

Enforcing Obligations *Erga Omnes* in International Law

The concept of obligations *erga omnes* – obligations owed to the international community as a whole – has fascinated international lawyers for decades, yet its precise implications remain unclear. This book assesses how this concept affects the enforcement of international law. It shows that all States are entitled to invoke obligations *erga omnes* in proceedings before the International Court of Justice, and to take countermeasures in response to serious *erga omnes* breaches. In addition, it suggests ways of identifying obligations that qualify as *erga omnes*. In order to sustain these results, the book conducts a thorough examination of international practice and jurisprudence as well as the recent work of the UN International Law Commission in the field of State responsibility. By so doing, it demonstrates that the *erga omnes* concept is now solidly grounded in modern international law, and clarifies one of the central aspects of the international regime of law enforcement.

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Foreword

The subject of obligations *erga omnes* – obligations to the international community as a whole – their character and possible consequences has been with us ever since the stray dictum of the International Court in the *Barcelona Traction* case in 1970. The shares in that Canadian company may have become worthless, but huge resources have been put into explaining and accounting for this particular product of the company's failure. And as so much has been said, so opinions have differed. The phrase was used incidentally only to mark out the terrain of diplomatic protection as an inherently bilateral sphere of interstate relations. It was a pretext for an apology for the Court's earlier decision in *Second South West Africa* – a disaster from a public relations point of view for the Court and a turning point in its relations with the Third World – in short it was law as politics. It showed the Court confronting a new structure of international law, where what matters are not bilateral but multilateral relations and multilateral norms – self-determination, non-discrimination, the prohibition of aggression, fundamental human rights. It showed the Court evading the challenge presented by the concept of peremptory norms of general international law, adopted over the dissent of France at the Vienna Conference in 1969. Where the States (or most of them) would boldly go with a fundamental assertion of core substantive values – or at least of the *possibility* of such values – the Court would timorously follow, reducing those values to a procedural concept of standing to sue. And so on.

The conceptual split which the two Latin phrases – *jus cogens* and *erga omnes* – caused in the academy has still not been fully traced. Could they not be different aspects of the same underlying concept – fundamental values of juridical interest to all and therefore not waivable without general assent? The International Law Commission in its Articles on

Responsibility of States for Internationally Wrongful Acts used both terms (in Articles 40 and 48) without implying that there is any radical distinction between them. It also used the notion of a group of States (Article 48(1)(a)), immediately contrasted with the international community as a whole – not, be it noted, the international community of States. Historically we have had a world in which there were hundreds of States and State-like entities – countless hundreds in 1648 – and a world in which there were around 60, at the numerical low point of 1945. Currently in the oscillation of numbers of States we seem to be stuck just short of 200 – but such numbers are evidently arbitrary. Perhaps all the States there are now are simply a ‘group of States’, the group of entities that happen to be States at this time, a contingency not a category.

There is much here that needs careful, painstaking and dispassionate analysis, avoiding dogma and the a priori. Christian Tams provides all this. Of course his is not the only work in the field but it may be judged by some distance the best, and not merely because it has the temporary advantage of being the most recent. It is well researched, historically informed, well-written and balanced in its judgements. It does not over-sell the subject but deals with it lucidly and thoroughly, convincing the reader where more strident works on the subject might not. It is a significant contribution, which I believe will help mark out Christian Tams as one of the very best international lawyers of the coming generation.

James Crawford
Lauterpacht Research Centre for International Law
16 July 2004

Preface

The concept of obligations *erga omnes* has fascinated international lawyers for some time. It has raised high hopes about the protection of fundamental interests shared by the international community as a whole, yet its precise implications remain, at best, uncertain. My own interest in the concept goes back to a seminar, held at the Christian-Albrechts University of Kiel (Germany) in early 1998, which clearly exposed both aspects – high hopes and lack of certainty. Internships at the United Nations International Law Commission, during the final stages of its work on State responsibility (1999–2001), made me realise that obligations *erga omnes* not only present an intellectual challenge, but are eminently relevant to States.

This book assesses to what extent the fascinating, yet elusive, concept of obligations *erga omnes* has had an impact on the rules of modern international law. It is based on research undertaken at the Universities of Cambridge and Kiel. It was submitted as a PhD thesis to the University of Cambridge in late 2003, and was subsequently awarded the Yorke Prize 2005. My research in Cambridge was supervised by Professor James Crawford, to whom I am much indebted. As the International Law Commission's Special Rapporteur on the topic of State responsibility, he was in a unique position to provide expert guidance. His comments and advice proved most helpful. At the same time, I have greatly appreciated his tolerance of criticism of the Commission's work.

In addition, a great number of people have helped me develop my thoughts on the topic. They include Judge Bruno Simma (The Hague); Professors Jost Delbrück (Kiel), Rainer Hofmann (Frankfurt), and Colin Wabrick (Durham); Chester Brown and Ben Olbourne (both at London); Martin Mennecke (Copenhagen); Dr. Andreas Paulus (Munich); as well as Dr. Guiguelmo Verdirame, Dr. Matthew Conaglen, and Dr. Roger O'Keefe

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(all at Cambridge). Between 2000 and 2003, while I was a member of Gonville & Caius College, Cambridge, my research was generously supported by the College's W. M. Tapp Fund. I am grateful to the Trustees of the Fund, in particular to Dr. Pippa Rogerson, as well as to the following bodies: the Whewell Fund; the Cambridge European Trust; Studienstiftung des deutschen Volkes; Evangelisches Studienwerk Villigst; Deutscher Akademischer Austauschdienst. Thanks are also due to Cambridge University Press, in particular to Finola O'Sullivan, Annie Lovett, and Jan Miles-Kingston, for all their help in turning this manuscript into book form.

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Delbrück (1998), 17

Where necessary, different entries published in the same year are distinguished by 'a' or 'b', i.e. Delbrück (1999a), Delbrück (1999b).

Documents issued by the International Law Commission are not included in the general bibliography, but listed separately.

Cases cited in the footnotes are listed in the Table of cases, which also gives shorthand titles used in the text.

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Abbreviations

A.C.	Appeal Cases (England and Wales)
ACHR	(Inter-)American Convention on Human Rights
AFDI	Annuaire français de droit international
AJIL	American Journal of International Law
AJPIL	Austrian Journal of Public International Law
All ER	All England Law Reports
AnnIDI	Annuaire de l'Institut de Droit International
ASR	Articles on State Responsibility (International Law Commission)
AVR	Archiv des Völkerrechts
Bd(e).	Band/Bände
BDGVR	Berichte der deutschen Gesellschaft für Völkerrecht
BGBI.	Bundesgesetzblatt
BISD	Basic Instruments and Selected Documents (GATT)
BYIL	British Yearbook of International Law
CAT	Convention Against Torture
CCPR	(International) Covenant on Civil and Political Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	(International) Convention on the Elimination of Racial Discrimination
CSECR	(International) Covenant on Social, Economic and Cultural Right
CTS	Consolidated Treaty Series (Parry ed.)
Diss.Op	Dissenting Opinion
Doc.	Document

DRC	Democratic Republic of Congo
EC	European Community
EC Bull.	Bulletin of the European Communities
ECHR	European Convention of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECOSOC	(United Nations) Economic and Social Council
ECR	European Court Reports (ECJ)
ed(s).	edition/editor(s)
EJIL	European Journal of International Law
ELR	European Law Review
EPIL	Encyclopaedia of Public International Law
<i>et al.</i>	<i>et aliter</i>
ETS	European Treaty Series
EURATOM	European Atomic Energy Community
Eur. Comm'n HR	European Commission on Human Rights
Eur. Ct. HR	European Court of Human Rights
EWCA (Civ.)	England and Wales Court of Appeal (Civil Division)
FCN	Friendship, Commerce and Navigation (treaties)
FRY	Federal Republic of Yugoslavia
GA	(United Nations) General Assembly
GATT	General Agreement on Tariffs and Trade
GYIL	German Yearbook of International Law
HJIL	Harvard Journal of International Law
HRLJ	Human Rights Law Journal
HRQ	Human Rights Quarterly
<i>ibid.</i>	<i>ibidem</i>
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
<i>id.</i>	<i>idem</i>
IDI	Institut de droit interational
i.e.	<i>id est</i>
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials

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ILO	International Labour Organisation
ILR	International Law Reports
Indian JIL	Indian Journal of International Law
JIR	Jahrbuch für Internationales Recht
LJIL	Leiden Journal of International Law
LNTS	League of Nations Treaty Series
LOSC	Law of the Sea Convention
MichJIL	Michigan Journal of International Law
MN	Marginal note
NILR	Netherlands International Law Review
NQHR	Netherlands Quarterly for Human Rights
Nordic JIL	Nordic Journal of International Law
NRG	Nouveau Recueil Général (Martens)
NYIL	Netherlands Yearbook of International Law
OAS	Organization of American States
OJ	Official Journal of the European Communities
ÖZÖR	Österreichische Zeitschrift für Öffentliches Recht
para(s).	paragraph(s)
PCIJ	Permanent Court of International Justice
Proc. ASIL	Proceedings, American Society of International Law
RBDI	Revue belge de droit international
RdC	Recueil des Cours
Res.	Resolution
RGDIP	Revue générale de droit international public
RIAA	Reports of International Arbitral Awards
RIW	Recht der Internationalen Wirtschaft
SADC	Southern African Development Community
SAYIL	South African Yearbook of International Law
SC	(United Nations) Security Council
SchwJIR	Schweizerisches Jahrbuch für Internationales Recht
Sep.Op.	Separate Opinion
Ser.	Series
Strasbourg Court	European Court of Human Rights
TEC	Treaty Establishing the European Community
TEU	Treaty Establishing the European Union
UKTS	United Kingdom Treaty Series
UN	United Nations
UNC	United Nations Charter
UNTS	United Nations Treaty Series

UNYB	United Nations Yearbook
US	United States
VCLT	Vienna Convention on the Law of Treaties
Virginia JIL	Virginia Journal of International Law
Vol.	Volume
VwGO	Verwaltungsgerichtsordnung (Germany)
WTO	World Trade Organization
Yb.	Yearbook
YbILC	Yearbook of the International Law Commission
YbECHR	Yearbook of the European Convention of Human Rights
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZÖR	Zeitschrift für Öffentliches Recht