Obligations erga omnes

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Content type: Encyclopedia entries
Article last updated: December 2008

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Subject(s):

Published under the auspices of the Max Planck Foundation for International Peace and the Rule of Law under the direction of Rüdiger Wolfrum.

A. Obligations erga omnes as a New Phenomenon in Public International Law

1 The International Court of Justice (ICJ) recognized in Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase) (→ Barcelona Traction Case) that there are two different categories of obligations under public international law. The Court stated that there are ‘obligations of a State towards the international community as a whole which are the concern of all States’ and for whose protection all States have a ‘legal interest’. These obligations are fundamentally different from those existing vis-à-vis another State.

2 Only one year before the Barcelona Traction Case, in 1969, the Vienna Convention on the Law of Treaties (1969) (→ VCLT) had been adopted. The VCLT had for the first time recognized the existence of ius cogens in public international law. The recognition by the community of States of the existence of norms from which no derogation is permitted implied that there exists a hierarchy of norms also in public international law. Almost as a logical consequence, the ICJ underlined the interest of the whole international community in the respect of and compliance with these fundamental norms. The ICJ has confirmed the existence of obligations erga omnes in East Timor (Portugal v Australia) (’East Timor Case’ para. 28); and in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) paras 155–60).

3 Although ius cogens and obligations erga omnes have different legal consequences, they are related to each other in important aspects. A rule from which no derogation is permitted because of its fundamental nature will normally be one in whose performance all States seem to have a legal interest. This is confirmed by pertinent case law. In the Barcelona Traction Case for instance the ICJ described obligations erga omnes in the following terms:

   Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination (para. 34; see also Aggression; Genocide; Slavery; Racial and Religious Discrimination).

4 In the East Timor Case and in the Israeli Wall Advisory Opinion (paras 155–159) the ICJ qualified as obligations erga omnes the obligation to respect the right of self-determination as well as certain obligations under international humanitarian law.

5 The ICJ did not explain in detail how these rights which are the concern of all States may be enforced. In the Barcelona Traction Case the Court stressed that on the universal level the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality. The ICJ mentioned Art. 24 (now Art. 33) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (→ ECHR) to illustrate that regional systems may contain such possibilities (Barcelona Traction Case para. 91).

6 In the Israeli Wall Advisory Opinion the ICJ circumscribed the obligations of third States as follows:

   Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by...
such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention (para. 159; See also → Jerusalem; → United Nations Charter; → Self-Determination; → Geneva Conventions I–IV (1949); → Civilian Population in Armed Conflict).

7 Obligations erga omnes should be clearly distinguished from treaty obligations, which may sometimes be obligations erga omnes regarding parts of the treaty (see Art. 60 VCLT). It is, on the other hand, quite possible that obligations erga omnes are also laid down in a treaty as in the Convention on the Prevention and Punishment of the Crime of Genocide (see also → Treaties, Third-Party Effect).

B. Early Indications

8 There exists an important tradition in international law for the view that States which are not directly affected may react, even with → reprisals, against breaches of international law of a specific nature. The doctrine according to which intervention was permissible under certain circumstances frequently dealt with that issue (→ Humanitarian Intervention). Writers in the 19th century, for instance Heffter, conceded that States may act as advocates for the international community and mankind in general and may enforce respect for human rights. Heffter stated in 1866:

Du reste une force puissance pourrait participer aux représailles d’une autre, lorsque sa coopération aurait pour but de mettre un terme aux violations du droit international ou à des procédés contraires à l’humanité et à la justice. En ce cas les états ne font que remplir une mission commune qui leur est tracée naturellement. Organes suprêmes et multiples de l’humanité, ils sont appelés à en faire respecter les lois partout où elles sont violées (at 211).

C. The Contribution of the International Law Commission (‘ILC’)

9 In 1976 the reports of the then Special Rapporteur of the → International Law Commission (ILC), Roberto Ago, analysed the issues in detail. He raised the question of whether all violations of public international law give rise to the same regime of → State responsibility or whether there are differences. Its cognates having been recognized in public international law, he regarded it as contradictory that the relation of responsibility on the basis of a breach should only exist between the State having violated the rule and the directly violated State. He introduced the idea that a distinction should be made between the delict and the crime. On this basis the ILC provisionally adopted Art. 19 Draft Articles on Responsibility of States for Internationally Wrongful Acts defining international crimes (→ International Criminal Law). The breaches of international law concerning the maintenance of international peace, self-determination, obligations safeguarding the human being, such as those prohibiting slavery, genocide, and → apartheid, and the obligations to safeguard and preserve the human environment were considered to be international crimes (see also → Environment and Human Rights; → Environment, International Protection). The notion of international crime was eventually abandoned by the ILC, but the articles adopted by the ILC in 2001 recognize that obligations may be owed to the ‘international community as a whole’ (Arts 33, 42, and 48 Draft Articles on State Responsibility). If that is the case, special rules of State responsibility apply (Arts 48, 54 Draft Articles on State Responsibility). In particular, any State other than the injured State is entitled to invoke the responsibility of another State for obligations erga omnes under Art. 48 Draft Articles on State Responsibility. If there exists an obligation erga omnes every State may claim from the responsible State cessation of the internationally wrongful act, and if necessary assurances and guarantees of non-repetition, and performance of the obligation of reparation in the interest of the injured State or of the beneficiaries of the obligation breached (→ Reparations; → War Reparations).

D. The Resolution of the Institut de Droit International on Obligations erga omnes of 2005

10 In 2005 the → Institut de Droit international adopted the Resolution on Obligations erga omnes in International Law on the basis of a report by Giorgio Gaja. The Institute treated as obligations erga omnes obligations under general international law which a State owes to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action (Art. 1 (a) Obligations erga omnes Resolution). The Institute added those obligations under a multilateral treaty that a State Party to the treaty owes in any given case to all other States Parties to the same treaty, in view of their common values and concern for compliance, so that a breach of that obligation enables all States to take action (Art. 1 (b) Obligations erga omnes Resolution). The principle of erga omnes Resolution states that a wide → consensus exists to the effect that the prohibition of acts of aggression, prohibition of genocide, obligations concerning the protection of basic human rights, obligations relating to self-determination, and obligations relating to the environment of common spaces are examples of obligations reflecting those fundamental values. According to Art. 2 Obligations erga omnes Resolution in case of a breach of an obligation erga omnes all the States to which the obligation is owed are entitled, even if they are not specially affected by the breach, to claim from the responsible State in particular: cessation of the internationally wrongful act, and performance of the obligation of reparation in the interest of the State, entity, or individual which is especially affected by the breach. Restitution should be effected unless materially impossible.

11 Where a jurisdictional link between a State alleged to have committed a breach of an obligation erga omnes
and a State to which the obligation is owed exists, the latter State has standing to bring a claim to the International Court of Justice or other international judicial institutions in relation to a dispute concerning compliance with that obligation (Art. 3 Obligations erga omnes Resolution). Where a widely acknowledged grave breach of an erga omnes obligation occurs, all the States to which the obligation is owed shall endeavour to bring the breach to an end through lawful means in accordance with the Charter of the United Nations. They shall not recognize as lawful a situation created by the breach, and are entitled to take non-forceful countermeasures under conditions analogous to those applying to a State specially affected by the breach (Art. 5 Obligations erga omnes Resolution).

E. State Practice as to Reactions of Not Directly Affected States

12 There have been several cases where States which were not directly affected have taken measures against States violating fundamental rules of public international law. Those reactions consisted in → retraction[s] but in some cases also in reprisals. One of the earliest examples concerns the reaction to the taking of → hostages in the American embassy in Tehran in 1980 (→ United States Diplomatic and Consular Staff in Tehran Case [United States of America v Iran]). On 22 April 1980 the Foreign Ministers of the European Community decided to take measures to impose → sanctions against Iran. All contracts concluded after 4 November 1979, the date when the hostages were taken, were suspended. The Member States of the European Community referred to a threat to peace and security and to the fact that the Security Council could not adopt a resolution imposing sanctions, just because of the Soviet → veto. When the Soviet Union intervened in Afghanistan the United Nations General Assembly condemned the action and the United States applied a series of embargo (→ Economic Sanctions) measures against the Soviet Union. In 1981 the Heads of State and Government (→ Heads of State; → Heads of Governments and Other Senior Officials) declared that Afghanistan had violated its obligations under the Convention for the Suppression of Unlawful Seizure of Aircraft because it had given refuge to the hijackers of a Pakistani aircraft. Consequently the Heads of State and Government proposed to suspend all flights to and from Afghanistan unless it immediately took steps to comply with its obligations. When emergency law (→ Emergency, State of) was declared in Poland on 13 December 1981 several States imposed sanctions against the Soviet Union because they regarded the latter as responsible for a threat to international peace by moving troops to the Polish border. When Argentina invaded the → Falkland Islands/Islas Malvinas in 1982 the European Community imposed sanctions which were considered as lawful on the basis of the violation of one of the fundamental rules of public international law. On 1 September 1983 a Korean airliner was shot down by Soviet fighters (→ Korean Air Lines Incident [1983]). When the action was discussed in the United Nations Security Council a condemnation was vetoed by the Soviet Union. Several States acted unilaterally by suspending the landing of Aeroflot flights on their territory for periods from 15 to 60 days. Of considerable interest is the flight ban decided by the Council of the European Community against Yugoslavia in 1998–99 because of the violations of international human rights in → Kosovo. The United Kingdom had first objected to a disregard of air-traffic agreements but was persuaded that this was legally possible (Frowein [2000] 443–4 n 51).

13 Those are only a few examples. The ILC has left open the possibility for States other than an injured State to take countermeasures (Art. 54 Draft Articles on State Responsibility). Art. 54 Draft Articles on State Responsibility imply that such a possibility might exist (‘lawful measures’). The ILC called the practice ‘limited and rather embryonic’ (Draft Articles on State Responsibility [137]). CJ Tamms, however, whose analysis of the matter is probably the best so far and who cites 15 cases between 1970 and 2003, illustrates that the contrary is the case. This seems to show that → State practice clearly confirms the right of States to take countermeasures where obligations erga omnes have been breached. The ILC even cites six of these examples but eventually leaves the question open (Draft Articles on State Responsibility 138–9). Art. 54 Draft Articles on State Responsibility implies, however, that measures taken by States not directly affected may be lawful.

F. Evaluation

14 As a consequence of the development of international law into more than a reciprocal relationship among individual States it seems that the notion of obligations erga omnes has been recognized. Reactions against the violation of such obligations should preferably be organized within an institutionalized system of the international community. The most important system of that nature is Chapter VII United Nations Charter. However, present-day international law seems to permit non-forceful proportionate countermeasures of States against violations of obligations erga omnes where no institutional system exists or an existing system does not function properly. The reactions to the shooting down of the Korean airliner as indicated earlier are a typical example of that sort.

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