

# Responsibility to the International Community as a Whole

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This is the fourth of the lectures given in honour of Earl Snyder.<sup>1</sup> In addition there have so far been nine Indiana law students visit the Lauterpacht Research Centre of International Law at the University of Cambridge as Snyder Fellows. Over and above his generous financial support to both Cambridge and Indiana, Earl Snyder's thoughtfulness and vision have thus generated a continuing series of personal links and intellectual exchanges between our two institutions. We are very grateful to him for his continuing generosity.

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Someone who speaks on pure questions of international law to a non-specialist United States audience is rather in the position of an uninvited guest at a very large and inclusive party. By the volume of legal activity, the impact and value of its constitutional system, the content of its laws and above all its litigious apparatus, the United States generates a huge internal debate about law and its impact. To that debate, international law is peripheral. By international law, I do not mean the law concerning the foreign relations of the United States, notwithstanding that successive editors of the *Restatement* seem to see it that way.<sup>2</sup> By contrast I propose to look at a pure question of international law, unrelated to the United States Constitution and its laws. But the subject is of concern to a United States' audience, since it addresses the question what we mean when we speak – in legal terms, in terms of international law – about responsibility to the international community as a whole. The United States itself often invokes such a responsibility against delinquent governments, and much of what it does under this rubric impacts powerfully on the rest of the world in ways which are expressed and justified, *inter alia*, in terms of law and legal obligation.

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<sup>1</sup> For the earlier lectures see E Lauterpacht, "International Law and Private Foreign Investment", (1997) 4 *Indiana J Global Legal Studies* 259; P Allott, "The True Function of Law in the International Community", (1998) 5 *Indiana J Global Legal Studies* 391; AC Aman, "Proposals for Reforming the Administrative Procedure Act: Globalization, Democracy and the Furtherance of a Global Public Interest", (1999) 6 *Indiana J Global Legal Studies* 397.

<sup>2</sup> For United States readers, international law is secreted in the interstices of the *Restatement 2<sup>nd</sup> of the Foreign Relations Law of the United States* (American Law Institute, 1987).

The issue of responsibility to the international community as a whole now confronts the International Law Commission. This is a United Nations body, elected by and accountable to the General Assembly, which drafts law-making treaties and other normative texts.<sup>3</sup> State responsibility is one of its most important unfinished tasks.

The Draft Articles on State Responsibility have been a work in progress now for about forty years. The complete text of the draft articles was adopted on first reading in 1996.<sup>4</sup> In 1997 the Commission undertook the task of revising this text in the light of government comments and subsequent legal developments – a task provisionally completed in 2000 and to be finally completed by 2001.<sup>5</sup> It is not necessary here to go in to the details of the Draft Articles on State Responsibility as they have evolved: they are set out in the Commission's reports and there is a substantial body of commentary on them.<sup>6</sup>

Before turning to my specific theme, it is worth making the preliminary point that the idea of a general law of international obligations does not strike any particular resonance in the common law mind. We are used to the historical development of legal systems in which the categories are *ex post* constructions: the end result is a law of contract, a law of tort, a law of restitution, etc. Modern attempts to develop the law of restitution seek to address this, although it may be that they will end by adding another extension to the existing edifice.<sup>7</sup> But civilians, we are told, at least since Justinian, have thought of the general law of obligations as a category, and the Draft Articles on State Responsibility are inspired by civilian modes of thought, not by the common law.<sup>8</sup> We tend to think, for example, of rules about standing or remoteness of damage as intrinsically part of each particular sector of law (public nuisance, judicial review, negligence, breach of fiduciary duty...). We are relatively unconcerned to be told that the rules for remoteness of damage are different for trespass and for negligence, or that the rules about the mental element are different for crime and for breach of contract. This is largely a result of a

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<sup>3</sup> See AW Watts, *The International Law Commission 1949-1998* (Oxford, vols. 1-4) for a useful compilation of the treaties and ILC texts.

<sup>4</sup> See *Report of the International Law Commission on the work of its forty-eighth session* (GAOR A/51/10, 1966) 125-151.

<sup>5</sup> For the current text of the Draft Articles (hereafter DASR) see A/CN.4/L.600, 11 August 2000; J Crawford, P Bodeau & J Peel, "The ILC's Draft Articles on State Responsibility: Towards Completion of a Second Reading", (2000) 94 *American Journal of International Law* 660. For a review of government comments thereon see J Crawford, "Fourth Report on State Responsibility", A/CN.4/517, 31 March 2001.

<sup>6</sup> See in particular the symposium in *EJIL*, vol. 10 (2) (1999).

<sup>7</sup> See e.g. D Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, OUP, 1999).

<sup>8</sup> In this respect the codified law of treaties is different, having been developed throughout by a series of common law special rapporteurs (Brierly, Lauterpacht, Fitzmaurice, Waldock).

historical process. The tendency to synthesize the rules, to formulate, for example, a general law of defences or excuses, does not appeal. But this is what the Draft Articles on State Responsibility seek to do.

At the international level there is a serious difficulty in bringing to bear general legal categories in relation to particular regimes. These develop their own internal economy, which has to be resolved within the framework of the Draft Articles by a generous interpretation of the *lex specialis* principle.<sup>9</sup> There is no clearer example than the law of the General Agreement on Tariffs and Trade, now the WTO. But the induction of general underlying rules – even if they are varied or derogated from in given fields – is probably worth doing, and anyway, the attempt has been taken so far that there is now no undoing it. It may be that functionally the Draft Articles will create rather general and flexible presumptions about the way in which the international law of obligations works, which will allow for specific regimes (in the human rights or trade law fields, for example) while at the same time influencing those regimes.

It may also be that there is a compromise emerging between the civilian and the common law modes of thinking about a general law of obligations – a step in the direction of a synthesis. When common law lawyers think about what the Draft Articles on State Responsibility identify as a series of rights and obligations, they tend to think in terms of specific procedures and specific remedies. I am told the English legal term “remedies” has no equivalent in other languages: civil lawyers would treat remedies as the consequences of a breach of obligation. But there may likewise be a compromise emerging between the rights-based approach and the common law remedial approach. If such a compromise is going to emerge in international law, it will be, in part, through the framework of this text.

Apart from these rather general considerations, the project raises a fundamental underlying issue. What do we mean when we say that an obligation is owed to the international community as a whole, or that a state is responsible to the international community as a whole for particular conduct? On the one hand, it seems clear that there are standards of conduct in international law that cannot be reduced to the interstate realm. They are not just obligations owed by States to each other. The International Court made this point in the *Barcelona Traction* case in 1970, when it referred to “an essential distinction 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”.<sup>10</sup> The Court instanced “the outlawing of acts of aggression, and of genocide” as well as “the basic rights of the human person, including protection from slavery and racial

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<sup>9</sup> See DASR art. 56[37].

<sup>10</sup> I. C.J. Reports 1970, p. 32.

discrimination” as examples of obligations *erga omnes*. On a number of subsequent occasions the Court has taken the opportunity to affirm the notion of obligations *erga omnes*, although it has been cautious in applying it. Thus in the *Case concerning East Timor*, the Court said:

“Portugal’s assertion that the right of peoples to self-determination... has an *erga omnes* character ... is irreproachable. The principle of self-determination... is one of the essential principles of contemporary international law.”<sup>11</sup>

In the *Genocide Convention case (Preliminary Objections)* the Court, after referring to a passage from its judgment in *Reservations to the Genocide Convention*, said that “the rights and obligations enshrined in the Convention are rights and obligations *erga omnes*”.<sup>12</sup> This finding contributed to its conclusion that its temporal jurisdiction over the claim was not limited to the time after which the parties became bound *inter se* by the Convention.<sup>13</sup>

On the other hand, the “international community as a whole” is an abstraction. There is no legal entity or person by that name. As Sir Gerald Fitzmaurice put it in his trenchant dissenting opinion in *Namibia* in 1971, “the so-called organized world community is not a separate juridical entity with a personality over and above, and distinct from, the particular international organizations in which the idea of it may from time to time find actual expression”.<sup>14</sup> One does not have to agree with his dissent as a whole to agree with this. No doubt the United Nations, which consists of almost all the states in the world, reflects for certain purposes the views of or acts in the name of the states, and to that extent represents the international community. But whether it does so in any given case is contingent. There have been notable cases where the United Nations has failed to act when confronted with situations which on any view are of general concern, in some cases an affront to “the conscience of mankind”. It is difficult to accept that the states and peoples of the world are now in a position where their legitimate collective concerns as to particular conduct (not affecting them in any special way) are to be channelled exclusively through the United Nations. In giving extensive powers and functions to the United Nations, and a limited monopoly in respect of control of the use of force, the states and the peoples invoked in the Charter did not give up entirely their individual capacity to act.

Thus the issue we face is the following. One of the most important modern

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<sup>11</sup> I.C.J. Reports 1995, p. 102.

<sup>12</sup> I.C.J. Reports 1996, p. 616.

<sup>13</sup> *Ibid.*, p. 617.

<sup>14</sup> Cf. Judge Fitzmaurice (dissenting), in the *Namibia Opinion*, I.C.J. Reports 1971 p. 12 at p. 241 (para. 33).

ideas about international obligations is that some at least are universal in scope, and cannot be reduced to bundles of bilateral interstate relations. Such obligations are said to be owed to the “international community as a whole”. Yet there appears to be no such thing. Are we to abandon the language of the Court in *Barcelona Traction*, for want of any acceptable manner of expressing it?

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One of Sir Henry Maine’s best known remarks is that the movement of western law has been a movement from status to contract.<sup>15</sup> It is an infuriating generalization. One hears it so often, it must be true, and yet one feels it is questionable. It is true up to a point, it tells you something but it does not tell you everything. Perhaps a parallel remark, in the field of international law, might be that the movement of international law has been from sovereignty to obligation. Of course, you will immediately think, this sets up a false dichotomy, just as status versus contract may be a false dichotomy. The Permanent Court of International Justice in its very first contentious case, *The Wimbledon*, in 1923, pointed out that there was a close link between sovereignty and obligation in international law, that they are not polar opposites.<sup>16</sup> It is often said by governments, in one way or another, “I am sovereign, therefore I am not under an obligation”. That statement made by individuals would be incoherent. Made by governments speaking for their states, it has somehow seemed to be coherent, because sovereignty has seemed a solvent of obligation. The sovereign is defined as free of law, *legibus solutus*. And it is in this emotive sense that there has been a shift from sovereignty to obligation.

That such a shift is happening seems plausible. The volume of international commitments continually increases, as more of the things governments want to do can only be done collaboratively. One of the features of the international legal system at present is the diversity of courts and tribunals. Key issues are arising before, for example, the Dispute Settlement Body of the World Trade Organization, the European Court of Human Rights, arbitration panels established under NAFTA, and so on. All these issues are now expressed in terms of obligations and their breach or fulfilment.

It is true that this change is not unalloyed and should not be overstated. The principal judicial organ of the United Nations is the International Court of Justice, and it

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<sup>15</sup> *Ancient Law* (1861; repr. Everyman Library, 1977) ch. 5, p. 100.

<sup>16</sup> P.C.I.J. Ser. A No. 1 (1923) at p. 25. The Court said: “No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.” See further J Crawford, “Negotiating Global Security Threats in a World of Nation States: Issues and Problems of Sovereignty” (1995) 38 *American Behavioural Scientist* 867.

has and for 15 years has had a significant calendar of cases. Yet the cases which raise the most interesting issues from the perspective of general public policy tend not to be cases before the International Court. Or if they are, the issues they raise seem to be sidestepped — for example, the judicial review issue, which was sidestepped in the *Lockerbie* case.<sup>17</sup> The International Court rightly prides itself in its handling of territorial disputes: these may be important enough in terms of the individual States concerned, but they do not often raise systemic issues.<sup>18</sup> There is a certain contrast with the work of regional and specialised courts and dispute settlement bodies. Even the *Barcelona Traction* case, where the Court made probably its most significant contribution to the international law of obligations, was concerned with an arid issue of diplomatic protection, and the Court's actual decision did not contribute much to the development of the law. So we have a situation where the pre-eminent court in the international legal system has not done much to clarify the modern law of obligations, while many of the other tribunals are beginning to do so, at least in their own particular field but often in terms which have broader implications.

No doubt there may be exceptions to that generalization as well. The Court on the whole did a good job in an obligation case involving an international river, the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*.<sup>19</sup> It usefully clarified in that case a number of important issues about the law of obligations. These were, in particular, the relation between the law of treaties and the law of responsibility, the existence and limits upon the defence of necessity, and the requirement of reversibility in the law of countermeasures. All three points have been fully assimilated in the current text of the Draft Articles. On the other hand, and more subtly, it can be argued that the result in that case can be explained on grounds of sovereignty, without any reference to doctrines of obligation.<sup>20</sup>

However this may be, and whatever the role of the International Court may be or have been, the shift I have identified from sovereignty to obligation exists. More emphasis will correspondingly be placed on the way in which obligations are carried out, and on what is done when they are not. In parallel with the shift from sovereignty to obligation

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<sup>17</sup> I.C.J. Reports 1992 p. 3; *ibid.*, p. 114.

<sup>18</sup> A case concerning a territorial dispute that did raise systemic issues (in particular, the question of the relation between rights over territory as property and rights over people as communities) was not a contentious case but an advisory opinion: *Western Sahara*, I.C.J. Reports 1975 p. 12. The careful lessons of that opinion have been rather overlooked or avoided in subsequent cases: e.g. *Namibia/Botswana*, judgment of 13 December 1999, paras. 71-75.

<sup>19</sup> I.C.J. Reports 1997, p. 7.

<sup>20</sup> The same might also be said, *mutatis mutandis*, for the Court's treatment of issues of sovereignty and obligation in the *Nuclear Weapons Advisory Opinion*, I.C.J. Reports 1996 p. 226, although the more important fact about that case is that it was an advisory opinion on an abstract question.

one may detect a shift at the instrumental level from immunity to accountability. And it is here that the work of the International Law Commission takes on a special significance. The Commission has spent much of its time on international transactions and obligations (the law of treaties, State responsibility, liability for injurious consequences, the law of international watercourses, etc.) and very little time on questions of sovereignty. Of the 14 topics on its first work program, “recognition of States and Governments” is the only one which the Commission has never tackled and I doubt will ever tackle.<sup>21</sup> The only work it has directly done on sovereignty issues was its work on state succession.<sup>22</sup> That was an offshoot of the law of treaties: state succession is an area of intersection between the fields of sovereignty and obligation. In the end one might say that the implications so far as sovereignty were concerned proved overwhelming, and the work on succession is regarded as only moderately successful.<sup>23</sup>

By contrast the Commission’s work on the law of treaties, leading to the Vienna Convention on the Law of Treaties, is its single most important achievement. The codified law of treaties is concerned, in a rather precise way, with three questions: whether there is a treaty obligation, what is its content, and who are the parties to the obligation. In other words, it is concerned with the coming into existence of treaty obligations, their interpretation and their termination. It is not concerned with questions of performance. The Draft Articles on State Responsibility, by contrast, are concerned with the general question of the performance of obligations, whether by treaty or otherwise. It covers the complete spectrum of international obligations. It provides the general secondary law of international obligations, in the same way that the Vienna Convention provides the general secondary law of treaties. In completing the Draft Articles, the Commission will thus be completing a cycle of work on the obligations of States.

But it will be completing the cycle with a number of differences. One is a difference of form and is perhaps not very important. The Vienna Convention became a treaty text, a treaty on treaties.<sup>24</sup> Whatever logical conundrums this may have raised, it gave the text a certain cachet and a level of stability. Amendments to the Convention can hardly be conceived, even if they may be called for.<sup>25</sup> But this is of limited significance. The Vienna Convention has hardly ever been applied, *as a treaty*, to other treaties. This is

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<sup>21</sup> See *Report of the International Law Commission on the work of its 48<sup>th</sup> Session, 6 May-26 July 1996* (A/51/10) para 162 & Annex II.

<sup>22</sup> See Watts, vol. II, chs. 10, 11.

<sup>23</sup> See J Crawford, “The Contribution of Professor D.P. O’Connell to the Discipline of International Law” (1980) 51 *British Ybk of Int Law* 1, 31-47 for an assessment.

<sup>24</sup> 1155 UNTS 331.

<sup>25</sup> Thus the ILC’s current detailed work on treaty reservations takes the form of a commentary on the Vienna Convention text. See *Report of the International Law Commission on the work of its 52<sup>nd</sup> Session, 1 May-9 June and 10 July-18 August 2000* (A/55/10), ch. VII.

because the conditions of its application are particularly strict. All the states participating in the conclusion of a treaty have to be parties to the Vienna Convention at the time the particular treaty is concluded.<sup>26</sup> This condition is virtually never met for multilateral treaties, and often not for bilateral treaties either. But it does not really matter, since there has not yet been a case where it would clearly have made a difference to the result whether the Vienna Convention applied *qua* treaty, as distinct from *qua* authoritative statement of the customary international law of treaties.

As to state responsibility, it is overwhelmingly likely that the eventual product will be not a treaty but a statement or text appended to a General Assembly resolution. I doubt however whether this will have much or any effect on the influence the text will have. Already the Draft Articles are being cited by courts and tribunals and are having an influence on the development of international law.<sup>27</sup> At most, the non-treaty form may make it more likely that the text may later be amended. Since many of the issues dealt with are controversial and still in the course of development, that may be no bad thing.

There is a second difference which is more important and which bears on my general theme. As noted, the Vienna Convention has a rather precise scope, concerned with the making and legal meaning of treaties. Even within that limited scope, it takes a particular and specific approach, which is essentially the treaty as a projection of the (valid) consent of the parties to it. All elements associated with the general law of treaties which could not be incorporated within this framework were suppressed – for example, the question whether and in what circumstances treaties could amount to a regime, the so-called “objective” effect of treaties.<sup>28</sup> This does not mean that the Vienna Convention deals only with bilateral treaties. It expressly extends to multilateral treaties and it is attentive to the important differences between different kinds of multilateral treaties.<sup>29</sup> Nonetheless it is not too much to say that it looks at multilateral treaties from the perspective of bilateral treaties. Its approach is, so to speak, bifocal. Only peripherally does it deal with the “public order” aspects of multilateral treaties, and then usually indirectly. That may even have been part of the secret of its diplomatic success.

It has not been possible or desirable to limit the Draft Articles on State Responsibility in the same way. Concerned as they are with the performance of all

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<sup>26</sup> See Vienna Convention, Art. 4.

<sup>27</sup> See e.g. *Gabčíkovo-Nagyymaros Case (Hungary v. Slovakia)*, I.C.J. Reports 1997 p. 7, at paras. 47, 50-53, 58, 79, 83; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, I.C.J. Reports 1999 para. 62.

<sup>28</sup> See S Rosenne, *Breach of Treaty* (Grotius, Cambridge, 1984) 85-125 for a review of some of the omitted issues.

<sup>29</sup> See Vienna Convention, arts. 20, 40, 41, 58, 60 (2).

international obligations, whatever their provenance, they cannot be limited to bilateral obligations of one state to another. But the question is whether, despite this broader scope, they nonetheless tend to assimilate the wider range of obligations to the strictly bilateral or interstate, whether in their turn they have adopted a bifocal approach. That accusation has certainly been made.<sup>30</sup> It is of particular relevance if we are to take seriously the idea of obligations to the international community as a whole.

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I have argued that one cannot take the idea of obligations owed to the international community in a simple sense as an obligation to an entity. The bilateral analogy clearly will not work, and the idea has to be disaggregated. The question is how.

An initial step might be to identify the international community with all existing states. Thus the phrase “the international community”, as used by the Court in *Barcelona Traction*, would be qualified by the addition of the words “of States”. That is indeed what article 53 of the Vienna Convention on the Law of Treaties does. According to article 53...

“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

The second sentence, with its reference to “the international community of States as a whole”, was added at the Vienna Conference. The ILC’s original text was shorter and less tendentious. Having been thus “corrected”, however (and in the interests of consistency), the ILC used the same formula in article 53 of the Draft Articles on Treaties between States and International Organizations of 1982, and it was repeated in the Vienna Convention of 1986.<sup>31</sup> A number of governments want to use the same phrase in the Draft Articles.<sup>32</sup> So there is a serious question whether we conceive of obligations *erga omnes* simply as obligations owed to all States.

In its commentary to article 53 the ILC recorded that the expression “international

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<sup>30</sup> See P Allott, “State Responsibility and the Unmaking of International Law”, *Harvard International Law Journal*, vol. 29, 1988, 1.

<sup>31</sup> Text in Watts, vol. II p. 907.

<sup>32</sup> “State Responsibility. Comments and observations received from Governments” (A/CN.4/515, 16 March 2001), sv Art. 43.

community of States”...

“could conceivably have been supplemented by a reference to international organizations, which would result in the phrase ‘international community of States and international organizations’. But in law, this wording adds nothing to the formula used in the Vienna Convention, since organizations necessarily consist of States, and it has, perhaps, the drawback of needlessly placing organizations on the same footing as States. Another possibility would have been to use the shorter phrase ‘international community as a whole’. On reflection, and because the most important rules of international law are involved, the Commission thought it worthwhile to point out that, in the present state of international law, it is States that are called upon to establish or recognize peremptory norms. It is in the light of these considerations that the formula employed in the Vienna Convention has been retained.”<sup>33</sup>

Evidently the Commission, which had avoided the phrase altogether in the initial version of article 53, found some difficulties with it in the context of a text concerning treaties of international organizations. International organizations are not the same as, and they are not to be identified with, States, as the International Court early pointed out.<sup>34</sup> In fact international organizations play a role in identifying and applying peremptory norms; they do not merely act as a forum in which States do so. This is not only the case with those international organizations which have an independent role in particular fields such as trade, fisheries or the environment. Nor is it limited to what are (so far) special cases such as the European Union, which have legal standing vis-à-vis states in the WTO and before the Law of the Sea Tribunal. The International Committee of the Red Cross is now recognised as an international legal person, and it has a central role in the formation and development of legal opinion in the field of international humanitarian law.<sup>35</sup> If the phrase “the international community of States as a whole” is intended as exclusive – i.e. as excluding non-States from the process of law-formation in the field of peremptory obligations – it no longer reflects the reality of the world, whether or not it did so in 1982.

There is a further point, which is that some obligations *are* owed, in terms, to all States, and these are not necessarily peremptory. For example many rights and obligations in the law of the sea are specifically of an interstate character: every state is entitled to a

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<sup>33</sup> Watts, vol. II, pp. 907-8.

<sup>34</sup> *Reparation for Injuries suffered in the Service of the United Nations*, I.C.J. Reports 1949 p. 174 at p. 179.

<sup>35</sup> See e.g. C Dominicé, “La personnalité juridique internationale du CICR” in Swinarski (ed), *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet* (Geneva/The Hague: ICRC, Martinus Nijhoff, 1984) 663; “Observer Status for the International Committee of the Red Cross: Explanatory Memorandum”, *Int Rev Red Cross*, No 279 (1990) 583; Switzerland-I.C.R.C., Agreement to Determine the Legal Status of the Committee in Switzerland, of 19 March 1993.

flag; ships not registered by a state are stateless and are subject to general jurisdiction.<sup>36</sup> So in other fields. For example nationality is a specific link between an individual and a state; persons lacking a nationality are stateless. International law has many rules of an “all states” character: all states are entitled to a territorial sea (no international organization is). But obligations of an “all States” character (obligations whose application depends on there being a state) are precisely *not* the rules we normally think of as peremptory. In particular those rules relating to the protection of individuals and human groups (prohibitions of genocide, apartheid, other crimes against humanity, the right to self-determination) — these are, with hardly any exceptions, rights and obligations which attach outside of or at least independently of the state. Their breach (and not only by states) “shocks the conscience of mankind”.<sup>37</sup> A formulation of *opinio juris* which appears to exclude that moral element does not seem appropriate.

To summarise, the term “international community as a whole” is now a well-accepted phrase. States remain central to the process of international law-making and law-applying, and it is axiomatic that every State is as such a member of the international community. But the international community includes entities in addition to States, and their role can be legally significant. The International Court used the phrase “international community as a whole” in the *Barcelona Traction* case,<sup>38</sup> and it has been used in other relevant contexts such as the Rome Statute for the International Criminal Court, 1998, article 5 (1).<sup>39</sup> It seems appropriate to continue to use it, and not to adopt a purely statist conception of fundamental obligations.

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Thus our conception of “the international community as a whole” needs to be an inclusive and open-ended one. But this only underlines the point. We cannot conceive of these obligations as owed “to” a wide and disparate group, as it were singularly or separately.

Perhaps the approach needs to be indirect? Even a relatively decentralised system can have community obligations (and we certainly need them). But in a decentralised system there is no all-purpose representative, no *parens patriae* who can securely act on

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<sup>36</sup> See United Nations Convention on the Law of the Sea, 1982, arts. 3, 17, 87, 92 (subject to art. 93), 116.

<sup>37</sup> As stated in G.A. resolution 96 (I), 11 December 1946; see *Reservations to the Genocide Convention*, I.C.J. Reports 1951 p. 15 at p. 23.

<sup>38</sup> I.C.J. Reports 1970 p. 3 at p. 32 (para. 33).

<sup>39</sup> The language of art. 5 (1) ultimately derives from the preamble to the Commission’s Draft Statute of 1994: *Yearbook... 1994*, vol. II (2), pp. 26-27, but it has been substantially reinforced in the transition to a substantive article.

the collective behalf. Resolving the tension between these two propositions leads us to ask, again, what kind of obligation is involved. What is it that lurks behind the Latin “*erga omnes*”?

It is not possible to be definitive about the answers. But let me at least begin by asking two questions of a general order about the general subject, obligations to the international community as a whole. First, are such obligations in international law civil or criminal in character? Secondly, are they to be seen in terms of analogies from private or public law?

Classical international law gave rather clear and definite answers to these two questions. The answer to the first question was that international law obligations were “civil” and not criminal – at any rate, they were not criminal. States cannot commit crimes, only individuals can commit crimes, as the Nuremberg Tribunal said.<sup>40</sup> Nor was there any process by which states could be held criminally responsible. The answer to the second question appears to have been that international law, in general, and the law of state responsibility in particular, was private and not public. Even Sir Hersch Lauterpacht in his first book, *Private Law Sources and Analogies*, treated international law as if it was private law for the purposes of drawing analogies, including in the field of responsibility.<sup>41</sup> The world-view that underlay those two answers (curiously enough it was not Hersch Lauterpacht’s world-view) was that of the horizontal, interstate, bilateral, billiard-ball world, so familiar to international relations theorists. It was horizontal in that there was no hierarchy of obligations or sources. It was interstate in that it was a closed world open only to states and their creations, international organizations. It was bilateral in that the underlying legal relations. They involved one state and another. They were typified by the law of diplomatic protection. International law treated the state as a single entity, aggregated the various interests at the level of a notional single governmental player – hence the metaphor of the billiard ball. No attempt was made to look within the state. Thus in the field of diplomatic protection, a *res judicata* against the individual injured did not bind the state. These were conceptually different domains.<sup>42</sup>

Now that world view, that view of the Westphalian international system, however much it may have reflected the period of the great wars, from the mid-eighteenth century until some time in the twentieth, is recognizably fading. In that context, and if time permitted, one could review the four characteristics I have mentioned, horizontality,

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<sup>40</sup> “Crimes against international law are committed by men, not by abstract entities...” *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg*, vol. 22, p. 466 (1948).

<sup>41</sup> H Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, London, 1927) 134-143.

<sup>42</sup> *Chorzów Factory* case P.C.I.J. Ser. A No. 17 (1928) p. 28.

interstateness, bilateralism, and the aggregation of the state, and show the ways in which each of these elements is being broken down. We would expect on that basis that the classical answers to my two questions are also changing, or at least are under reconsideration.

Well, so they are, but so far no synthesis has emerged. And it turns out that the two questions are associated with the two longest and least satisfactory of the Draft Articles on State Responsibility adopted on first reading in 1996. The first is article 19, which stipulates a distinction between crimes and delicts in international law.<sup>43</sup> The second is article 40, which identifies a wide range of states as individually injured by a breach of an international obligation, and gives them each essentially the same range of rights to seek reparation or otherwise to respond to a breach.<sup>44</sup> Thus article 19 appears to say that there

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<sup>43</sup> Article 19 reads as follows:

- “1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.
2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.
3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:
  - (a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
  - (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
  - (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;
  - (d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.
4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.”

<sup>44</sup> Article 40 reads as follows:

- “1. For the purposes of the present articles, ‘injured State’ means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One, an internationally wrongful act of that State.
2. In particular, “injured State” means:
  - (a) if the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

are such things as state crimes. And article 40 appears to say that the general law of obligations in international law gives rise to individual injuries on the analogy of private law. Different parts of the text appear to say on the one hand that serious breaches of community obligations produce criminal responsibility, and on the other hand that breaches of such obligations are to be equated with breaches of the individual or “subjective” rights of states, to which states may or may not respond as they see fit, irrespective of the responses of others. Each of these answers is fundamentally unsatisfactory, because each invokes or implies the wrong analogy, respectively the analogy of crimes and the analogy of private law in matters of public interest. Unless this underlying difficulty can be resolved, the articles will not be improved by mere redrafting.

The discrepancy between articles 19 and 40 is by no means obvious. On the face of it, both articles appear to embrace the broader view. This is the view that international law can reflect different ways of finding states to be responsible, that international law

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- (b) if the right infringed by the act of a State arises from a judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;
  - (c) if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;
  - (d) if the right infringed by the act of a State arises from a treaty provision for a third State, that third State;
  - (e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:
    - (i) the right has been created or is established in its favour;
    - (ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or
    - (iii) the right has been created or is established for the protection of human rights and fundamental freedoms;
  - (f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.
3. In addition, ‘injured State’ means, if the internationally wrongful act constitutes an international crime\*, all other States.”

A footnote to para. (3) adds that: “The term ‘crime’ is used for consistency with article 19 of Part One of the articles. It was, however, noted that alternative phrases such as ‘an international wrongful act of a serious nature’ or ‘an exceptionally serious wrongful act’ could be substituted for the term ‘crime’, thus, *inter alia*, avoiding the penal implication of the term.”

embodies relations which are not merely private or bilateral but can be public and multilateral. Indeed article 40 expressly refers to article 19 as the paradigm case where “all States” are interested or “injured”. But each article then fails, in different ways, to articulate the consequences of that approach. Indeed, it is not too much to say that each immediately reverts to older way of thinking about the issues.

As to article 19, it is true that we have a conception of “crimes”. But it is a conception of crimes divorced from any conception of due process and divorced from any consequences that could properly be described as penal. It is criminal responsibility, as it were, reduced to the level of denunciation. In theory we could conceive of an international system in which egregious conduct of states, and not just individuals, was to be regarded as criminal. After all, certain conduct of governmental actors, including heads of government, is to be regarded as criminal, with serious consequences in such fields as immunity.<sup>45</sup> National legal systems have achieved a genuine form of corporate criminal responsibility, overcoming the idea that a corporate person cannot commit crimes. The European Community is beginning to find ways of imposing fines upon member States.<sup>46</sup> At the international level, if we look at the way certain crimes are committed, we may well find that there is an aggregate criminal responsibility which it would be unfair, or which it may not be practically possible, to allocate to any individual. There can be something systematic about state conduct, over and above the conduct of individuals; it may produce results in aggregate which have a different moral dimension and which cause harm to individuals and communities which no individual could commit. Thus there is no *a priori* reason for excluding the idea of international criminal responsibility, whether by reference to the nature of the state or otherwise. But it is necessary to develop proper due process requirements, without which criminal responsibility is morally (and legally) intolerable. By contrast article 19 only envisages a bogus state criminal responsibility. It reduces the criminal responsibility of the state to a series of trivial consequences associated with a high level of rhetoric. Not even punitive damages be admitted. If it is said at the same time that there are state crimes and that punitive damages are unknown in international law, then we either have a serious substantive deficiency, or a serious terminological problem.

Then there is article 40.<sup>47</sup> If in substance article 19 denatures crimes, what article 40 does in substance is to multiply bilateral relations. Article 40 deems a range of states to

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<sup>45</sup> See e.g. *R v Bow Street Metropolitan Stipendiary Magistrate ex p. Pinochet Ugarte (Amnesty International and others intervening)* (No 3) [1999] 2 All ER 97.

<sup>46</sup> See Case C-387/97, *Commission of the European Communities v. Hellenic Republic*, judgment of 4 July 2000, paras. 85-86.

<sup>47</sup> See J Crawford, “The Standing of States: A Critique of Article 40 of the ILC’s Draft Articles on State Responsibility”, in M. Andenas (ed.), *Judicial Review in International Perspective. Liber Amicorum for Gordon Slynn* (Kluwer, The Hague, 2000) 25.

be injured by an act of an international obligation in a variety of cases. For example any state is injured by a breach of human rights if it is a party to the human rights standard in question.<sup>48</sup> It is obviously important to recognize that states have a legal interest in compliance with human rights. At the international level, in the absence of proper individual recourse measures, this may be the only way of addressing the issue. The recognition that states may have a range of legal interests in the performance of obligations where they are not the primary beneficiaries of those obligations is an important step forward.

But what does article 40 do, having made that step? It treats all of the states, which are deemed to be injured in the very long list it provides, as equally injured. It effectively treats them all in the same way. They are all equated to the bilaterally injured state. The state which is the primary victim of an armed attack (Kuwait, for example, in respect of the invasion by Iraq) is treated in exactly the same way as any third state. Just as article 19 denatures the notion of criminal responsibility, so article 40 denatures the notion of legal interest. 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. Article 40 fails to do that, instead falling back on the notion of individual injury and the private law analogy.

What is to be done? The first thing is to maintain the universalist framework. There may still be (perhaps common-law trained) international lawyers who regard the idea of a general law of obligations as an illusion. In their view, the right approach is simply to parse or interpret individual primary rules. That is an atomistic approach. It does not seem appropriate at a time when more coherence is called for. We have to admit, of course, that we are only creating a general set of categories. But it is something to create the right categories.

The second thing is not to denature concepts, which are general concepts in most legal systems. There may be no *a priori* reason why international law cannot generate criminal responsibility. But let us admit that it has not done so yet. Let us reserve the notion of criminal responsibility of states for forms of responsibility that we would recognize as criminal if others had it – corporations, for example, or opposition groups. Let us not create new and bogus categories special to the state. The general set of procedures that exists now for insuring compliance, for determining whether there has been non-compliance and for determining the consequences of non-compliance, are for the most part based upon civil law analogies, or they are *sui generis*. That does not exclude

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<sup>48</sup> DASR (1996), art. 40 (2) (e) (iii); above note 44.

the possibility of criminal law procedures and consequences. But let us not seek to impose them by some mere process of general denunciation.

As to the field of the public-private distinction in article 40, let us not equate public with private. Just as we should not create artificial distinctions in article 19, we should not create artificial similarities in article 40. Let us distinguish between the state which is directly affected by a breach of an international obligation and the state which has a legal interest in compliance with the obligation, irrespective of how or whether the breach has affected it. It is true that this raises difficulties of definition (though we could hardly do worse than article 40). One clear example of an injured state – the state which is particularly affected by a breach of a multilateral obligation – does not appear in article 40. It is specifically mentioned in the much more concise and coherent account of legal injury under multilateral treaties which is contained in article 60 of the Vienna Convention on the Law of Treaties.

So we need a clearer account at the interstate level of who is the victim of a breach, i.e. the individually injured state. But let us also recognize that the victims of breaches of international obligations are not necessarily states. There may well be breaches of international obligations the only victims of which are non-states. This was the case, as the International Court expressly recognised in 1971, with South West Africa (Namibia): the victim there was a people and not a state.<sup>49</sup> That does not mean that states do not have what common lawyers will call standing: it is characteristic that common lawyers would use a procedural term for a notion which in the draft articles is treated as a right. Let us identify that category as the category of legal interest. It may have to be defined rather generally, but it must be distinguished from the category of victim. To do that is the first step in disentangling the tangle article 40 now creates, by which, for example, any state in the world can take countermeasures for a breach of human rights even though the victim of that breach does not want the countermeasures to be taken, and may actually be harmed by them.

Presently we have the spectre of certain states galloping to the aid of victims who are clear that they do not want such aid. As the Court said in the *Nicaragua* case, if a state purports to act in collective self-defence of another, it must act with the consent of the state which is said to be the victim of the attack. The same should apply to state responsibility, especially so far as reparation is concerned. More generally we have to distinguish between the position of the victim and the legal interests of third states. Those third states – like Ethiopia and Liberia were in the *Second South-West Africa* cases<sup>50</sup> – are to be treated

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<sup>49</sup> I.C.J. Reports 1971 p. 56 (para. 127).

<sup>50</sup> I.C.J. Reports 1996 p. 6.

as acting in the public interest. We need to recognize the distinction between a public law remedy and what would be individual remedies for individual victim.

To conclude, the Draft Articles on State Responsibility cannot do more, as a set of the secondary rules of responsibility, than articulate certain key distinctions and thereby create certain basic categories of wrongdoer and responder. But this it can do. It is particularly in the framework of article 40 that we should recognise that 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 obligations 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. It may be that in doing so we may further synthesize civilian and common law approaches to the law of obligations and to the consequences of their breach. We may thereby assist in the development of an international law of obligations which is practically oriented, historically informed, and progressive.

**James Crawford**