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The Invocation of Responsibility for the Breach of ‘Obligations under Peremptory Norms of General International Law’

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Abstract

The invocation of responsibility for the breach of an international obligation is a matter involving numerous substantive issues. This paper examines only two — the law of diplomatic protection and the process of international adjudication. Both these issues raise particular problems where the obligation in question is a peremptory norm of international law. All states have a legal interest in ensuring compliance with peremptory norms, whether or not they or their nationals are materially injured by any given breach. That this entails a multilateral, as opposed to a bilateral, delictual relationship was recognized by the International Law Commission when it drafted the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts. Although Articles 42 and 48 of these Articles recognize that states not directly injured by the breach of a peremptory obligation are entitled to invoke the responsibility of the delinquent state, these two Articles are not self-contained. In particular, they are expressly subject to Articles 44 and 45. These preclude the invocation of responsibility unless the nationality of claims rule is satisfied (Article 44) or if the injured state has validly waived or acquiesced in the lapse of the claim (Article 45). These conditions restrict, if not negate, the practical utility of Articles 42 and 48.

In his Fourth Report on State Responsibility, the Special Rapporteur, Professor James Crawford, expressed the view that Part Two, Chapter III, of the Draft Articles adopted by the International Law Commission, which deals with ‘serious breaches of obligations under peremptory norms of general international law’, is:

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a framework for the progressive development, within a narrow compass, of a concept which is or ought to be broadly acceptable.¹

Subsequently, the Commission adopted a final set of Articles on the Responsibility of States for Internationally Wrongful Acts,² which were approved, without vote, by the General Assembly in Resolution 56/83.³ The terms by which these Articles were adopted are significant. The second preambular paragraph noted:

that the International Law Commission decided to recommend to the General Assembly that it take note of the draft articles in a resolution and annex the draft articles to the resolution, and that it consider at a later stage, and in the light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles with a view to concluding a convention on the topic.⁴

This was reinforced in operative paragraph 3 of Resolution 56/83, which provided that the General Assembly:

Takes note of the articles on the responsibility of States for internationally wrongful acts, presented by the International Law Commission . . . and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action.

Accordingly, these Articles expressly constitute a soft instrument which, moreover, embodies some provisions that avowedly amount to the progressive development of international law that go beyond the codification (or clarification) of existing custom.

The invocation of responsibility for the breach of an obligation, whether this arises under a peremptory norm of general international law or not, is a conceptual synapse in international law, as it is a junction where numerous substantive issues merge and cross. For instance, obvious relationships can be forged between the invocation of responsibility and the law of treaties, particularly the breach of treaties; the secondary rules of diplomatic protection; and the process of international adjudication.

Issues of state responsibility were excluded from the ambit of the 1969 Vienna Convention on the Law of Treaties, by virtue of Article 73. Given constraints of time and space, this paper will not examine cognate issues arising in the law of treaties.⁵ The focus of this symposium is, after all, on breaches of obligations arising from

¹ UN Doc. A/CN.4/517 (2 April 2001) 20, para. 52 (hereinafter 'Fourth Report'). All Commission documents cited may be found on www.un.org/law/ilc/repofra.htm and www.law.cam.ac.uk/rcil/ilcsr/statresp.htm.

² UN Doc. A/CN.4/L.602/Rev.1 (26 July 2001), formally adopted by the Commission on 9 August 2001.

³ A/RES/56/83 (12 December 2001): I am grateful to Professor Crawford for supplying me with a copy of this resolution.

⁴ On the Commission's recommendation, see International Law Commission, Report on the Work of Its Fifty-Third Session (23 April–1 June and 2 July–10 August 2001) UN Doc. A/56/10 (hereinafter 'ILC Report 2001'), 38–41, paras 61–67; and James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002) 57–61.

⁵ On these matters, see e.g. Shabtai Rosenne, *Developments in the Law of Treaties 1945–86* (1989) 33 *et seq*; Bowett, 'Treaties and State Responsibility', in D. Bardonnet, J. Combacau, P.M. Dupuy and P. Weil, *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally* (1991) 137. See also the *Rainbow Warrior* arbitration (*New Zealand v. France*) 82 ILR 499, at 548–551; and the *Gabcikovo-Nagymaros Project* case (*Hungary v. Slovakia*), ICJ Reports (1997) 7, at 38–39, paras 46–48.

peremptory norms of general — as opposed to conventional — international law and the consequent international responsibility of states. The other two topics, however, are more germane, and due attention shall be paid to them, particularly as the Commission is currently examining diplomatic protection.⁶ One should expect the state responsibility and diplomatic protection projects to cohere, as the latter is frequently the modality by which allegations that a state is responsible for an internationally wrongful act are expressed:

Diplomatic protection [is] not separate from State responsibility; a State acting on behalf of one of its nationals [is] nonetheless invoking State responsibility.⁷

Similarly, international adjudication is an important route for the invocation and vindication of an allegation that a state's responsibility has been engaged.

The principal Articles relevant to the invocation of responsibility for 'a serious breach by a State of an obligation arising under a peremptory norm of general international law' are Articles 40, 42 and 48. Article 40 provides:

1. This Chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 42 provides:

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) that State individually; or
- (b) a group of States including that State, or the international community as a whole, and the breach of the obligation:
 - (i) specially affects that State; or
 - (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Article 48 provides:

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
 - (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
 - (b) the obligation breached is owed to the international community as a whole.
2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

⁶ See J. R. Dugard, Special Rapporteur, First Report on Diplomatic Protection, UN Doc. A/CN.4/506 (7 March 2000), and Addendum, UN Doc. A/CN.4/506/Add.1 (20 April 2000); Second Report on Diplomatic Protection, UN Doc. A/CN.4/514 (28 February 2001), and Corrigendum, UN Doc. A/CN.4/514/Corr.1 (27 July 2001); International Law Commission, Report on the Work of Its Fifty-Second Session (1 May–9 June and 10 July–18 August 2000), UN Doc. A/55/10 (hereinafter 'ILC Report 2000'), 141–175, paras 406–495; and ILC Report 2001, *supra* note 4, at 507–521, paras 158–207.

⁷ ILC Report 2000, *supra* note 6, at 86, para. 286.

- (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with Article 30; and
 - (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.
3. The requirements for the invocation of responsibility by an injured State under Articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.⁸

Although the substantive ambit of this paper is restricted to the invocation of responsibility, some consideration of fundamental concepts seems necessary. Invocation shall, however, be examined in isolation from any consequent issues such as countermeasures and reparation for injuries. The latter in particular has given rise to uncertainties within the International Law Commission itself, as Professor Crawford noted in his Fourth Report:

It does not seem disproportionate to allow all States to insist upon the cessation of a breach of an obligation owed to the international community as a whole. This would seem to follow directly from the Court's *dictum* in *Barcelona Traction*. Whether a claimant State should be able to seek reparation 'in the interests of the injured State or of the beneficiaries of the obligation breached' is, perhaps, less clear. In particular, this is something the injured State, if one exists, might reasonably be expected to do for itself.⁹

This uncertainty persists in the final Articles. The Commission's commentary to Article 48(2), which addresses the issue of the remedies that a state not directly injured by a breach of an obligation arising under a peremptory norm might claim, notes:

a State invoking responsibility under article 48 and claiming anything more than a declaratory remedy and cessation may be called on to establish that it is acting in the interest of the injured party. Where the injured party is a State, its government will be able authoritatively to represent that interest. Other cases may present greater difficulties, which the present articles cannot solve.¹⁰

1 The Conceptual Framework Underpinning an Invocation of Responsibility

Article 42(a) contemplates the traditional — perhaps stereotypical — bilateral delictual relationship. It identifies the state entitled to invoke the responsibility of another on the basis of the obligation allegedly breached. If the performance of an obligation is owed individually to a state, then that state is entitled to invoke responsibility should breach occur. One aim of the Articles is an attempt to transcend this bilateral straitjacket. As Professor Crawford has observed:

⁸ Article 43 deals with the notice of claim that an injured State must give to the allegedly delictual state; Article 44 deals with the admissibility of claims (the nationality of claims rule and the duty to exhaust local remedies); and Article 45 deals with the loss of the right to invoke responsibility through waiver of or acquiescence in the lapse of the claim by the injured state.

⁹ Fourth Report, *supra* note 1, at 16, para. 41.

¹⁰ ILC Report 2001, *supra* note 4, at 323, para. 12; Crawford, *supra* note 4, at 279.

international law embodies interests which are closely analogous to public law interests in other legal systems. We have not yet succeeded in ridding ourselves of the notion that legal obligation in international law can be analogized to bilateral legal obligations, and their breach to bilateral wrongs. To make progress means creating some (if not too many) additional categories.¹¹

His remedy is apparently simple:

We cannot make progress in developing the idea of a public international law (rather than a private spectre of international law), unless we distinguish between the primary beneficiaries, the right holders, and *those states with a legal interest in compliance*.¹²

As Article 48(1) makes clear, whether a state, not entitled to invoke the responsibility of an allegedly delinquent state under Article 42, has 'a legal interest in compliance' with the obligation breached depends on the normative nature of that obligation. Whether the extension of the category of states entitled to invoke responsibility in Article 48 is successful in transcending the bilateralism embedded in the traditional law of state responsibility remains to be seen. Ancillary rules — such as those regulating diplomatic protection — may serve to constrain the scope of the progress sought to be gained.

A Invocation of the Responsibility of a State

Both Articles 42 and 48 refer to states' entitlements 'to invoke the responsibility of another State' but, despite 'the pivotal significance of the concept of invocation of responsibility',¹³ invocation is not defined anywhere in the Articles. It is, however, stated in the commentary to Article 42 that:

For this purpose,¹⁴ invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal. A State does not invoke the responsibility of another State merely because it criticizes that State for a breach and calls for the observance of the obligation, or even reserves its rights or protests. For the purpose of these articles, protest as such is not an invocation of responsibility; it has a variety of forms and purposes and is not limited to cases involving State responsibility. There is in general no requirement that a State which wishes to protest against a breach of international law by another State or remind it of its international responsibilities in respect of a treaty or other obligation by which they are both bound should establish any specific title or interest to do so. Such informal diplomatic contacts do not amount to the invocation of responsibility unless and until they involve specific claims by the State concerned, such as for compensation for a breach affecting it, or specific action such as the filing of an application before a competent

¹¹ Crawford, 'Responsibility to the International Community as a Whole', Fourth Annual Snyder Lecture, April 2000, Bloomington School of Law, Indiana University, available at [www.law.cam.ac.uk/rcil/Snyderlect00\(f\).doc](http://www.law.cam.ac.uk/rcil/Snyderlect00(f).doc), 17 (as this is a Word document, rather than a PDF document, pagination may change on downloading according to the page parameters set for printing). See also his Third Report on State Responsibility, A/CN.4/507 (10 March 2000), para. 84 (hereinafter 'Third Report').

¹² Crawford, *supra* note 11, at 16 (emphasis added).

¹³ State Responsibility: Comments and Observations Received from Governments, UN Doc. A/CN.4/515 (19 March 2001), United Kingdom comment to Part Two *bis*, Chapter I, at 59.

¹⁴ That is, for the purpose of Part Three, Chapter I, on 'The Implementation of the International Responsibility of a State'.

international tribunal, or even the taking of countermeasures. In order to take such steps, i.e. to invoke responsibility in the sense of the articles, some more specific entitlement is needed.¹⁵

This definition of invocation clearly entails the presentation of some type of claim by a state either ‘injured’ under the terms of Article 42 or ‘interested’ within the meaning of Article 48. Although it should be clear that mere protest need not amount to the invocation of responsibility — consider, for instance, the role of protest in the process of the formation of customary international law — it might be difficult to distinguish protest clearly from invocation where a state is acting under Article 48 in the collective interest. Drawing this distinction could well depend on the circumstances and terms of the complaint made, but it seems impossible to do so if an interested state requests only cessation and/or non-repetition of the alleged delict. Arguably, these are performatively inherent in the very notion of protest.¹⁶ An interested state, or for that matter an injured state,¹⁷ has a discretion whether or not to seek reparation but, as shall be seen, an interested state could face difficulties in claiming reparation.

The definition of invocation adopted by the Commission is wider than that sought by the United Kingdom which argued that:

the invocation of responsibility means the making of a formal diplomatic claim or the initiation of judicial proceedings against the responsible State in order to obtain reparation from it . . . [I]nformally calling upon a State to abide by its obligations does not count as an invocation of responsibility. It should also be clear that the initiation of actions such as the scrutiny of a State’s actions in an international organization, or a proposal that a situation should be investigated by an international body, or the invocation of a dispute settlement mechanism that does not entail a binding decision (for instance, a fact-finding mission, or a conciliation commission) do not amount to an invocation of responsibility, and that the right to take such actions is not subject to the limitations set out in the draft.¹⁸

This view of invocation seems rigidly and narrowly litigious, contemplating a determination, binding on the disputant states, that a delict has or has not been committed, and that consequently reparation is or is not due. In contrast, the Commission contemplates acts invoking responsibility that need neither be litigious nor binding. Moreover, seeking reparation is only an optional consequence, rather than a constitutive requirement, of invocation.

Perhaps the United Kingdom’s view was motivated by a desire to maximize the freedom of action of states to protest perceived violations of multilateral treaties. It claimed that:

Under the draft, in certain circumstances non-injured States that are parties to multilateral treaties or members of groups towards which an obligation is owed do not have the right to invoke responsibility.¹⁹

¹⁵ ILC Report 2001, *supra* note 4, Commentary to Article 42, 294–295, para. 2 (footnote omitted); Crawford, *supra* note 4, at 256. See also Third Report, *supra* note 11, at para. 105.

¹⁶ This view conceives the promulgation of a protest as at least akin to a ‘speech act’: see J. L. Austin, *How to Do Things with Words* (2nd ed., 1975).

¹⁷ On the injured state’s discretion regarding remedies, see Third Report, *supra* note 11, Second Addendum, UN Doc. A/CN.4/507/Add.2 (1 July 2001), paras 227, 232–233 and 247.

¹⁸ State Responsibility: Comments and Observations, *supra* note 13, at 59.

¹⁹ *Ibid* (emphasis added).

This fear arguably underpins its reservation of the right to take action 'not subject to the limitations set out in the draft'. It is met by the wider definition adopted by the Commission, although conceivably at the cost of introducing malleability in the distinction between protest and invocation where an interested state is concerned.

B Interested States Entitled to Invoke Responsibility Under Article 48

Clarification of the notion of invocation was not the only conceptual task facing the Commission. It may be recalled that Professor Crawford identified the need to distinguish between 'primary beneficiaries, the right holders, and those states with a legal interest in compliance'.²⁰ The 'right holders' are those states entitled to invoke responsibility under Article 42 inasmuch as an obligation owed materially to such a state has been breached by the delinquent state. Of more importance for instant purposes is the notion of other states 'with a legal interest in compliance' as more often than not a violation of an obligation arising from a peremptory norm of international law will not result in material injury accruing to most states. Their interest in the delict arises from the very fact that a peremptory obligation has been breached rather than in any experience of injury suffered.

Article 48(1) identifies the category of interested, as opposed to injured, states entitled to invoke the responsibility of another as:

Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

- (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
- (b) the obligation breached is owed to the international community as a whole.

Some states have objected to the formulation of the distinction between injured and interested states, and the recognition of the latter category's entitlement to invoke responsibility.²¹ In particular, in relation to Article 48(1)(b), the Netherlands commented:

A reading of article [42] . . . in conjunction with [article 48] reveals that a distinction is now being made between two categories of State, namely, on the one hand, the directly injured State or group of States, which can all invoke the responsibility of a particular State, and on the other hand, States which, if the responsible State is in breach of *erga omnes* obligations, are affected to a degree in a more theoretical or 'legal' way and can therefore invoke legal consequences only to a limited extent. The Netherlands has reservations about the desirability of this distinction, and wonders whether the price for deleting the term 'international crime' is not too high.²²

²⁰ *Supra*, text to note 12.

²¹ See e.g. the comments of France, India and the Nordic states recorded in P. Bodeau, 'Comments and Observations by Governments in the 6th Committee, 54th session — 1999: Summary of Main Points' (1999), www.law.cam.ac.uk/rcil/ilcsr/Comments6thCtee1999.doc, at 11; and State Responsibility: Comments and Observations, *supra* note 13, the Netherlands (61–62), China (69–70) and the rather unenthusiastic comments of Japan (70). By 2001, however, the Nordic states had decided to support the distinction (70).

²² State Responsibility: Comments and Observations, *supra* note 13, at 61.

We need not be detained in analyzing the category of states entitled to invoke responsibility under Article 48(1)(a), as it clearly contemplates a legal relationship restricted to an identifiable group of states rather than one arising under general international law. The conceptual distinction between Article 48(1)(a) and Article 48(1)(b), as noted in the Commission's commentary, is one between obligations *erga omnes partes* and obligations *erga omnes*,²³ although the Articles themselves avoid using this terminology. Furthermore:

article 48 refrains from qualifying the position of the States identified in article 48, for example by referring to them as 'interested States'. The term 'legal interest' would not permit a distinction between articles 42 and 48, as injured States in the sense of article 42 also have legal interests.²⁴

C *Obligations Owed to the International Community as a Whole*

Commission documents²⁵ continually reiterate that Article 48, and its identification of 'interested' states, finds its *fons et origo* in the 1970 *Barcelona Traction* judgment ruling that:

[A]n 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* . . .

Obligations the performance of which is the subject of diplomatic protection are not of the same category. It cannot be held, when one such obligation in particular is in question, in a specific case, that all States have a legal interest in its observance. In order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so.²⁶

This ruling in *Barcelona Traction* stands in stark contrast to the denial of standing to Liberia and Ethiopia in the 1966 *South West Africa* cases²⁷ — a conceptual opposition not lost on either Professor Crawford or the Commission itself. Indeed, Article 48(1)(a)

²³ ILC Report 2001, *supra* note 4, Commentary to Article 48, 320, para. (6) and 321, paras (8) and (9); and Crawford, *supra* note 4, at 277–278. For a more extensive discussion of this distinction, see Third Report, *supra* note 11, at 43, para. 92, 45–46, para. 97, and 49, para. 106. Further, both concepts may be seen as inherent in the *Barcelona Traction* judgment — see below.

²⁴ ILC Report 2001, *supra* note 4, Commentary to Article 48, 319, para. (2); Crawford, *supra* note 4, at 276–277.

²⁵ See, for instance, Crawford, First Report on State Responsibility, UN Doc. A/CN.4/490/Add.2 (5 May 1998) 7, para. 69; Third Report, *supra* note 11, at 45–46, para. 97; Fourth Report, *supra* note 1, at 19, para. 49; ILC Report 2001, *supra* note 4, Commentary to Article 48, 319, para. (2); and Crawford, *supra* note 4, at 276–277.

²⁶ *Barcelona Traction, Light and Power Co. Ltd* case, Second Phase, Final Judgment, ICJ Reports (1970) 3, at 32, paras 33 and 35; cf. *ibid.*, at 47, para. 91.

²⁷ *South West Africa*, Second Phase Judgment, ICJ Reports (1966) 6.

is a 'deliberate departure' from the *South West Africa* decision.²⁸ In *South West Africa*, the International Court of Justice declared inadmissible the Liberian and Ethiopian applications on the grounds that neither had any special material interest in South Africa's compliance with the 'conduct' provisions of the Mandate over South West Africa. The Court ruled that the applicants' claim of *locus standi* amounted:

to a plea that the Court should allow the equivalent of an '*actio popularis*', or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present; nor is the Court able to regard it as imported by the 'general principles of law' referred to in Article 38, paragraph 1(c), of its Statute.²⁹

In response, Schwelb³⁰ argued that the right of *actio popularis* was recognized as part of international law long before 1966. Schwelb's analysis, however, is more in line with situations falling under Article 48(1)(a), inasmuch as all the examples he cited involved treaty regimes — such as the Genocide Convention³¹ — rather than general international law. The thrust of Article 48(1)(b) is to extend states' entitlement to invoke responsibility beyond such conventional obligations in line with the *Barcelona Traction* ruling. But what obligations are encompassed in the category of those 'owed to the international community as a whole'?

The Commission consciously employed this phrase in Article 48, preferring it to the apparently equivalent 'obligations *erga omnes*'. The latter term was avoided as it 'conveys less information than the Court's reference [in *Barcelona Traction*] to the international community as a whole and has sometimes been confused with obligations owed to all parties to a treaty'.³² This precision is connected with the desire to transcend the bilateral straitjacket often imposed on issues of responsibility by adopting an inclusive notion of the 'international community' that embraces non-state entities.³³ In particular, it underlines the existence of the category of 'primary beneficiaries' of obligations considered necessary to achieve this aim:

For example, Ethiopia and Liberia were not themselves the beneficiaries of the obligation they invoked in the second *South West Africa* cases. The beneficiaries were the people of South West Africa itself; it was their 'subjective' right to have the territory administered on their behalf and in their interest which was at stake. Ethiopia and Liberia claimed an adjectival or procedural right, to seek to ensure that South Africa complied with its obligations to the people of the

²⁸ ILC Report 2001, *supra* note 4, at 321, n. 766: on the opposition between *Barcelona Traction* and *South West Africa*, see also Third Report, *supra* note 11, at 39–40, para. 85; and Crawford, Peel and Olleson, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading', 12 *European Journal of International Law* (2001) 963, at 976, n. 51.

²⁹ ICJ Reports (1966) 6, at 47, para. 88.

³⁰ Schwelb, 'The *Actio Popularis* and International Law', 2 *Israel Yearbook of Human Rights* (1972) 46.

³¹ *Ibid.*, at 50–51.

³² ILC Report 2001, *supra* note 4, Commentary to Article 48, 321, para. (9), and also Commentary to Article 25, 204, para. (18); Crawford, *supra* note 4, at 184–185 and 278. See also ILC Report 2000, *supra* note 6, at 41–42, paras 124–127; and Fourth Report, *supra* note 1, at 19, para. 49.

³³ See Crawford, *supra* note 4, at 40–41; and Crawford, Peel and Olleson, *supra* note 28, at 972–973.

territory . . . A legal system which seeks to reduce the legal relations between South Africa, the people of the territory, and the two applicant States to a bilateral form is deficient.³⁴

Following *Barcelona Traction*, the Commission has taken the view that peremptory norms and obligations ‘owed to the international community as a whole’ are essentially two sides of the one coin:

From the Court’s reference to the international community as a whole, and from the character of the examples it gave, one can infer that the core cases of obligations *erga omnes* are those non-derogable obligations of a general character which arise either directly under general international law or under generally accepted multilateral treaties (e.g. in the field of human rights). They are thus virtually coextensive with peremptory obligations (arising under norms of *jus cogens*). For if a particular obligation can be set aside or displaced as between two States, it is hard to see how that obligation is owed to the international community as a whole.³⁵

There is, at the very least, a considerable overlap between the two categories.³⁶ *Jus cogens* obligations, however, are generally seen as embodying elements of international public policy, with their peremptory nature being a consequence of this. As the Commission has itself counselled:

it [would not] be correct to say that a provision in a treaty possesses the character of *jus cogens* merely because the parties have stipulated that no derogation from that provision is to be permitted.³⁷

For instance, Article 34(1) of the Statute of the International Court of Justice has peremptory effect in providing that only states may be parties in contentious cases,³⁸ but surely does not have *jus cogens* status.

Other cases might be less clear-cut. For instance, to take the example of human rights norms cited by Professor Crawford, multilateral human rights treaties frequently contain derogation clauses allowing for the suspension of most, but not all, of their provisions during public emergencies ‘that threaten the life of the nation’.³⁹ Does this mean that only non-derogable rights have peremptory status? Or, assuming that derogable rights also have parallel customary status, is derogation simply a treaty

³⁴ Third Report, *supra* note 11, at 39–40, para. 85; see *ibid*, at 38–40, paras 83–85 generally; and also *supra* text to notes 11 and 12.

³⁵ Third Report, *supra* note 11, at 49, para. 106(a); see also ILC Report 2001, *supra* note 4, Commentary to Article 48, 281, para. (7); Crawford, *supra* note 4, at 277–278; and de Hoogh, ‘The Relationship Between *Jus Cogens*, Obligations *Erga Omnes*, and International Crimes: Peremptory Norms in Perspective’, 42 *Austrian Journal of Public and International Law* (1991) 183.

³⁶ Third Report, *supra* note 11, Fourth Addendum, UN Doc. A/CN.4/507/Add.4 (4 August 2000), para. 373; Fourth Report, *supra* note 1, at 19, para. 49; and ILC Report 2001, *supra* note 4, Commentary to Part Two, Chapter III, 281, para. (7); and Crawford, *supra* note 4, at 244.

³⁷ International Law Commission, *The Law of Treaties: Final Draft Articles and Commentary* (1966), Commentary to Draft Article 50, para. (2); reproduced Arthur Watts, *The International Law Commission 1949–1998*, vol. II (1999) 741.

³⁸ On the non-derogable nature of provisions of the Statute, see *Free Zones of Upper Savoy and Gex*, Order of 19 August 1929, 1929 PCIJ Series A, No. 22, and also Articles 92 and 103 of the UN Charter.

³⁹ For instance, 1966 UN Covenant on Civil and Political Rights, Article 4; and 1950 European Convention on Human Rights, Article 15.

mechanism that, under the *Nicaragua dictum*, is irrelevant to customary law, and thus all have peremptory force.⁴⁰

Similarly, the four 1949 Geneva Conventions contain a common non-derogation provision. Persons protected by each Convention 'may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention'.⁴¹ Although manifestly a provision aimed at the direct beneficiaries of the Conventions — the individuals they protect — this is reinforced by common Article 1 of the Conventions that requires states parties to 'respect and to ensure respect for the present Convention in all circumstances'.⁴² While some of the provisions of the Conventions undoubtedly have *jus cogens* status,⁴³ other provisions clearly do not.⁴⁴ The Commission has recognized only unidentified 'basic rules of international humanitarian law' as peremptory.⁴⁵

Although providing a non-exhaustive list of peremptory norms of general international law to elucidate Article 40,⁴⁶ the Commission is less than candid on the criteria to be used to distinguish between conventional obligations that are simply peremptory, peremptory obligations under general international law for the purposes of Part Three, Chapter II, of the Articles, and obligations owed to the international community as a whole.⁴⁷ While recognizing that the examples of peremptory norms given in the commentary to the Draft Articles on the law of treaties embody

⁴⁰ *Military and Paramilitary Activities In and Against Nicaragua*, Merits Judgment, ICJ Reports (1986) 14, at 95, para. 178, 100, para. 188, and 105, para. 200. '[A] principle enshrined in a treaty, if reflected in customary international law, may well be so unencumbered with the conditions and modalities surrounding it in the treaty' that excluded from the parallel custom are any procedures 'closely dependent on the content of a treaty commitment and of the institutions established by it'. *Ibid.*, at para. 200. Cf. Baxter, 'Multilateral Treaties as Evidence of Customary International Law', 41 *British Yearbook of International Law* (1965–1966) 275, at 285, on the paradox of the non-transmission of reservations made to treaty provisions to parallel customary law crystallizing as a result of the treaty.

⁴¹ First Geneva Convention, Article 7; Second Geneva Convention, Article 7; Third Geneva Convention, Article 7; and Fourth Geneva Convention, Article 8. As the 1977 Additional Protocols supplement the 1949 Conventions (see Article 1(3) of Protocol I and Article 1(1) of Protocol II), the non-derogation clause applies equally to them. For a commentary on the provision, see e.g. Jean Pictet (ed.), *Commentary to Geneva Convention I* (1952) 77 *et seq.*

⁴² For a commentary on this provision, see e.g. *ibid.*, at 24 *et seq.*

⁴³ For instance, the prohibition on torture contained in common Article 3(1)(a) of all four Conventions and in Article 12 of Convention I.

⁴⁴ For example, the duty imposed on detaining powers under Article 38 of Convention III that '[p]risoners shall have opportunities for taking physical exercise, including sports and games, and for being out of doors'.

⁴⁵ Following the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, ICJ Reports (1996) 226, at 257, para. 79; see ILC Report 2001, *supra* note 4, Commentary to Article 40, at 284, para. (5); Crawford, *supra* note 4, at 246.

⁴⁶ See ILC Report 2001, *supra* note 4, Commentary to Article 40, at 283–284, paras (4)–(6); and Crawford, *supra* note 4, at 246–247. In this connection, it is worth recalling Professor Crawford's characterization of Part Two, Chapter III, as 'a framework for . . . progressive development' in Fourth Report, *supra* note 1, at 20, para. 52.

⁴⁷ Indeed, in the context of diplomatic protection, the view was expressed that there is 'the lack of clear understanding of the meaning and the scope of *jus cogens*': see ILC Report 2000, *supra* note 6, at 157, para. 452.

obligations owed to the international community as a whole, the Commission simply comments:

there is at least a difference in emphasis. While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance — i.e. in terms of the present articles, in being entitled to invoke the responsibility of any State in breach.⁴⁸

This difference in emphasis explains the difference in terminology employed in Part Two, Chapter III, and Part Three, Chapter I. In the latter, as the focus is on ‘the universality of the obligation and the persons or entities to whom it is owed . . . the appropriate term is . . . obligations to the international community as a whole’.⁴⁹

2 The Broader International Legal Context

Although potentially wide-reaching in their practical implication, the Articles’ recognition of the entitlement of all states to invoke the responsibility of another state’s breach of an obligation owed to the international community as a whole — or peremptory norm in another light — is fairly modest. The Articles are not self-contained. To evaluate the potential efficacy of the Articles in transcending the bilateral paradigm traditionally imposed on issues of state responsibility, they must be located within the corpus of general international law. This does not involve an appeal to primary rules imposing specific obligations, but rather a consideration of other ‘secondary’ rules — namely, the law governing the diplomatic protection of nationals, and the rules governing the presentation of international claims and their admissibility before international tribunals.

A Diplomatic Protection

Articles 42 and 48 are subject to the same requirements for the invocation of a claim, namely, those specified in Articles 43, 44 and 45. Article 43’, Notice of a Claim by an Injured State’, simply indicates that notice of a claim need be given to the alleged delinquent. It need not detain us. Articles 44 and 45, however, raise issues worth exploring. Article 44 provides:

The responsibility of a State may not be invoked if:

- (a) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;
- (b) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Article 45 provides:

The responsibility of a State may not be invoked if:

- (a) the injured State has validly waived the claim;

⁴⁸ ILC Report 2001, *supra* note 4, Commentary to Part Two, Chapter III, 281, para. (7); Crawford, *supra* note 4, at 244–245; see also Third Report (Add.4), *supra* note 11, para. 375.

⁴⁹ Fourth Report, *supra* note 1, at 19–20, para. 49.

- (b) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Although Article 44 embodies hurdles that a state injured in terms of Article 42 must overcome in order to present a claim on behalf of one of its nationals, these are unexceptional. Article 44, however, could present acute problems for a state wishing to invoke responsibility under Article 48. Article 45 poses the paradox of whether an injured state itself could block invocation of responsibility under Article 48, even when the obligation breached is peremptory and owed to the international community as a whole.

B 'Interested' States: Invocation and Reparation

Where an interested state invokes responsibility under Article 48, but only seeks cessation and/or non-repetition of the alleged delict, this is difficult to distinguish from a simple protest. Does it amount to the presentation of a claim in the absence of any additional demands or action? Given the definition of invocation set out in the commentary to Article 42, perhaps not. Invocation requires 'specific claims by the state concerned, such as for compensation for a breach affecting it, or specific action such as the filing of an application before a competent international tribunal, or even the taking of countermeasures'.⁵⁰ A claim for compensation under Article 48(2)(b) is limited to:

performance of the obligation of reparation in accordance with the preceding Articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

The Commission conceded that this provision amounts to progressive development,⁵¹ but 'justified since it provides a means of protecting the community or collective interest at stake'. The aim here was to meet the situation that in cases of a breach of an obligation falling under Article 48, 'it may well be that there is no State . . . which . . . is individually injured by the breach, yet it is highly desirable that some State or States be in a position to claim reparation, in particular restitution' in the interest of any injured state or 'the beneficiaries of the obligation breached'.⁵² This is an obvious attempt to take state responsibility beyond the bilateral paradigm. Yet an interested state claiming reparation 'may be called on to establish that it is acting in the interest of the injured party'. If the injured party is a state, its own government can represent that interest but '[o]ther cases may present greater difficulties, which the present articles cannot solve'.⁵³

The possibility of an interested state lodging a claim seeking reparation on behalf of

⁵⁰ ILC Report 2001, *supra* note 4, Commentary to Article 42, 295, para. (2) (note omitted); Crawford, *supra* note 4, at 256.

⁵¹ A point also noted by the United Kingdom which stated that it amounted to 'a wholly novel form of action' that 'goes further than is warranted by customary international law': see State Responsibility: Comments and Observations, *supra* note 13, at 72 and 73.

⁵² ILC Report 2001, *supra* note 4, Commentary to Article 48, 323, para. (12); Crawford, *supra* note 4, at 279.

⁵³ ILC Report 2001, *supra* note 4, Commentary to Article 48, 323, para. (12); Crawford, *supra* note 4, at 279 (note omitted in quotation).

another injured state, which itself has not invoked responsibility, has received a mixed response from states. The United Kingdom has expressed the view that the injured state's abstinence should be taken as a waiver of the claim, which extinguishes other states' entitlement to invoke responsibility.⁵⁴ On the other hand, The Netherlands and Korea have both argued that, where the obligation in issue is one owed to the international community as a whole, any waiver by the injured state extinguishes only its claim, but leaves unaffected interested states' entitlements under Article 48.⁵⁵

This is a thorny issue. While the Commission's intention to ensure the enforcement of collective interests is laudable, to allow one state to raise a claim on behalf of another seems to discard the principles of both sovereign equality and state autonomy. An injured state is under no obligation to invoke responsibility or seek reparation.⁵⁶ To allow another to do so on its behalf, where it can be inferred that it has no desire to do so, seems to lack any foundation in legal principle.⁵⁷ The better view appears to be that a state can only present a claim for reparation on behalf of another with the latter's consent, or rather that of its government. But what happens if the alleged delict — e.g. an unlawful intervention — has displaced the 'legitimate' government, and thus the injured state lacks 'valid' representatives?⁵⁸

Article 45 complicates matters. If the injured state's government does not raise a claim, does this amount to waiver or an acquiescence 'in the lapse of the claim' — assuming that this is possible in the case of peremptory norms owed to the international community as a whole? Although the injured state's claim can be extinguished if its waiver or lapse is 'valid', the Commission's view is that this does not affect the international community's interest 'from being expressed in order to ensure a settlement in conformity with international law'.⁵⁹ This seems barely to advance the argument. As invocation requires more than protest, in the face of a valid waiver or acquiescence by the injured state, what reparation can other states claim? Similarly, although a state can assert diplomatic protection on account of injury sustained by its

⁵⁴ State Responsibility: Comments and Observations, *supra* note 13, at 72.

⁵⁵ *Ibid.*, at 67 and 68.

⁵⁶ Although cf. Draft Article 4 of the ILC's Draft Articles on Diplomatic Protection: see Dugard, First Report on Diplomatic Protection, *supra* note 6, at 27 *et seq.*, paras 75 *et seq.* Draft Article 4 imposes a duty, in principle but subject to exceptions, on a state to exercise diplomatic protection on behalf of a national injured by a 'grave breach of a *jus cogens* norm attributable to another state'. This Draft Article proved to be 'particularly controversial' when discussed by the Commission (see ILC Report 2000, *supra* note 6, at 143, para. 418), and the Special Rapporteur has conceded that it dealt with a 'controversial question and was a proposal *de lege ferenda* in the field of progressive development, not codification' (*ibid.*, at 155, para. 447). Given that this Draft Article amounts only to a contested proposal for the future development of the law (see *ibid.*, at 155 *et seq.*, paras 447 *et seq.*), it need not detain us further.

⁵⁷ Albeit within a narrow compass, cf. *Nicaragua*, Merits Judgment, ICJ Reports (1986) 14, at 104, para. 195: 'There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.'

⁵⁸ See Third Report, *supra* note 11, at para. 110, and Add.4, para. 377.

⁵⁹ ILC Report 2001, *supra* note 4, Commentary to Article 45, 308–309, paras (4) and (6); Crawford, *supra* note 4, at 266–267 (quotation from para. (4)).

nationals, can it do so where the beneficiaries are nationals of another, perhaps the delinquent, state?

The resolution of these issues of representation manifestly fall outside the Articles. Although they aim at extending state responsibility beyond the bilateral paradigm, this may be constrained by less liberal norms embedded in the matrix of general international law.

C Admissibility of Claims: The Nationality of Claims Rule

Article 44 is not simply concerned with the admissibility of claims before an international tribunal, but rather with:

questions of admissibility ... of a more fundamental character. They are conditions for invoking the responsibility of a State in the first place.⁶⁰

Article 44 thus makes the invocation of responsibility — and not simply the litigation of that claim of responsibility — dependent on the satisfaction of the nationality of claims rule and the exhaustion of local remedies. In the context of the invocation of responsibility under Article 48 by an injured state on behalf of non-national beneficiaries injured by a breach of a preemptory obligation, the nationality of claims rule takes on a logical priority. If this is not satisfied, then whether local remedies have been exhausted or not becomes irrelevant.⁶¹ Responsibility simply cannot be invoked.

The commentary to Article 44 notes that questions of the nationality of claims are to be dealt with as part of the Commission's work on diplomatic protection.⁶² This is still at an early stage. A promised report, on the right of a state to assert diplomatic protection over a non-national injured by the breach of 'a *jus cogens* norm' where the national state has refused to exercise protection, has not yet materialized.⁶³ Nevertheless, the project as it stands demonstrates conflict with the state responsibility project. Its content, moreover, does not augur well for the admissibility of the invocation of responsibility on behalf of non-national beneficiaries.

If it is accepted that a claim of state responsibility often finds its expression through the application of the rules of diplomatic protection, then there is at least an apparent dissonance between the notion of invocation employed in the state responsibility project and the notion of action that constitutes diplomatic protection. 'Action' manifestly comprehends more than 'invocation':

⁶⁰ ILC Report 2001, *supra* note 4, Commentary to Article 44, 305, para. (1); Crawford, *supra* note 4, at 264.

⁶¹ In this light, the exhaustion of local remedies requirement shall not be discussed further. For the Commission's views on this, see ILC Report 2001, *supra* note 4, Commentary to Article 44, 305–307, paras (3)–(5); Crawford, *supra* note 4, at 265. Some initial work has also been done on this in the Commission's project on diplomatic protection: see Dugard, Second Report on Diplomatic Protection, *supra* note 6, *passim*; and ILC Report 2001, *supra* note 4, at 515 *et seq*, paras 184 *et seq*.

⁶² ILC Report 2001, *supra* note 4, Commentary to Article 44, 305, para. (2), n. 722; Crawford, *supra* note 4, at 264; and Third Report (Add.2), *supra* note 11, para. 242.

⁶³ Dugard, First Report on Diplomatic Protection, *supra* note 6, at 60, para. 185(a); in particular, this will 'examine the controversial question of whether the doctrine of obligations *erga omnes* has any application to diplomatic protection'.

legal scholars . . . use the term ‘diplomatic protection’ to embrace consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retorsion, severance of diplomatic relations, economic pressure and, the final resort, the use of force.⁶⁴

Further, at least within the Commission debates on Draft Article 1 of the diplomatic protection project — which provides that states may exercise diplomatic protection on behalf of their nationals — the view was expressed that:

Under international law, obligations concerning human rights were typically obligations *erga omnes*. Any State could request cessation of the breach, whether the persons affected were its own nationals, nationals of the wrongdoing State, or nationals of a third State. Thus, any requirement of nationality of claims appeared to be out of place when human rights were invoked.⁶⁵

The Articles on State Responsibility adopt a manifestly contrary view: satisfaction of the nationality of claims rule — as this shall be defined in the diplomatic protection project — is a requirement for the admissibility of the invocation of responsibility by *any* state.

It is, of course, possible that the Commission will adopt the view that the nationality of claims rule should be suspended where a state invokes responsibility for non-national beneficiaries injured by the breach of a peremptory obligation. The project, as it stands, is not, however, auspicious. During discussions of the Draft Articles, it was argued that:

Diplomatic protection was based on the idea that the State of nationality was specially affected by the harm caused or likely to be caused to an individual. It was not an institution designed to allow States to assert claims on behalf of individuals, in general, but on behalf of the State’s own nationals.⁶⁶

The tenor of the Commission’s work on the nationality of claims rule demonstrates a clear adhesion to this traditional view. Draft Article 8 envisages entitling states to exercise diplomatic protection on behalf of stateless persons or refugees, injured by another state, after becoming resident in the claimant state.⁶⁷ Draft Article 1(2) presents this as an exhaustive exception to the scope of diplomatic protection defined in Draft Article 1(1) — namely, action taken by a state in respect of an injury caused to

⁶⁴ *Ibid.*, at 15, para. 43; see *ibid.*, at 15–16, paras 41–46. Professor Dugard noted (*ibid.*, at 16, para. 45) that the ‘choice of means of diplomatic action’ open to states was limited by the restrictions on countermeasures reflected in the Articles on State Responsibility. He also proposed a Draft Article 2 (*ibid.*, at 16 *et seq.*, paras 47 *et seq.*) that permitted, subject to conditions, the use of force to rescue nationals. This did not prove popular with the Commission, where debate ‘revealed that there was no unanimity on the meaning of the term “diplomatic protection”, but . . . also shown that diplomatic protection did not include the use of force. It was thus quite clear that Draft Article 2 was not acceptable to the Commission.’ ILC Report 2000, *supra* note 6, at 152, para. 439.

⁶⁵ ILC Report 2000, *supra* note 6, at 145, para. 422.

⁶⁶ *Ibid.*, at 162, para. 463. Some would extend this rationale to deny diplomatic protection to NGOs: see Doehring, ‘Diplomatic Protection of Non-Governmental Organizations’, in M. Rama-Montaldo (ed.), *El derecho internacional en un mundo en transformacion: Liber amicorum en homenaje al Profesor Eduardo Jiménez de Aréchaga*, vol. I (1994) 571.

⁶⁷ On this Draft Article, see Dugard, First Report on Diplomatic Protection, *supra* note 6, at 57 *et seq.*, paras 175 *et seq.*; and ILC Report 2000, *supra* note 6, at 170 *et seq.*, paras 486 *et seq.*

one of its nationals by the internationally wrongful act or omission of another state. It was also identified as 'an instance of the progressive development of international law' departing 'from the traditional position stated in the *Dickson Car Wheel Company v. United Mexican States* case'.⁶⁸ It proved to be 'controversial' within the Commission itself.⁶⁹

Similarly, Draft Article 9 on the continuous nationality rule, which aims at 'abandoning the traditional rule in favour of a new approach',⁷⁰ is careful to preserve the sensibilities of former national states. Although paragraph 1 of this Draft Article provides that, where a person has changed nationality after sustaining an unlawful injury, his new national state may exercise diplomatic protection in respect of that injury, paragraph 4 counters:

Diplomatic protection may not be exercised by a new State of nationality against any previous State of nationality in respect of an injury suffered by a person when he or she was a national of the previous State of nationality.

The clear impression gained from the current status of the diplomatic protection project is that the Commission is disposed to uphold the customary requirement of a nexus of nationality between the individual injured and the state exercising protection on his behalf.⁷¹ This would appear to preclude even the invocation of responsibility under Article 48 by an interested state on behalf of non-national beneficiaries injured by the breach of a peremptory obligation. As matters currently stand, there is accordingly a contradiction between the Articles on State Responsibility and the exegesis of the nationality of claims rule in the diplomatic protection project.⁷²

It could be argued, however, that the invocation of the breach of a peremptory norm transcends diplomatic protection, following the distinction drawn by the International Court of Justice in *Barcelona Traction*. Such an argument, however, is only a partial reading of the judgment. The Court also ruled that, although it had identified certain human rights norms as obligations *erga omnes* at the global level, human rights instruments did not confer on states the capacity to protect the victims of human rights infringements regardless of their nationality, although this might be conferred by regional human rights instruments.⁷³ In his Separate Opinion in the *Nuclear Tests* cases, Judge Gros adverted to the Court's use:

of covert and contradictory allusions . . . [which] is not without its dangers. This is evident . . . as regards the attempts to make use of paragraphs 33 and 34 of the Judgment in the *Barcelona*

⁶⁸ ILC Report 2000, *supra* note 6, at 170, para. 486.

⁶⁹ *Ibid.*, at 143, para. 418.

⁷⁰ ILC Report 2001, *supra* note 4, at 510, para. 170; see also *ibid.*, at 511, paras 171–172, and 512, para. 174. On this Draft Article, see Dugard, First Report on Diplomatic Protection, Addendum, *supra* note 6, *passim*; and ILC Report 2001, *supra* note 4, at 509 *et seq.*, paras 167 *et seq.*

⁷¹ States can, of course, depart from the nationality of claims rule by agreement, as occurred e.g. in the *Rainbow Warrior* arbitration. For examples of such agreed departures, see R.Y. Jennings and A.D. Watts, *Oppenheim's International Law*, vol. I (9th ed., 1992) 513, n. 7.

⁷² This was noted during the Commission's debates on Draft Article 4, *supra* note 56: ILC Report 2000, *supra* note 6, at 157, para. 453.

⁷³ *Barcelona Traction, Light and Power Co. Ltd* case, Second Phase, Final Judgment, ICJ Reports (1970) 3, at 47, para. 91.

Traction case without taking account of the existence of paragraphs inconsistent with these, i.e. paragraphs 89 to 91, which were in fact intended to qualify and limit the scope of the earlier pronouncement. That pronouncement was in fact not directly related to the subject of the judgment, and was inserted as a sort of bench-mark for subsequent use.⁷⁴

The question therefore arises whether this has subsequently emerged in general international law. Although the capacity to protect non-national beneficiaries ‘is highly desirable’, nevertheless, as the Commission itself concedes, this ‘involves a measure of progressive development’, expressed, moreover, in an avowedly soft instrument.⁷⁵ State practice, outside treaty regimes that confer such a right, is absent, and accordingly no such customary entitlement has arisen.

This, however, leaves the question open of an interested state invoking responsibility on its own behalf in order to vindicate its own interest in upholding the rules of international law. Once again, if an interested state requests only cessation and/or non-repetition of the breach, this seems indistinguishable from protest. An additional claim appears to be required in order that this might be classified as invocation. An obvious way by which this could be achieved would be by presenting a case before an international tribunal to determine the fact of breach. But would an interested — as opposed to an injured — state have *locus standi* to do so?

D *The Possibility of Litigation*

Despite the International Court of Justice’s rejection of the Liberian and Ethiopian claims in the *South West Africa* case, on the ground that an *actio popularis* aimed to vindicate the public interest was unknown in international law, this surely cannot preclude in principle the admissibility of a case, filed by an interested rather than an injured state, that another is in breach of a preemptory obligation. Three points appear to be crucial in determining the success of such an action: the terms of the jurisdictional title involved; the nature of the claim presented; and the Court’s interpretation of Article 45 should the injured state have waived its claim or be deemed validly to have acquiesced in the lapse of the claim.

As the International Court of Justice ruled in the *East Timor* case, ‘the *erga omnes* character of an obligation and the rule of consent to jurisdiction are two different things’.⁷⁶ The existence of an obligation owed to the international community as a whole does not, *ipso facto*, confer on all states the title to initiate litigation for its vindication in case of breach. Nor does the existence of that obligation suspend the operation of rules governing the exercise of the Court’s jurisdiction — such as the *Monetary Gold*⁷⁷ doctrine — in cases where a specific jurisdictional title exists.

⁷⁴ *Australia v. France*, ICJ Reports (1974) 276, at 290, para. 24.

⁷⁵ ILC Report 2001, *supra* note 4, Commentary to Article 48, 323, para. (12); Crawford, *supra* note 4, at 279.

⁷⁶ *East Timor* case, ICJ Reports (1995) 90, at 102, para. 29.

⁷⁷ *Monetary Gold Removed from Rome* case, ICJ Reports (1954) 19, at 32; see also *East Timor*, ICJ Reports (1995) 90, at 100–102, paras 23–29 and 104–105, paras 34–35; and, critically, Simma, ‘From Bilateralism to Community Interest in International Law’, 250 *RdC* (1994-VI) 217, at 297–298.

Whether a requisite and effective jurisdictional title exists depends on the circumstances of the case. This is a simple consequence of Article 36(1) of the Statute of the International Court of Justice:

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties or conventions in force.

On the basis of the equivalent Article in its Statute, in the *Minority Schools* case, the Permanent Court of Justice stated (perhaps too broadly) that 'there is no dispute which States entitled to appear before the Court cannot refer to it'.⁷⁸ This case, like other early Permanent Court cases such as *Certain German Interests in Polish Upper Silesia*, recognized the competence of the Court to deliver declaratory judgments — 'the possibility of a judgment having a purely declaratory effect has been foreseen . . . in Article 36'.⁷⁹ Further, the *Northern Cameroons* case recognized that one function of a declaratory judgment could be the exegesis of customary international law.⁸⁰

Accordingly, if the jurisdictional title in issue is wide enough, an interested state could bring an action seeking a declaratory judgment that another state was in breach of a peremptory obligation arising under general international law. For instance, if both states had deposited unrestricted declarations under Article 36(2) of the Statute, an action would surely be competent to determine 'the existence of any fact which, if established, would constitute a breach of an international obligation' (subparagraph c). Even such a factual contest, as to whether or not a delict had actually been committed, would be sufficient to fulfil the requirement that a dispute exists between the parties which is necessary to seise the Court. As the Court reaffirmed in the *East Timor* case, 'a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties'.⁸¹

Jurisdiction is, however, only one aspect of the matter: the claim must also be admissible. This depends on the substantive content of the claim presented. Undoubtedly, at least as the law stands at the moment, a claim presented to vindicate the interests of, and seek reparation for, injured non-nationals would be rejected as inadmissible on the basis of the nationality of claims rule. It would seem a better strategy to seek a declaratory judgment aimed at elucidating an interpretation of the peremptory obligation in issue and/or an authoritative finding that breach had occurred.

Professor Schachter once noted that:

in practice, governments (and often courts) tend to take the codification treaty as the embodiment of customary law. The accessibility of the treaty — its black letter law — is an

⁷⁸ *Rights of Minorities in Upper Silesia (Minority Schools)* case, 1928 PCIJ Series A, No. 15, 22; see also *ibid.*, at 24.

⁷⁹ 1926 PCIJ Series A, No. 7, 19. On declaratory judgments, see Shabtai Rosenne, *The Law and Practice of the International Court, 1920–1996*, vol. III (1997) 1636–1637.

⁸⁰ *Northern Cameroons* case, ICJ Reports (1963) 15, at 37.

⁸¹ ICJ Reports (1995) 90, at 99, para. 22; see also the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, ICJ Reports (1996) 595, at 614–615, para. 29, and 616–617, para. 33.

important practical factor. It reduces the need for intellectual effort in so far as it makes it unnecessary to hunt for scarce and fragmentary precedents and to distinguish among them.⁸²

The Articles on the Responsibility of States for Internationally Wrongful Acts do not yet constitute a treaty text, although that transformation is envisaged. It must be expected, nonetheless, that the Articles will be used in international legal discourse regardless of their formal normative status. In cases of a breach of a peremptory norm injuring non-nationals, a declaratory judgment recording this, gained at the instigation of an interested state, could be useful in restoring international legality. Consider, for instance, the ‘mobilization of shame’ in enforcing human rights obligations.⁸³

The process of normative solidification around a text is, however, not without danger. The Article 44 requirement that the nationality of claims rule be satisfied before responsibility can even be invoked could too easily be a shield for a delinquent state. Tradition is thus in the ascendant — *a fortiori* as a claim made under Article 48(2)(b) by an interested state on behalf of the injured state or the beneficiaries of the obligation breached was expressly identified as an instance of progressive development.⁸⁴ To proceed beyond the traditional straitjacket imposed on matters of responsibility, and open methods of recourse that amount to more than the possibility of a declaratory judgment, the Commission’s diplomatic protection project must promulgate an equally express provision that disapplies the nationality of claims rule in cases of the breach of an obligation owed to the international community as a whole. This would equally amount to progressive development but, as Professor Schachter reminds us:

conventions — disentangled from past practice — are applied and accumulate authority as general international law.⁸⁵

⁸² Schachter, ‘Entangled Treaty and Custom’, in Y. Dinstein and M. Tabory (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989) 716, at 721–722; see also Baxter, *supra* note 40, at 278.

⁸³ See Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994) 107.

⁸⁴ ILC Report 2001, *supra* note 4, Commentary to Article 48, 323, para. (12); Crawford, *supra* note 4, at 279.

⁸⁵ Schachter, *supra* note 82, at 722.