viewed by the two Articles are in fact injured if their "rights" have been violated through a breach of obligation by a responsible state. *Lastly*, it delves into the effect of the reunification of the articles on the implementation of state responsibility. It also endeavours to clarify issues surrounding the implementation of obligations *erga omnes* such as whether community decisions are required for its invocation and whether the directly affected states have the primacy of action over those states which are not.

INTRODUCTION

In a decentralised legal system, international adjudication remains an important route for the invocation of state responsibility and vindication of rights.[1] However, like any other legal system, international law requires claimants to have a "demonstrable interest" in order to "bring an action in respect to a wrong."[2] This view is reflected in the Draft Articles on State Responsibility ("Draft Articles"), Article 42 of which provides for the recourse of an injured state in cases of breach of its right by another state. On the other hand, Article 48 provides for the instances when a state with a legal interest may claim limited remedies.

This two-tiered approach has been brought about by the shift to an "objectified view of responsibility independent of its effects" and the view that not all responsibility relations may be "assimilated to the classical right-duty relations."[3] Thus, the approach eliminates "injury" (understood as "damage") as a condition for liability to arise and creates two bases for claims: "right" and "legal interest." States "injured" in the sense of Article 42 benefit from a set of legal entitlements which is more complete than those applicable to states falling under Article 48. Potentially, this creates problems

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[1] Iain Scobbie, *The Invocation of Responsibility for the Breach of 'Obligations under Peremptory Norms of General International Law'*, 13 EUR. J. INT'L L. 1201, 1203 (2002); ROSALYN HIGGINS, PROBLEMS AND PROCESSES: INTERNATIONAL LAW AND HOW WE USE IT 186 (1995).

[2] Phoebe Okowa, *Issues of Admissibility and Law on International Responsibility*, *in* INTERNATIONAL LAW 478 (Evans ed., 3rd ed. 2010).

[3] James Crawford, *Overview of Part Three of the Articles on State Responsibility*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 934 (Crawford, Pellet & Olleson eds., 2010); Alain Pellet, *Remarques sur une révolution inachevée: Le projet d'articles de la CDI surla responsabilité des Etats*, 42 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 7, 4 (1996).

of subjectivity and over-breadth and results in two kinds of claimants and two levels of claims.[4]

The Article revisits the concepts of rights, obligations, and injury, and proposes the reunification of the articles on the issue of standing to bring claims to international dispute resolution. Part I examines the approach provided by the Draft Articles and determines whether it has been adopted in practice. Part II suggests that this two-tiered approach may be avoided by clarifying the distinction between "rights" and "legal interests" while "bilateralising" international obligations. Further, it proposes to do away with the current system based on the concept of "legal entitlements" to that of "injury" (defined as a violation of a "right"). The latter requires claimant states to demonstrate that a "right" was violated in relation to the "breach." Part III proposes that any "remedy" a party may have would then be dependent on the "injury" suffered. It also clarifies certain issues concerning the implementation of obligations *erga omnes* such as whether community decisions are required for its invocation, and whether the directly affected states have the primacy of action over those states which are not directly affected by the breach of international obligation.

I. OVERVIEW OF THE INVOCATION OF STATE RESPONSIBILITY

A. Standing

The issue of standing, or of "who can invoke the responsibility of a state for a breach of international law," is often a disputed one.[5] Standing requires a "sufficient link between [the state] and the legal rule that forms the subject matter of the enforcement action."[6] It has been claimed that the state "must be the holder of the respective right matching the obligation breached by the [responsible] state."[7] Simply, "the injured state must also be

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[4] *See* CHRISTIAN TAMS, ENFORCING OBLIGATIONS ERGA OMNES 29 (2005); Mark Toufayan, *A Return to Communitarianism? Reacting to "Serious Breaches of Obligations Arising under Peremptory Norms of General International Law" under the Law of State Responsibility and United Nations Law*, 42 CAN. Y.B. INT'L L. 197, 225 (2005); Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798, 805 (2002).

[5] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF INTERNATIONAL LAW 580 (8th ed. 2012); *see* Christian Tomuschat, *Article 36*, *in* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE 704 (Zimmerman et al. eds, 2012); TAMS, *supra* note 4, at 26.

[6] TAMS, *supra* note 4, at 26.

[7] K. Sachariew, *State Responsibility for Multilateral Treaty Violations: Identifying the "Injured State" and Its Legal Status*, 35 NETH. INT'L L. REV. 273, 276 (1988).

a party to the primary legal relationship" or "a party to the breach."[8] Thus, "no state could [bring a claim for] a violation of international law [that] was committed by another state unless its own rights were infringed by this breach of law."[9]

Thus, traditionally, tribunals have acknowledged that only "the state directly injured in its own 'legal interests' has the right to submit a claim" to invoke "the responsibility of [a] state committing an internationally wrongful act."[10] In the *Reparations for Injuries* case, the International Court of Justice ("Court") stated that "only the party to whom an international obligation is due can bring a claim in respect of its breach."[11] As a consequence, "in the absence of an international authority capable of bringing about general respect for international law," states would not have a general capacity to bring claims to ensure that the law is enforced.[12]

There is, of course, an exception to this rule—that is, if a specific treaty provides for the standing of states not directly injured.[13] In some cases, treaties provide that "all states can respond against breaches irrespective of individual injury."[14] For instance, the European Convention on Human Rights provides that any state party "may refer to the [European Court of Human Rights] any alleged breach of the [treaty and its protocols] [committed] by another [state party]."[15] Thus, in cases where there exists a treaty provision granting standing to states not directly injured, courts "had little difficulty in applying such clearly formulated dispute settlement

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[8] TAMS, *supra* note 4, at 26.

[9] Jessica Howard, *Invoking State Responsibility for Aiding the Commission of International Crimes–Australia, the United States and the Question of East Timor*, 2 MELB. J. INT'L L. 1, 13-14 (2001), *citing* DIONISIO ANZILOTTI, TEORIA GENERALE DELLA RESPONSIBILITÀ DELLO STATO 88-89 (1902).

[10] Roberto Ago, *Fifth Report on State Responsibility*, II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 3, 28 (1976); Howard, *id.* at 13-14.

[11] Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 149, 181-82 (Apr. 11); JAMES CRAWFORD, STATE RESPONSIBILITY: GENERAL PART 366 (2013).

[12] Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 217, 295 (1994), *citing* BRIGITTE BOLLECKER-STERN, LE PRÉJUDICE DANS LA THÉORIE DE LA RESPONSABILITÉ INTERNATIONALE 50 (1973).

[13] Ago, *supra* note 10, at 28 n.128; *See* Simma, *id.*

[14] TAMS, *supra* note 4, at 2.

[15] *Id.*, *citing* Convention for the Protection of Human Rights and Fundamental Freedoms Art. 33, Nov. 4, 1950, 213 UNTS 221; Pfunders (Austria v. Italy), Admissibility, 4 Y.B. 116 (1961); *See* Constitution of the International Labour Organisation Art. 26, Apr. 1, 1919, 15 UNTS 40.

clauses."[16] In the *Memel Statute* case, the Court stated that "[t]he Applicant Powers are not here [before the Court] to defend their particular interests, nor to maintain any rights of their own which they allege to have been infringed. Their only interest is to see that the Convention to which they are Parties is carried out by Lithuania."[17]

Nevertheless, it is claimed that international law has moved from this restrictive view of standing to a more expansive one. It has been observed that "there is a growing awareness that the [traditional approach] is inadequate for [providing solutions to] problems such as, [but not limited to] the maintenance of international peace and security, ensuring worldwide respect for human rights, democratising international economic relations, [and] preserving the human environment."[18] Thus, it is forwarded that the "interest of every member of the international community to see international law being generally respected" may now be "sufficient to establish standing before the Court."[19] Simply, it gives "other states or the organised international community the capacity to react to violations" which would otherwise "remain unenforceable under general international law."[20]

The *Draft Articles* appear to reflect these two views. On the one hand, Article 42 presents the idea of an "injured state." This is the state "whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act."[21] The use of the term "individual" under Article 42 indicates that in the circumstances, the "performance of the obligation was owed to that state" thereby highlighting the restrictive view.[22] On the other hand, Article 48 deals with "states other than injured states."[23] These are the states with a

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[16] TAMS, *id.* at 75.

[17] *Id.* at 76, *citing* Interpretation of the Statute of the Memel Territory, 1932 PCIJ Series C No. 59, at 173.

[18] Sachariew, *supra* note 7, at 273.

[19] *See id.* at 274; Simma, *supra* note 12, at 295; Dinah Shelton, *Hierarchy of Norms and Human Rights: Of Trumps and Winners*, 65 SASK. L. REV. 301, 322-23 (2002).

[20] Simma, *supra* note 12, at 297.

[21] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 31, 116 (2001).

[22] *Id.* at 118; Crawford et al., *supra* note 3, at 943; Willem Riphagen, *Sixth Report on State Responsibility*, II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 4, 7 (1985).

[23] *See* Julia Barboza, *Legal Injury: The Tip of the Iceberg in the Law of State Responsibility?*, *in* INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 20 (Ragazzi ed., 2005).

legal interest in the compliance with the international obligation.[24] Thus, the latter article may be said to have incorporated the progressive view on standing.

Article 42(a) refers to states to which the obligation is owed individually but the provision applies to both bilateral or multilateral relationships.[25] For instance, in a bilateral treaty or a unilateral commitment of one state to another, the breach of the obligation by one state entitles the state to whom the obligation is owed to bring a claim against the state breaching the obligation. On the other hand, multilateral relationships, "although will characteristically establish a framework of rules involving state parties [may] in certain cases [...] give a situation [that] involves a relationship of a bilateral character between two parties."[26] Thus, multilateral treaties may give rise to "'bundles' of bilateral relations."[27]

Article 42(b)(i) considers states "specially affected" by a violation of a collective obligation mirroring article 60(2)(b) of the Vienna Convention on the Law of Treaties ("Vienna Convention").[28] It contemplates the instance where the effects of the breach of obligation extend to a group of states bound by the obligation. However, in contrast with Article 42(a), the breach has a "particularly adverse effect on one state" or a smaller subgroup. In this case, "there exist both the more extensive legal entitlements of the specially affected state" and the "lesser legal entitlements of the other states in respect of whom the breached obligation existed."[29] Under this provision, "for a state to be considered injured, it must be affected by the breach in a way [that] distinguishes it from the generality of other states to which the obligation is owed."[30]

Lastly, Article 42(b)(ii), mirroring Article 60(2)(c) of the Vienna Convention, refers to the scenario where "the obligation breached is of an interdependent type" or an obligation the violation of which by any state "radically changes the position of all the other states to which the obligation

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[24] Scobbie, *supra* note 1, at 1205, *citing* James Crawford, *Responsibility to the International Community as a Whole,* fourth annual Snyder Lecture delivered before the Indiana University School of Law-Blomington (Apr. 5, 2000).

[25] International Law Commission, *supra* note 21, at 118.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 119; Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331.

[29] Crawford, *supra* note 3, at 946; James Crawford, *Third Report on State Responsibility*, II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 12, 36 (2000).

[30] Rachael Johnstone, *Invoking Responsibility for Environmental Injury in the Arctic Ocean*, 6 Y.B. POLAR L. 3, 15 (2014).

is owed with respect to the further performance of the obligation."[31] The obligation is premised on an "implied understanding that the purpose of the obligation can only be attained if each party [to the obligation] complies with it."[32] Thus, it treats every state to the legal relationship to be particularly affected and allows each state individually entitled to react to the breach.[33]

On the other hand, Article 48, paragraphs (1)(a) and (b) entitle states to invoke responsibility "not in its individual capacity by reason of having suffered injury, but in its capacity as a member of a group of states to which the obligation is owed, or as a member of the international community as a whole."[34] In other words, it contemplates obligations *erga omnes partes* and *erga omnes* respectively. Article 48 thus considers the distinction between "the primary beneficiaries [or] the right holders and those states with a legal interest in compliance."[35] To this end, Article 48(1)(a) provides for the scenario where an obligation is established for the collective interest of a group of states "but transcends the sphere of bilateral relations of state parties."[36] Article 48(1)(b), on the other hand, allows for a state to invoke responsibility 'if the obligation in question is owed to the international community as a whole'.[37]

It is claimed that "the significance of this provision is that it, read with article 42, breaks the link between substantive rights and processes which previously restricted the development of the law."[38] However, it is also claimed that the Article allows for "public interest standing, not the exercise of a subjective right."[39] Thus, given the nature of the "interest" involved, paragraph (2) of Article 48 specifies the exhaustive categories of remedies that may be claimed.[40] The measures are limited to the cessation of the internationally wrongful act; assurances and guarantees of non-

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[31] Bruno Simma & Christian Tams, *Article 60: Termination or suspension of the operation of a treaty as a consequence of its breach*, *in* VIENNA CONVENTION ON THE LAW OF TREATIES 1364 (Corten & Klein eds., 2011).

[32] Crawford, *supra* note 3, at 945.

[33] International Law Commission, *supra* note 21, at 119.

[34] *Id.* at 126.

[35] Scobbie, *supra* note 1, at 1205; Johnstone, *supra* note 30, at 17.

[36] International Law Commission, *supra* note 21, at 126.

[37] *Id.*

[38] CRAWFORD, *supra* note 11, at 366.

[39] Crawford, *supra* note 3, at 934; Marina Spinedi, *From One Codification to Another: Bilateralism and Multilateralism in the Genesis of the Codification of the Law of Treaties and the Law of State Responsibility*, 13 EUR. J. INT'L L. 1099, 1101 (2002).

[40] International Law Commission, *supra* note 21, at 127, *noting* S.S. "Wimbledon" [hereinafter "*Wimbledon*"], 1923 PCIJ Series A No. 1, 30; South West Africa (Liberia v. South Afr.), Preliminary Objections, 1962 I.C.J. 319, 320.

repetition; and performance of the obligation of reparation, in the interest of the injured state or of the beneficiaries of the obligation breached.

B. Observations

The two-tiered approach was not adopted without criticism. Doubts had been cast as to the desirability of the distinction made by Articles 42 and 48 and whether "states should be able to claim a breach of these obligations even if they have suffered no direct injury."[41] Of course, "there are surely advantages in strengthening awareness among states that the obligations of international law [such as those] relating to aggression, basic human rights, and the shared environment are of general interest and common concern."[42] However, unlike the implementation of responsibility "which normally concerns two or a few states," the second tier involves "*omnes* injured states" where the "risks of arbitrariness and conflict increase geometrically."[43] This being the case, some states expressed concern as to the "breadth, potential for abuse, and for [the] opening the floodgates of litigation."[44] States have observed that they "are not inclined to [...] allow every member of the now numerous community of states to become a 'prosecutor' on behalf of the community in judicial proceedings."[45]

Similarly, criticisms have also been directed to the lack of collective decision-making to bring a claim or take an action under Article 48. To recall, the Article allows a state to invoke responsibility "not in its individual capacity by reason of having suffered injury, but in its capacity as a member of a group of states to which the obligation is owed, or indeed as a member of the international community as a whole."[46] However, the "implementation of integral obligations is [seen to be] frequently within the competence of a collective organ which is empowered to assess performance by the parties and eventually decide upon the measures to be taken in case of non-compliance" rather than individual states themselves.[47] Thus it is claimed that Article 48 recognises community rights but does not

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[41] Weiss, *supra* note 4, at 801, 803; International Law Commission, *State Responsibility: Comments and Observations received from Governments*, A/CN4/515, at 75, 80 (2001).

[42] Jonathan Charney, *Third State Remedies in International Law*, 10 MICH. J. INT'L L. 57, 94 n.180 (1989).

[43] Gaetano Arangio-Ruiz, *Seventh Report on State Responsibility*, II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 6, 17 (1995); Spinedi, *supra* note 39, at 1111.

[44] CRAWFORD, *supra* note 11, at 368; International Law Commission, *supra* note 41, at 79.

[45] Charney, *supra* note 42, at 94 n.180.

[46] International Law Commission, *supra* note 21, at 126.

[47] Sachariew, *supra* note 7, at 285.

predicate their assertion on community decisions.[48] While the Article is premised on collective obligations, "the provision leaves it to each state to determine whether a breach of an obligation owed to the international community as a whole has occurred and whether to make a claim."[49]

Further, the legal status of the second tier has also been questioned.[50] Of course, there appears to be no problem in the adoption of Article 42 as it has long been accepted that "where the injury complained of has been suffered by the state itself, the state's [standing] to present a claim is not in doubt."[51] On the other hand, Article 48 presents a different issue. While it is claimed that the principle that states have standing to "institute proceedings to vindicate its interest as a member of the international community has long been accepted,"[52] judicial acceptance of this view appears to be limited. Thus, it is submitted that it is the principle that states may owe obligations *erga omnes* or *erga omnes partes* that has been accepted but not necessarily the standing derived from this principle.

C. Practice

Although earlier cases have made references to obligations *erga omnes*,[53] the view which Article 48 is hinged on traces its roots to the *dictum* in the *Barcelona Traction* case which "limited if not reversed the Court's judgement in the *South West Africa* cases"[54] According to said *dictum*:

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[48] Daniel Bodansky & John Crook, *The ILC's State Responsibility Articles: Introduction and Overview*, 96 AM. J. INT'L L. 773, 786 (2002).

[49] Weiss, *supra* note 4, at 805; International Law Commission, *supra* note 41, at 73; Alan Nissel, *ILC Articles on State Responsibility: Between Self-Help and Necessity*, 38 N.Y.U. J. INT'L L. & POL. 355, 366 (2005).

[50] Brigitte Stern, *A Plea for "Reconstruction" of International Responsibility Based on the Notion of Legal Injury*, *in* INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 97, 99 (Ragazzi ed., 2005).

[51] LASSA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW VOL. 1: PEACE 511-12 (Jennings & Watts eds., 9th ed. 2008); SIMON OLLESON, THE IMPACT OF THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS 249 (2008).

[52] CRAWFORD, *supra* note 11, at 365.

[53] *See* Aaland Islands, 1920 LNOJ Spec. Supp. 3, 17; *Wimbledon*, 1923 PCIJ Series A No. 1, at 20; Corfu Channel (U.K. v. Albania) [hereinafter "*Corfu Channel*"], Merits, 1949 I.C.J. 4, 22 (Apr. 9); Reservations to the Convention on the Preservation and Punishment of the Crime of Genocide [hereinafter "*Reservations to the Genocide Convention*"], Advisory Opinion, 1951 I.C.J. 15, 23 (May 28); Pfunders, *supra* note 15, at 138.

[54] CRAWFORD, *supra* note 11, at 364-65, *citing* Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain) [hereinafter "*Barcelona Traction*"], Judgment, 1970 I.C.J. 3, 32, ¶ 33 (Feb. 5), *compare with* South West Africa Second Phase (Ethiopia v. South Africa; Liberia v. South Africa) [hereinafter "*South West Africa*"], Judgement, 1966 I.C.J. 6, 35 (July 18).

> These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[55]

The pronouncement, however, must be taken *cum grano salis*.[56] It should be noted that while the Court recognised the legal interests of all states, it did not state that this legal interest could be vindicated by way of proceedings.[57] The context in the *Barcelona Traction* case was a "discussion of what is usually seen as Belgium's *jus standi* to claim against Spain for the injury done to the Canadian company in which Belgian nationals were shareholders."[58] However, the matter is "not in fact a procedural one [as] the question was [...] whether the action of the Spanish courts constituted a breach of an international legal obligation owed to Belgium."[59] It was recognised that "if the facts were as claimed, there had been a breach of an obligation owed to Canada as [the] national state of the company."[60] Thus, "when the Court [...] suggested that Belgium would have been in no difficulty if it had been relying on an obligation *erga omnes*, it apparently contemplated that Belgium, on that hypothesis, would have been able not merely to 'invoke' the obligation before the Court, but to obtain reparation for the injury done to its nationals."[61] This distinction becomes clearer in light of Court's latter pronouncement in the same case:

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[55] Barcelona Traction, *id.* at 32, ¶ 33; Ian Sinclair, *State Responsibility and the Concept of Crimes of States*, *in* INTERNATIONAL CRIMES OF STATES: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 OF STATE RESPONSIBILITY 225 (Weiler, Cassese & Spinedi eds., 1989).

[56] Nuclear Tests (Australia v. France) [hereinafter "*Nuclear Tests*"], Judgment, 1974 I.C.J. 253, 387 (Dec. 20) (De Castro, *dissenting*); *See* Barcelona Traction, *id.* at 325 (Ammoun, separate opinion).

[57] *See* TAMS, *supra* note 4, at 162; Alfred Rubin, *Actio Popularis, Jus Cogens and Offenses Erga Omnes*, 35 NEW ENG. L. REV. 265, 277 (2001); Stephen McCaffrey, *Lex Lata or the Continuum of State Responsibility*, *in* INTERNATIONAL CRIMES OF STATES: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 OF STATE RESPONSIBILITY 97 (Weiler, Cassese & Spinedi eds., 1989), *compare with* MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 97 (1996).

[58] Hugh Thirlway, *Injured and Non-Injured States Before the International Court of Justice*, *in* INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 314 (Ragazzi ed., 2005).

[59] *See* TAMS, *supra* note 4, at 162

[60] *Id.*

[61] *Id.*

> In the present case, it is therefore essential to establish whether the losses allegedly suffered by Belgian shareholders in Barcelona Traction were the consequence of the violation of obligations of which they were the beneficiaries. In other words: has a right of Belgium been violated on account of its nationals' having suffered [an] infringement of their rights as shareholders in a Company not of Belgian nationality?[62]

Of course, it could be argued that while the passage lacks legal significance, "being an isolated statement" that is "outside the field of enforcement," "the notion of obligations *erga omnes* 'has [been seen to have] developed apace' and is [now] more than an aberration."[63] Yet, an analysis of caselaw may prove otherwise. For instance, the Court's treatment of obligations *erga omnes* in the *Namibia* opinion appears to be ambiguous. It is true the Court stated that it had to "declare that there is an obligation" upon the members of the United Nations "to bring the situation to an end."[64] However, what the Court effectively did is to assert that states had some specific obligation of non-recognition and of not assisting South Africa.

The same was also raised in the *Nuclear Tests* case but was not passed upon by the Court in the grant of interim measures and in the judgment.[65] However, worth noting are the dissenting opinions which pointed out that Australia had no material interest in asking the Court to declare the tests to be unlawful infringements of the principle of freedom of the high seas. For instance, Judge De Castro rejected the view that the international community may bring claims for violations of obligations *erga omnes*. Thus, he stated that he was "unable to believe that by virtue of [the] dictum the Court would regard as admissible, for example, a claim by State A against State B that B was not applying 'principles and rules concerning the basic rights of the human person' with regard to the subjects of State B or even State C."[66] Similarly, in the *East Timor* case, the Court, while "recognising the

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[62] *Barcelona Traction*, 1970 I.C.J. 3, 35.

[63] TAMS, *supra* note 4, at 166, *citing* East Timor (Portugal v. Australia) [hereinafter "*East Timor*"], Judgement, 1995 I.C.J. 90, 215 (June 30) (Weeramentary, *dissenting*).

[64] Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 270, [hereinafter "*Namibia*"], Advisory Opinion, 1970 I.C.J. 16, 54, ¶ 117 (June 21).

[65] *See* Nuclear Tests, Interim Measures, 1973 I.C.J. 99, ¶ 33 (June 22); *East Timor*, 1995 I.C.J. at 215 (Weeramentary, *dissenting*).

[66] *Nuclear Tests*, 1974 I.C.J. 253, 387 (De Castro, *dissenting*); *and* 437 (Gros, separate opinion); *compare with Nuclear Tests*, 1974 I.C.J. at 437 (Barwick, *dissenting*) *and* 305-06 (Petrén, separate opinion).

erga omnes status of the right to self-determination, upheld the indispensable third-party rule, declining to exercise its jurisdiction."[67]

Obligations *erga omnes* were also the subject of the *Application of the Genocide Convention* case, which was also unclear as to the issue of standing as the Court merely referred to the notion of obligation in terms of the territorial applicability of the Genocide Convention.[68] It did mention, however, that "the [state parties] do not have any interests of their own [as] they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d'être* of the Convention."[69] However, Judge Oda, in his declaration, viewed the Genocide Convention as one that protects not the particular rights of any individual state but "the status of human beings with human beings and the university interest of the individual in general."[70] Thus, "no state, not even the victims' state of nationality, therefore could invoke the responsibility of the responsible state."[71] Further, "nor did the *erga omnes* status of the obligation to prevent and punish genocide affect this result, as obligations *erga omnes* were 'borne in a general manner [...] by [states] in their relations with [...] the international community as a whole'."[72]

The *Wall* advisory opinion also "dealt with obligations *erga omnes*, but cannot be said to have clarified the matter."[73] The Court "indicated that it would consider "the legal consequences of the internationally wrongful acts flowing from Israel's construction of the wall as regards other States" and observed that "the obligations violated by Israel include certain obligations *erga omnes*."[74] However, the opinion was limited to the recognition that Israel violated the right of the Palestinian people to self-determination along with

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[67] CRAWFORD, *supra* note 11, at 377, *citing East Timor* 1995 I.C.J. at 102, ¶ 29. *See also East Timor*, 1995 I.C.J. at 215 (Weeramantry, *dissenting*) *and* 131-32 (Ranjeva, separate opinion).

[68] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro) [hereinafter "*Application of the Genocide Convention*"], Judgment, 1996 I.C.J. 595, 615, ¶ 31 (July 11).

[69] *Id.* at 611, ¶ 22.

[70] *Id.* at ¶ 6 (Oda, declaration).

[71] TAMS, *supra* note 4, at 187.

[72] *Id.*

[73] HUGH THIRLWAY, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE: FIFTY YEARS OF JURISPRUDENCE VOLUME II 1155 (2013), *citing* Construction of a Wall in the Occupied Palestinian Territory [hereinafter "*Wall*"], Advisory Opinion, 2004 I.C.J. 136, 200, ¶ 159 (July 9).

[74] *Id.*

its other international law obligations and the obligations of states not to recognise the illegal situation brought about by the breach.[75]

The issue of standing, at least for obligations *erga omnes partes*, may only have been dealt with directly once by the Court and in a few instances by other courts or tribunals.[76] In the *Obligation to Prosecute or Extradite* case, the Court stated that Belgium had an interest under Article 48 as the provisions of the Torture Convention were obligations *erga omnes partes*.[77] Parenthetically, it must be noted that Belgium merely invoked Article 42(b)(i) and even expressly excluded Article 48 which makes the pronouncement of the Court more surprising.[78] Dissenting opinions expressed scepticism as to the legal status of *erga omnes partes* standing. Judge Xue noted that, while the dictum of the *Barcelona Traction* case has been referred to by the Court in a number of cases, "in none of them, has it pronounced that the existence of a common interest alone would give a state entitlement to bring a claim in the Court."[79] Thus, by "adopting the notion *erga omnes partes*, it seems that the Court has blurred the distinction between the claimant state and the other states parties by prescribing a general right to invoke international responsibility in the Court."[80]

The absence of decisions under Article 48 highlights the fact that the provision was crafted *de lege ferenda*.[81] As pointed out by the International

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[75] Toufayan, *supra* note 4, at 209; *see* Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Judgment, 2016 I.C.J. 255 (Oct. 5).

[76] *See* Prosecutor v. Blaskic, Judgment on the Request for Review, ICTY, 95-14/1, ¶29 (Oct. 29, 1997); Prosecutor v. Furundžija, Judgment, ICTY, 95-17/110, ¶151 (Dec. 10 1998); Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, ITLOS Case No. 17, ¶180 (Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Feb. 1, 2011); *note* Human Rights Committee, General Comment No. 31 U.N. Doc C/21/Rev1/Add13, at 26 (2004).

[77] Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, 2012 I.C.J. 422, ¶¶68-70 (July 20).

[78] Memorial Submitted by the Kingdom of Belgium, Obligation to Prosecute or Extradite (Belgium v. Senegal), International Court of Justice, General List No. 144, at 5.14-18 (July 1, 2010).

[79] *Id.* at 575 (Xue, *dissenting*).

[80] *Id.* at 576, 588 (Donoghue, *dissenting*), *and* at 618 (Sur, *dissenting*).

[81] James Crawford, *Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts*, *in* FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA 239 (Fastenrath et al. eds., 2011); International Law Commission, Conclusions of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, A/61/10, ¶38 (2006); Nissel, *supra* note 49, at 362; Fernando Bordin, *Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law*, 64 INT'L COMP. L. Q. 535,

Law Commission ("ILC") itself "this aspect of article 48, paragraph 2, involves a measure of progressive development, which is justified since it provides a means of protecting the community or collective interest at stake."[82] However, in most cases, "the Court found a way to avoid giving force to the claims based on the *erga omnes* character of an obligation."[83] This reluctance may be due to the "lack of clear parameters of the rule"[84] and the "procedural problems which the admission of consequences might entail."[85] Alternatively, it may be due to the reluctance of states to "set precedents which could be used in future litigations against them"[86] or "allow [states] to become 'surrogate prosecutor[s]' on behalf of the international community."[87]

II. REVISITING INTERESTS, OBLIGATIONS, AND INJURY

A. Interest-Right Analysis

The first adopted text of the Draft Articles collectively referred to the "legal entitlements" corresponding to the obligations of responsible states as "rights."[88] This means that all states entitled to invoke state responsibility were collectively referred to as "injured states." However, it was subsequently proposed that a distinction should be made between "relationships involving rights and those involving legal interests."[89] Thus, this led to the adoption of a distinction that depends on the basis of the

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556 n.107 (2014); Bruno Simma, *Does the UN Charter Provide an Adequate Legal basis for Individual or Collective Responses to Violations of Obligations* Erga Omnes?, *in* THE FUTURE OF INTERNATIONAL LAW ENFORCEMENT. NEW SCENARIOS – NEW LAW? 126 (Delbrück ed., 1993).

[82] International Law Commission, *supra* note 21, at 114, 2-3.

[83] Karl Zemanek, *New Trends in the Enforcement of Erga Omnes Obligations*, 4 MAX PLANCK Y.B. U.N. L. 1, 10-11 (2000); Tomuschat, *supra* note 5.

[84] André Nollkaemper, *International Adjudication of Global Public Goods*, 23 EUR. J. INT'L L. 769, 781 (2012); NINA JØRGENSEN, THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES 222-23 (2000).

[85] Toufayan, *supra* note 4, at 6.

[86] Okowa, *supra* note 2, at 499-500.

[87] Toufayan, *supra* note 4, at 225; International Law Commission, State Responsibility: Comments and Observations received from Governments, A/CN4/488, at 31-32 (1998).

[88] Crawford, *supra* note 3, at 942, *citing* International Law Commission, *Report on the Work of the 48th Session*, II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 57, 62 (1996).

[89] *Id.* at 942, *citing* Crawford, *supra* note 29, at 25, 32-33.

claim, either based on right or legal interest, of the state alleging a breach of international obligation.[90]

It is accepted that for a claimant state to have standing, possession of "mere interests" is not enough.[91] Any state would possess a "myriad of interests"[92] ranging from "economic, political, humanitarian, or similar" interests.[93] It has been noted that "in the long run every state has an interest in the observance of any rule of international law [however] this by no means authorises [...] every state to demand the performance by every other state of its international obligations."[94] If being "'interested' simply meant being 'concerned,' all states would always be somehow interested in every legal rule."[95] Further, the requirement of a "mere interest" would be futile since "each state is the judge of its own interest."[96] Moreover, "it begs the question which state can be said to have an interest in the observance of a legal rule or under which circumstances it can claim to be affected or injured by a breach of international law."[97] Thus, "in order to avoid the problems of subjectivity and over-breadth, it is therefore necessary to define which types of interests, and which forms of concern, are sufficient to establish standing."[98]

One view is that any "interest" invoked by a claimant state must be "personal and direct" and that "legal actors could only respond to breaches of individual legal positions."[99] This is in direct contrast with the view that international law "has long recognised that states may have legal interests in matters" that do not necessarily "affect their material interests,"[100] or that states may have interests common with other states as in the accomplishment of the objectives a particular convention.[101] However, it has

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[90] Crawford, *supra* note 3, at 942.

[91] Kyoji Kawasaki, *Injured State in International Law of State Responsibility*, 28 HITOTSUBASHI J. L. & POL. 17, 20 (2000).

[92] *East Timor*, 1995 I.C.J. 90, 103.

[93] *South West Africa*, 1966 I.C.J. 6, 242 (Koretsky, *dissenting*); at 425 (Jessup, *dissenting*); *Barcelona Traction*, 1970 I.C.J. 3, 36, ¶ 46.

[94] Willem Riphagen, *Fourth Report on State Responsibility*, II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1, 21 (1983).

[95] TAMS, *supra* note 4, at 28.

[96] *South West Africa*, 1962 I.C.J. 319, 570 (Morelli, *dissenting*).

[97] TAMS, *supra* note 4, at 28.

[98] *Id.*; Sachariew, *supra* note 7, at 274.

[99] TAMS, *supra* note 4, at 51. *South West Africa* at 455-56 (Winiarski, *dissenting*).

[100] *South West Africa*, 1966 I.C.J. 6, 425 (Jessup, *dissenting*).

[101] *Reservations to the Genocide Convention*, 1951 I.C.J. 15, 23; *Nuclear Tests*, 1974 I.C.J. 253, 370, ¶ 118 (Onyeama, Dillard, Jiménez de Aréchaga, and Waldock, *dissenting*); *East Timor*, 1995 I.C.J. 90, 255, ¶ 101 (Skubiszewski, *dissenting*).

also been noted that "it is not sufficient for a state to point to specific factual consequences of a breach, or to political or humanitarian concerns to which a breach has given rise."[102] There must be something else that formalises the claim. This being the case, the directness or materiality of an interest may not be adequate in resolving the issue of standing. Thus, in the second phase of the *South West Africa* case the Court stated that "the existence of an 'interest' does not of itself entail that this interest is specifically juridical in character [...] in order to generate legal rights and obligations, it must be given juridical expression and be clothed in legal form."[103]

This means that in order to decide whether a state has standing, a distinction must be drawn in "international law as in municipal law" between "interests protected by law" or a "legally protected lawful interests" and those which are not.[104] In other words, such interest must be "clothed in legal form" or made effective by substantive law such that the claimant state may demand enforcement from the responsible state.[105] If this is the case, then such "legally protected interest" exists because there is a corresponding duty on the part of the responsible state to respect such "interest." In other words, the interest exists "when in consequence of given facts, the law declares that [one] is entitled to enforce against another a claim."[106] Thus, it can be said that the responsible state has a "duty" which is the correlative of the claimant state's "right."[107] Simply, the claimant state must have a recognised "right" that corresponds to the "obligation" breached by the responsible state.[108]

From this, it is submitted that the creation of the distinction between "rights" and "legal interests," thereby creating the two-tiered approach, may have been unnecessary and only contributes to the unwieldiness of the articles dealing with the invocation of state responsibility. The concept of "rights," after all, is closely intertwined with

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[102] TAMS, *supra* note 4, at 31

[103] *South West Africa*, 1966 I.C.J. at 34, ¶ 50.

[104] *Barcelona Traction*, 1970 I.C.J. 3, 325 (Ammoun, separate opinion); Sachariew, *supra* note 7, at 274; TAMS, *supra* note 4, at 29. *See* Kent Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991, 1023 (1977).

[105] Republic v. Coalbrine International, 617 SCRA 491, 497 (2010); Uy v, Ct. of Appeals, 372 Phil 743, 752 (1999). *See South West Africa*, 1966 I.C.J. 6, 34, ¶ 51.

[106] Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, YALE L.J. 712, 717 (1917), *citing* Mellinger v. City of Huston, 68 Tex. 37, 45, 3 S.W. 249 (1887).

[107] *Id.*

[108] *Id.* at 725 n.44; *Nuclear Tests*, 1974 I.C.J. 253, 304 (Petren, *dissenting*); *South West Africa*, 1962 I.C.J. 319, 455 (Winiarski, *dissenting*).

that of "legal interests" if not the same. This being the case, the two-tiered approach might have easily been avoided if the first adopted text of the Draft Articles, collectively referring to the basis of invocation of state responsibility as "rights," was adopted.[109] By considering the issue of standing to be based on "rights" rather than "interests," the approach avoids the creation of two tiers as the issue becomes simply whether the claimant state has an enforceable or demandable "right" against the responsible state.

B. Obligations Analysis

Another reason for splitting the articles on the invocation of state responsibility is the view that the "bilateralist approach" is inadequate in dealing with issues concerning community interests.[110] Thus, the view that "all responsibility relations could be assimilated to classical bilateral right-duty relations" was rejected during the second reading of the Draft Articles.[111] It is submitted however that the rejected view holds true. As in the case of rights and interests, the reunification of Articles 42 and 48 may be done by "bilateralising" international obligations.

Article 42 (a) is founded on this view of relations where the obligation breached is "owed to the claimant state individually."[112] This is true in the case of bilateral legal relationships such as in bilateral treaties, where there exist "reciprocal rights and obligations as between two state parties to the treaty."[113] However, "multilateral [legal relationships also] often have the same effect."[114] It can be that "even if the content of the obligations imposed is uniform towards all other state parties, the legal relationships remain bilateral ones as between each pair of state parties, and the legal relationship between one pair is quite separate from the legal relationship between another pair of states parties."[115] Further, "this may be the case even if the uniformity of the content of the bilateral legal relationships is itself founded upon an interest common to several state parties which are in the same position, defined in the multilateral [legal

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[109] *See* International Law Commission, *supra* note 88, at 62.

[110] Sachariew, *supra* note 7, at 273; Simma, *supra* note 12, at 313; International Law Commission, *supra* note 81, at ¶391; Federica Paddeu, *Multilateral Disputes in Bilateral Settings: International Practice Lags Behind Theory*, 76 CAM. L.J. 1, 3 (2016); ENZO CANNIZARO, THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION 67 (2011).

[111] TAMS, *supra* note 4, at 33, *citing* James Crawford, *Introduction*, *in* ARTICLES ON STATE RESPONSIBILITY 1 (Crawford ed., 2002).

[112] International Law Commission, *supra* note 21, at 118.

[113] Riphagen, *supra* note 22, at 7.

[114] *Id.*

[115] *Id.*

relation] itself, or even common to all states parties."[116] Indeed, treaties are often concluded in multilateral form because of the existence of such interests common to several or all states. Thus, the relationship is "referred to as giving rise to 'bundles' of bilateral relations."[117]

The same reasoning could be applied to Article 42 (b) (i) dealing with "specially affected states" should a collective obligation be violated. In this circumstance, the responsible state may be said to have breached its obligation towards the state or the states "particularly injured" individually.[118] Each state or a group of states in a multilateral legal relationship could bring a claim to enforce its violated right.[119] Thus, the relationship between the responsible state and the affected state or states remains bilateral.

As to Article 42 (b) (ii), the provision is premised on the view that obligations owed by the responsible state are interdependent, such that the purpose of the obligation could only be attained if each party complies with it.[120] As with Article 60 (2) (c) of the Vienna Convention, "the provision covers the special case of integral [legal relationships] the objective of which can only be achieved through the interdependent performance of obligations by all parties."[121] As such, the obligation appears to be "indivisible" as the performance of the prestation "cannot be validly performed in parts."[122] The relationship of the parties, on the other hand, may be described as "solidaristic" in the sense that the breach of the obligation by the responsible state affects all the other states in the legal relationship.[123] Thus, the claimant states have a common interest against the responsible state which would be: (i) the cessation of the acts affecting the performance of the interdependent obligation; (ii) restitution; and (iii) assurance of non-repetition.[124] Notwithstanding these, bilateral relations are still maintained

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[116] *Id.*

[117] International Law Commission, *supra* note 21, at 118.

[118] *See* Thomas Giegerich, *Article 60: Termination or suspension of the operation of a treaty as a consequence of its breach*, *in* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 1039 (Dörr & Schmalenbach eds., 2012).

[119] International Law Commission, *supra* note 21, at 119.

[120] Crawford et al., *supra* note 3, at 945; Simma & Tams, *supra* note 31, at 1364; Johnstone, *supra* note 30, at 16.

[121] *See* Simma & Tams, *id.*

[122] ARTURO TOLENTINO, IV CIVIL CODE OF THE PHILIPPINES 252, 255 (1991); Danae Azaria, *State Responsibility and Community Interest in International Energy Law: A European Perspective*, 5 CAM. J. INT'L & COMP. L. 169, 174 (2016); Olivia Pegna, *Counter-claims and Obligations Erga Omnes before the International Court of Justice*, 9 EUR. J. INT'L L. 724, 732 (1998).

[123] Spinedi, *supra* note 39, at 1106; *see* TOLENTINO, *id.* at 217, 227-28.

[124] International Law Commission, *supra* note 21, at 119.

with the responsible state on one side and the claimant state or states on the other.

With regard to Article 48, there are views that the relationship between the responsible state, and the states to which the obligation is owed, is solidary.[125] However, it has been said "this is not always guaranteed" as there might be "divergence among the existence of the wrongful act and the obligations that flow from the wrongful act of the responsible state."[126] Nevertheless, it should be noted that in some jurisdictions, public laws have "long recognised that great numbers of individuals can hold parallel or identical rights to see a particular obligation observed."[127] Thus, it submitted that "bilateralisation" under Article 48 remains possible.

An obligation under the Article may be considered as an obligation *in rem* residing in a state, and owed to the members of a class of states where each of the members may claim against the former in cases of breach.[128] As a correlative of rights *in rem*, the obligation of a state correlates to a right granted upon every other state with the sole exception of the state to whom the obligation is imposed.[129] An obligation *erga omnes* then may be seen as a series of rights *erga singulum*.[130] This means that if an obligation *erga omnes* is imposed upon State A, it owes an obligation *erga singulum* to State B, a separate obligation *erga singulum* to State C, and so on. These obligations are in no way dependent one upon the other. Thus, if State A violates its obligation, it becomes opposable *erga singulum* to any state who enjoys the correlative right.[131] Hence, the bilateral relations among states are maintained.

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[125] MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES 17, 201 (2010); Sachariew, *supra* note 7, at 282.

[126] Crawford et al., *supra* note 3, at 252.

[127] TAMS, *supra* note 4, at 35.

[128] *See* Hohfeld, *supra* note 106, at 740, 745; Weiss, *supra* note 4, at 800-01; Thirlway, *supra* note 73, at 1151; Crawford, *supra* note 29, at ¶ 85.

[129] *See* Shalev Ginossar, *Rights in Rem – A New Approach*, 14 ISR. L. REV. 286, 290 (1979), *citing* Amsterdam v. Minister of Finance, (1952) 6 PD 945, 986 (Israel).

[130] *See East Timor*, 1995 I.C.J. 90, 172 (Weeramantry, *dissenting*); *see also* Pellet, *supra* note 3, at 4; TAMS, *supra* note 4, at 175, *citing* Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413, 422 (1983); *compare with* International Law Commission, *supra* note 81, at ¶ 383; Johnstone, *supra* note 30, at 25.

[131] *See East Timor*, 1995 I.C.J. at 214 (Weeramantry, *dissenting*); Thirlway, *supra* note 73, at 1151; Weiss, *supra* note 4, at 800-01.

C. Reconstructing Rules Based on Injury

The term "injury" is not defined consistently in international law, nor is there an agreed or exact definition.[132] The "definition is crucial because it thereby describes the group of states that can legitimately claim a violation of a right owed to them by another state."[133] The term may be understood as the violation of a legal right resulting from a breach of obligation.[134] It is distinct from "damage" which is the "material or other loss suffered by the injured state."[135] It was also one of the pillars of international responsibility along with the internationally wrongful act and the causal link between injury and the former.[136]

While "injury" is central to international responsibility, the reference to the term, as a condition for the existence of international responsibility, was eliminated.[137] Early reports have indicated an acceptance of the view that "any breach of an international obligation towards another state involves some kind of 'injury' to that other state."[138] However, such reference failed to make its way to the Draft Articles,[139] which instead employs the term "injury" in relation to the "injured state" and "states other than the injured state."[140] Injury "was not a constituent [considered] as an element of responsibility and account had been taken only of legal [or] abstract injury resulting from any breach of an international obligation."[141] The removal of the term is said to "display the will to bring responsibility into existence as soon as the international legal order is breached, that is to

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[132] James Crawford, *Fourth Report on State Responsibility*, II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 3, 8 (2001).

[133] David Bederman, *Article 40(e) and (f) of the ILC Draft Articles on State Responsibility: Standing of Injured States Under Customary International Law and Multilateral Treaties*, Annual Meeting of the American Society of International Law, Apr. 1-4, 1998.

[134] CRAWFORD, *supra* note 11, at 55; Willem Riphagen, *Third Report on State Responsibility*, II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 22, 35 (1982); HUGH THIRLWAY, THE SOURCES OF INTERNATIONAL LAW 149 (2014); *see* BPI Express Card Corp. v. Ct. of Appeals, G.R. No. 120639, 296 SCRA 260, 272, Sept. 25, 1998; Equitable Banking Corp. v. Calderon, G.R. No. 156168, 446 SCRA 271, 280, Dec. 14, 2004; Custodio v. Ct. of Appeals, G.R. No. 116100, 253 SCRA 483, 490, Feb. 9, 1996.

[135] CRAWFORD, *supra* note 11, at 55;

[136] Stern, *supra* note 50, at 94.

[137] *Id.*; Gaetano Arangio-Ruiz, *Fourth Report on State Responsibility*, II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 6, 43 n.298 (1992).

[138] International Law Commission, *Report on the Work of the 25th Session*, II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 163, 183 (1973); Barboza, *supra* note 23, at 7.

[139] *See* International Law Commission, *supra* note 21, arts. 1, 12.

[140] *Id.* at 116.

[141] Arangio-Ruiz, *supra* note 137, at 43 n.298.

introduce a sort of review of legality through the institution of international responsibility."[142] Thus, the existence of the wrongful act becomes the sole trigger of responsibility. However, this approach is problematic considering that "whenever the breach of an international obligation occurs, the subjective right corresponding to that obligation is injured [and] at the same time, the so-called 'objective legal order' is also injured."[143] The 'breach of an obligation by a state always entails the violation of the subjective right of another state, since the correlation between obligation and subjective right is always valid."[144] Following this reasoning, "a state can thus be 'injured' by the breach of an international obligation even if it did not suffer any damage other than the infringement of its right."[145] From this, "in order to identify the 'injured state or states' in each particular case for the purposes of the legal consequences of an internationally wrongful act, it is essential, therefore, to determine which state or states have suffered an infringement of their right."[146]

The concept of "injury" highlights again the split introduced by the *Draft Articles*. Article 42 presents the concept of an "injured state" or a state that has suffered a direct or personal material or moral damage.[147] On the other hand, Article 48 provides for "states other than the injured state" thereby suggesting that states under Article 48 have not been injured.[148] Further, it appears that the *Draft Articles* somehow conflate "injury" and "damage." This observation becomes more evident in the ILC's commentary to Article 42 where it appears to employ the term "injury" to mean damage instead of the violation of a right:

> For example, a case of pollution of the high seas in breach of article 194 of the United Nations Convention on the Law of the Sea may particularly impact on one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed. In that case, independently of any general interest of the States parties to the Convention in the preservation of the marine environment, those coastal States parties should be considered as injured by the breach [...] For a State to be

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[142] Stern, *supra* note 50, at 94.

[143] Barboza, *supra* note 23, at 19-20.

[144] *Id.*

[145] Arangio-Ruiz, *supra* note 137, at 43.

[146] *Id.*

[147] Sachariew, *supra* note 7, at 275; Johnstone, *supra* note 30, at 15; Yasuhiro Shigeta, *Obligations to Protect the Environment in the ICJ's Practice: To What Extent Erga Omnes*, 55 JAP. Y.B. INT'L L. 176, 199 (2012).

[148] International Law Commission, *Report on the Work of the 46th Session*, II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 136, 143 (1994).

> considered injured, it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed.[149]

Considering the "injury" of a state in relation to the violation of its "rights" removes the need for the two classifications under the *Draft Articles*. In such a case, there would no longer be a "state other than an injured state." There would only be the "injured state" whose rights have been breached and the "non-injured state" whose rights had not been violated. Thus, the split based on "injury" could certainly be avoided. It would "concretise the preoccupation of all states for the respect of international rules [and] would also permit the reunification of the concept of responsibility [that] currently seems to be splintered between different elements that are difficult to regroup."[150] Therefore, from the analyses based on interests and obligations and the reconstruction based on the concept of injury, Articles 42 and 48 could be reunified in the following manner:

> For the purposes of invoking state responsibility, a state is an injured state if a:
>
> (a) right has been created or is established for the protection of the individual interests of a state or states; or
>
> (b) right has been created or is established for the protection of a particular group of states or the collective interests of states, subject to the relevant rules of international law; and
>
> such right was violated by another state through an internationally wrongful act.[151]

III. IMPLEMENTATION OF STATE RESPONSIBILITY

A. Remedies Available

The foregoing demonstrated how Articles 42 and 48 could be reunified on the basis of "rights," "injury," and the "bilateralisation" of obligations. The next question revolves around the remedies available to claimant states. Traditionally, "international responsibility was synonymous

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[149] International Law Commission, *supra* note 21, at 119.
[150] Stern, *supra* note 50, at 101.
[151] *See* Kawasaki, *supra* note 91, at 23.

with an obligation to make reparation."[152] However, with the work of the *Draft Articles*, the "responsibility for internationally wrongful acts" created "complex situation resulting from a breach [that] gives rise to a bundle of rights in favour of the victim and obligations bearing on those responsible for the breach of which the obligation to make reparation is but one element."[153]

Thus, the split between Articles 42 and 48 obliged the ILC to "introduce new obligations, resulting from wrongful acts, beside the obligation to make reparation, on the one hand, and to give new rights to states other than injured states, on the other hand, without clarifying the capacity in which they have standing."[154] As previously mentioned, Article 48 (2) specifies the exhaustive categories of remedies that a "state other than an injured state" may claim which is a "more limited range of rights as compared to those of 'injured states' under [A]rticle 42."[155] While an "injured state" under Article 42 is entitled to a full range of reparations,[156] "states other than an injured state" are entitled to request cessation, satisfaction, and performance of the obligation in the interest of the "injured state."[157]

In private law, the old adage is "the interest is the measure of the action."[158] As a corollary, the remedy that a claimant is entitled to is dependent on the class of the right violated, the extent of the breach, and the nature of damage suffered. Following the reunification of Articles 42 and 48, "there would only be one concept, that of injured state, which may suffer different forms of injury."[159] Further, "there would only be one aspect of responsibility [or consequence of the internationally wrongful act] which is the obligation to make reparation" the extent of which differs based on the obligation breached and the damaged caused.[160] Simply, if the state is injured then it should be entitled to the appropriate remedies. Thus, there should be no need to split categories of injured state based on the range of

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[152] Stern, *supra* note 50, at 97.

[153] *Id.*, *citing* JEAN SALMON, DICTIONNAIRE DE DROIT INTERNATIONAL PUBLIC 999 (Salmon ed., 2001).

[154] *Id.* at 99

[155] International Law Commission, *supra* note 21, at 127; *see Wimbledon*, 1923 PCIJ Series A No. 1, 30.

[156] Kawasaki, *supra* note 91, at 18.

[157] International Law Commission, *supra* note 21, at 127-28; Marjan Ajevski, *Serious Breaches, the Draft Articles on State Responsibility and Universal Jurisdiction*, 2 EUR. J. L. STUD. 12, 25-26 (2008).

[158] *Barcelona Traction*, 1970 I.C.J. 3, 325 (Ammoun, separate opinion).

[159] Stern, *supra* note 50, at 102.

[160] *Id.*

claims injured states are entitled to nor is there a need to spell this out in the *Draft Articles*.

To illustrate, a state suffering direct material or moral damage would certainly be entitled to the full range of reparations under international law. As the International Court ruled in the *Chorzów Factory* case, "it is a general conception of law that every violation of an engagement involves an obligation to make reparation."[161] The responsible state then must make a full reparation for any damage caused by the internationally wrongful act and "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[162] Thus, the state is entitled to restitution, compensation, cessation, and satisfaction depending on the attendant circumstances including, but not limited to, the extent of the damage suffered by the state.

On the other hand, a state not suffering direct damage but was nonetheless injured due to a wrongful act of another state would, under international law, be entitled to a limited range of claims. Unlike in the case of a state that suffered direct material or moral damage, restitution or compensation would not be available as there is no loss suffered. A prerequisite for restitution or compensation is damage. Without any damage, any compensation given to states not directly injured would amount to undue profit.[163]

Cessation may also be available along with assurances and guarantees of non-repetition if circumstances so require albeit this "may be a measure of progressive development."[164] The ILC nevertheless forwards that such may be justified "since it provides a means of protecting the community or collective interest at stake."[165] The Commission further notes that "certain provisions [of treaties such those dealing with human rights] allow [for the] invocation of responsibility by any state party" and in the

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[161] Factory at Chorzów (Germany v. Poland) [hereinafter "*Chorzów Factory*"], 1928 PCIJ Series A No. 17, 27; *see* Gabčikovo-Nagymaros Project (Hungary/Slovakia) [hereinafter "*Gabčikovo-Nagymaros*"], Judgment, 1997 I.C.J. 7, 80 (Sept. 25); M/V Saiga (No. 2) [hereinafter "*M/V Saiga*"], 120 ILR 143, 199 (1999); Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, 2010 I.C.J. 14, ¶ 273 (Apr. 20); Rainbow Warrior, 20 RIAA 215, 268–71 (1990); *Wall*, 2004 I.C.J. 136, 198.

[162] *Chorzów Factory*, *id.* at 47.

[163] Kawasaki, *supra* note 91, at 27; *see Gabčikovo-Nagymaros*, 1997 I.C.J. at 81; *M/V Saiga*, 120 ILR at 199; *Chorzów Factory*, *id.* at 47; Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, 2018 I.C.J. (General List) 150, ¶¶ 54-87 (Feb. 2).

[164] International Law Commission, *supra* note 21, at 127.

[165] *Id.*

cases where they have been resorted to, "a clear distinction has been drawn between the capacity of the [claimant] state to raise the matter and the interests of the beneficiaries of the obligation."[166]

Lastly, a declaration may be available to formalise that the activity complained of is contrary to international law. It has been observed that the "the focus of [the] action by a state under article 48 [not being damaged] in its own right and therefore not claiming compensation on its own account [would be] likely to be on the very question whether a state is in breach."[167]

This is not unheard of, as states have brought claims in the past seeking declarations as to legal positions. Recently, in the *South China Sea Arbitration* case, the Philippines sought a declaration on whether the Philippines' and China's respective rights and obligations in regard to the South China Sea are governed by the United Nations Convention on the Law of the Sea, thereby invalidating China's claims based on "historic right", and whether China had violated the said convention by interfering with the Philippines' sovereign rights and freedoms, through construction and fishing activities that have harmed the marine environment.[168]

B. Concerns Regarding the Implementation of Obligations Erga Omnes

The last issue that this Article seeks to address is the approach in dealing with states invoking a claim under an obligation *erga omnes*. It now highlights another merit of the reunification of Articles 42 and 48, especially in addressing issues of whether a claim under an obligation *erga omnes* requires community decisions and whether such is subordinate to the claim of a state that suffered a direct damage.

Traditional remedies afforded to states not directly damaged, but nonetheless having an interest in a case, is that of intervention.[169] The statute of the Court provides for two categories of intervention. The *first* is available

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[166] *Id.*

[167] International Law Commission, *supra* note 21, at 127, *citing* German Interests in Polish Upper Silesia (Germany v. Poland), 1926 PCIJ Series A No. 7, 18; *Corfu Channel*, 1949 I.C.J. 4, 35; *Wimbledon*, 1923 PCIJ Series A No. 1, 30.

[168] South China Sea Arbitration (Philippines v. China), Jurisdiction, PCA Case No. 2013-19, ¶ 26 (Perm. Ct. Arb.) (Oct. 29, 2015); *see* South China Sea Arbitration (Philippines v. China), Merits, PCA Case No. 2013-19, ¶ 1203 (Perm. Ct. Arb.) (July 12, 2006); *see* Mavrommatis, 1925 PCIJ Series A No. 5, 51; Interpretation of Judgments Nos. 7 and 8, 1927 PCIJ Series A No. 13, 20-21; Eastern Greenland, 1933 PCIJ Series A/B No. 53, 23-24, 75.

[169] Thirlway, *supra* note 23, at 321; Statute of the ICJ, arts. 62-63.

when a non-treaty state "has an interest of a legal nature which may be affected by the decision in the case."[170] The *second* grants the opportunity to a party to a convention when the construction of such convention is in question.[171] Notwithstanding these options, the Court "has been very cautious in defining the legal interest required for interventions by third parties to disputes before it" to the extent that it has only granted third-party intervention in a few cases.[172] Further, the function of intervention is not to allow the intervenor to make a claim but rather protect its interests.[173] The intervenor merely asks "the Court to find the existence of exactly the same wrongful act as the injured state." The "only difference would be the nature of the remedies asked for, those requested by the intervener being 'weaker' than those available to the" injured state.[174] As it requires the existence of a primary dispute, intervention would not be quite enough to implement obligations *erga omnes*.

However, one of the issues pertaining to the implementation of state responsibility pertaining to obligations *erga omnes* is the question of whether states are permitted to implement responsibility for such violations without an authorising community decision.[175] A view "holds that international institutions bear sole responsibility for community enforcement of such obligations."[176] Thus, "breaches of integral obligations should be based on solidarity rather than one-sided reactions."[177] For instance, in the *East Timor* case, the Court "remained non-persuaded that the UN organs had acted forcefully through resolutions to define and protect the rights of the Timorese people."[178] Thus, it appears that that the Court may "have taken the view that enforcement of [obligations *erga omnes*] is a collective one acting through the United Nations."[179] The view forwards the

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[170] Thirlway, *supra* note 58, at 322; *see* Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) [hereinafter "*Frontier Dispute*"], Judgment on the Application to Intervene, 1990 I.C.J. 92, 133-34, ¶ 97 (Sept. 13); Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Judgment on the Application to Intervene, 1999 I.C.J. 1029 (Oct. 21).

[171] Charney, *supra* note 42, at 65.

[172] Weiss, *supra* note 4, at 807.

[173] *See Frontier Dispute*, 1990 I.C.J. at 92.

[174] Thirlway, *supra* note 58, at 322.

[175] Bodansky & Crook, *supra* note 48, at 786; Roberto Ago, *Second Report on State Responsibility*, II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 177, 184 (1970); *see* Gaetano Arangio-Ruiz, *Fifth Report on State Responsibility*, II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 3, 17-8 (1993).

[176] Toufayan, *supra* note 4, at 215.

[177] Sachariew, *supra* note 7, at 283; *see* Riphagen, *supra* note 94, at ¶ 115.

[178] *Id., citing East Timor*, 1995 I.C.J. 90, 256, ¶¶ 103-04 (Skubiszewski, *dissenting*).

[179] *Id., citing* Claudia Annacker, *The Legal Regime of Erga Omnes Obligations in International Law*, 46 AUS. J. PUB. & INT'L L. 131, 139 (1993); André De Hoogh, *The*

danger of leaving it to each state "to determine whether a breach of an obligation owed to the international community as a whole has occurred and whether to make a claim."[180]

On the other hand, the opposing view, under the *uti singuli* theory, points out that in case of the absence of a competent organisation or, if it exists, its inability to take effective measures, an injured state is entitled to implement state responsibility on its own.[181] Collective decisions or institutional implementation may be "unrealistic given the decentralised nature" of the international community.[182] It is submitted that the latter theory is also in accord with the claim that obligations *erga omnes* are "bilateralisable." While these obligations are owed to the international community as a whole, the obligations remain separate obligations *erga singulum* between the claimant state and the responsible state. Thus, should there be a breach of such an obligation, a state whose right was violated is entitled to bring a claim notwithstanding lack of community decision on the matter. Of course, an exception to this proposal is the scenario where the legal relationship establishes a control mechanism that "supervise the implementation of obligations by state parties to the relevant [relationship]."[183]

Another issue is the relationship of a claimant state under an obligation *erga omnes* that has not suffered a direct damage, and a state that has. In this circumstance, it has been suggested that priority of reactions should be provided to the "particularly [damaged] state."[184] Thus, it follows from this view that the claim of a state under an obligation *erga omnes* is "merely accessory to the claim of the directly [damaged] state."[185] It appears then that aside from creating two tiers for the basis for standing, Articles 42 and 48 also create two levels for the preference and concurrence of actions.

Similarly, it has also been forwarded that the claimant state under an obligation *erga omnes* "may be called on to establish that it is acting in the interest of the injured party" especially in cases where there is no directly

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Relationship between Jus Cogens, Obligations Erga Omnes and International Crimes: Peremptory Norms in Perspective, 42 AUS. J. PUB. & INT'L L. 183, 208-11 (1991).

[180] Weiss, *supra* note 4, at 805.

[181] Sachariew, *supra* note 7, at 283, *citing* MARTIN HANZ, ZUR VÖLKERRECHTLICHEN AKTIVLEGITIMATION ZUM SCHUTZE DER MENSCHENRECHTE, EUROPARECHT-VÖLKERRECHT 108 (1985); Bruno Simma, *Self-Contained Regimes*, 16 N.Y. INT'L L. 129 (1985).

[182] Toufayan, *supra* note 4, at 217.

[183] Kawasaki, *supra* note 91, at 18.

[184] CRAWFORD, *supra* note 11, at 366-67.

[185] Thirlway, *supra* note 58, at 316-17.

damaged state or such state is incapable of bringing claims.[186] From these, it has been forwarded that "a modified structural account is proposed that facilitates an *actio popularis*, whenever the beneficiary of an obligation cannot invoke responsibility."[187]

However, if the argument for the reunification "rights" and "interests" is followed, a state claiming on the basis of obligations *erga omnes* would be considered to be invoking an individual right although the obligation was established for the benefit of a group of states or the community of states.[188] This being the case, its claim of individual right cannot be considered as accessory to another, nor would there be a need for a structure catering to a residual *action popularis*. Thus, it is forwarded that the determination of the claims of the state under an obligation *erga omnes* is mutually exclusive of the determination of the claims of the state not under an obligation *erga omnes*. After all, the former would not constitute *res judicata* on the latter, nor would the latter be a prerequisite for the former. Nonetheless, it is admitted that "although finding might well have implications for the legal situation of those two states."[189]

CONCLUSION

The Draft Articles are indeed a progressive development of international law that went beyond the codification and clarification of existing custom.[190] However, like any progressive development, it is not without problems. Part I highlighted the issues surrounding the adoption and application of the two-tiered approach presented by the *Draft Articles* with regard to the rules of standing ranging from overbreadth, potential for abuse, desirability of distinction, and legal status. It looked into the decisions of the International Court of Justice and various tribunals, concluding that while there may be practice from states in raising such an issue, there is an absence of judicial recognition with regard to the second tier, thereby highlighting its status as *lex ferenda*.

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[186] *Id.*; International Law Commission, *supra* note 21, at 127.

[187] Johnstone, *supra* note 30, at 26; Ajevski, *supra* note 157, at 25-26.

[188] Stern, *supra* note 50, at 101.

[189] Thirlway, *supra* note 58, at 318-19; Andreas Zimmermann, *Article 35*, *in* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE 649 (Zimmerman et al. eds, 2012), *citing* Phosphate Lands in Nauru (Nauru v. Australia), Judgment, 1992 I.C.J. 240, ¶55 (June 26).

[190] Scobbie, *supra* note 1, at 1202; Okowa, *supra* note 2, at 499-500; CRAWFORD, *supra* note 11, at 366.

After highlighting the problems and the status of the two-tiered approach, the Article sought to address the views that led to the creation of the two-tiers and demonstrate the merits of the reunification of the articles. In Part II, the Article dealt with the issue of the distinction between "rights" under Article 42, and "interests" used in Article 48. This Article sought to eliminate this distinction by relying on "rights" alone as a basis for the invocation of state responsibility in inter-state adjudication. It also considered the distinction based on "obligations" that contributed to the division of tiers. It noted that international obligations, even *erga omnes partes* and *erga omnes*, could be "bilateralised," thereby eliminating the need for different approaches based on the nature of the obligations. The Article then addresses the issue of "injury" that also contributed to the two-tiered approach. The *Draft Articles* refer to two classes based on "injury", and provide separate remedies based on the extent of the damage. The Article noted that both classes of states are in fact injured if their "rights" have been violated through a breach of obligation by a responsible state. This being the case, there would be no need for such distinction.

Lastly, as to remedies, Part III notes that general international law already provides the range of claim that is dependent on the extent of the breach, the class of the right violated, and the nature of damage suffered. As such, there is no need to adopt a distinction based on the remedies available to a claimant state. It also endeavoured to clarify issues surrounding the implementation of obligations *erga omnes*. Following the premises set out in previous parts, this Article noted that the implementation of these obligations should not be made dependent on community decisions or international institutions. Further, the claim of a state under an obligation *erga omnes* should not be considered as an accessory to the claim of the state not under such an obligation. The claims of both states are mutually exclusive although one may have implications on the other.

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