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A Formal Prescriptive Approach to
General Principles of (International) Law

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**EUROPEAN UNIVERSITY INSTITUTE
DEPARTMENT OF LAW**

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Abstract

From the analytical viewpoint a *norm* can *formally* be regarded as a *right-duty* (or *claim-obligation*) *relation* (1) that regulates *behaviour* (*action/inaction*) (2) among *subjects* (3) in definite *space* (4) and *time* (5). In normative terms, general principles (the ‘basis’) of (international) law can be conceived of as general obligations, i.e. obligations *erga omnes* (towards everyone). Obligations *erga omnes*, indivisible or divisible because of their content, link a subject to every other subject of international law, endowed with a correlative claim, so that the whole obligations *erga omnes* are matched by the whole claims *erga omnes* of all the subjects of international law. Indivisible obligations *erga omnes* are unavailable from the viewpoint of the power, so *cogentes*, breaches violate necessarily all the correlative claims, possibly enabling every subject to invoke the responsibility and impose sanctions. Correspondingly, sanctions should be regarded as indivisible obligations *erga omnes*, the violation of which allows universal enforcement. Nevertheless, specifically by reason of the gravity of the breach, it is possible to split primary and secondary norms, conceiving of the sanction as a bilateral relation allowing solely reciprocal enforcement in the case of an infringement. Divisible obligations *erga omnes* are available from the viewpoint of the power, so *dispositivae*, breaches must be seen as relative, enabling only the subject(s) injured to invoke the responsibility and impose sanctions. Correspondingly, sanctions should be regarded as bilateral obligations, the infringement of which gives rise to reciprocal enforcement. Nevertheless, it is possible to figure out that specifically the gravity of the breach ‘unifies’ the primary divisible obligation, allowing universal invocation of the responsibility, so that the secondary obligation could be either bilateral or a general indivisible one, respectively permitting relative or absolute enforcement in the case of a breach.

Keywords

(Primary/Secondary) Formal Legal Norm; Subject; Claim-Obligation Relation; (Absolute (General)/Relative/Indivisible/Divisible) Right-Duty Relation (*erga omnes*); (Positive/Negative/Licit/Illicit) Behaviour; Space; Time; Principle of Imputation (the ‘ought’); Hierarchy; System of Norms; (International) Law; General Principles.

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Naturally, responsibility for opinions expressed and any possible errors remains my own

To G.

'Entia non sunt multiplicanda praeter necessitatem'

William of Ockham

A Formal Prescriptive Approach to General Principles of (International) Law

Ottavio Quirico*

General principles of (international) law as subject matter and norms as basis of legal logic: by way of introduction

This study is a brief inquiry in the theory of (international) law: it focuses on general principles in particular.

By ‘general theory of law’ I intend the analysis of law, as a whole, through its fundamental concepts.¹ From this viewpoint, general principles of international law belong to the general theory, because they are the root of the international legal order and should facilitate its global comprehension. Following a particular doctrine, namely the monist view of the legal system, it is possible to assert that general principles constitute the foundation and tool to conceive of law in its entirety. Furthermore, the scope of the general principles entails their crucial importance in understanding evolving and fragmenting international law.

From the judicial standpoint the concept of ‘general principle (of (international) law)’ is largely exploited, whereas from the juristic standpoint the issue is discussed in general works of very important authors.² Not surprisingly, much analysis has been devoted to the issue in the framework of the international responsibility of states, since the work of the ILC on the matter strictly links ‘secondary’ norms, governing responsibility, and ‘primary’ norms, simply regulating obligations.³

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¹ See H. Kelsen, *Pure Theory of Law* (1967), tr. by M. Knight (1989), at 1; E. Pattaro, ‘Per una mappa del sapere giuridico’, in U. Scarpelli, R. Treves, *La teoria generale del diritto – Problemi e tendenze attuali* (1983), at 249; U. Scarpelli, C. Luzzati, *Compendio di filosofia del diritto* (2000), at 5; J.-L. Bergel, *Théorie générale du droit* (2003), at 3-4.

² See, for instance, H. Kelsen, *Principles of International Law* (1956); C. Wolff, *Jus gentium* (1764); E. De Vattel, *Droit des Gens* (1758); H. Grotius, *De iure belli ac pacis* (1625).

³ See S. Villalpando, *L’émergence de la communauté internationale dans la responsabilité des États* (2005), at 1-40.

Basically, ‘general principles’ can be regarded either as a *descriptive* or a *prescriptive* concept. From the descriptive perspective, they are abstractions from norms, belonging to legal meta-language, helpful in understanding the (international) legal system or parts of it. From the prescriptive perspective, they are norms, belonging to legal language, hopefully facilitating a holistic interpretation of the (international) legal system in a unitary way.⁴

Our logic completely aligns itself with the conception of law as ‘ontological normative science’, the premises of which draw especially from H. Kelsen, H. L. A. Hart and N. Bobbio:⁵ legal reflection is speculation on norms, so normative meta-language. Thus, it is submitted that general principles, instead of being inconsistent abstractions, are norms⁶ and the aim is to study rules belonging to the international legal order characterized by the attribute of generality. In fact, I refer indiscriminately to ‘general principles’ or ‘general norms’ of (international) law and my reflection is meta-language on the general norms of (international) law.

In the general theory of law, the norm (from the Greek ‘*nomos*’: ‘rule’) is quite unanimously qualified as a prescriptive proposition, because it sets a duty.⁷ Actually, although a rule can exist even in the absence of words (we can think, for instance, of the signs belonging to the rules of the road or figure out, more simply, an imperative expressed by simple gestures),⁸ the norm can always be enunciated through words. Thus, the normative proposition becomes the certain anchorage for the lawyer’s thinking, the fundamental unit of his reasoning.⁹ In this regard, it should be noted that the norm, being prescriptive, entails the idea of the right-duty relation, in whatever way it is expressed. Hence, we must reflect on the term ‘right’: although words cannot exhaust the essence of things, they reveal a more or less complete part of them.

The term ‘right’ (‘Recht’, ‘droit’, ‘diritto’, ‘derecho’) comes from low Latin ‘*directum*’, past participle of the verb ‘*dirigere*’ (‘to line up’, ‘to trace a certain direction’, hence ‘to set out, to set in order, to regulate, to rule’), which means what is in straight line, i.e. the contrary of what is tortuous. We spontaneously ascribe this feature to the ruler, used to trace straight lines, so that one can figure out formally the idea of the right-duty relation as a link among subjects.¹⁰

Although the norm entails the concept of the right-duty relation, it does not correspond entirely with it, being also something more. In particular, it is necessary to introduce two other elements to comprehend the norm, namely subjects and behaviour

⁴ In fact, the literature often refers to ‘rules’ and ‘principles’ as prescriptions in the field of international law (see M. Koskenniemi, ‘General Principles: Reflections on Constructivist Thinking’, in M. Koskenniemi *et al.*, *Sources of International Law* (2000), at 360 *et seq.*). See also the Study Group of the ILC, Report on Fragmentation of International Law, A/CN.4/L.682 (13 April 2006), at 206, § 409, 244-245, §§ 481-483, 246, § 486, and Addendum (Draft Conclusions), A/CN.4/L.682/Add.1 (2 May 2006), at 4, § 1.

⁵ See in particular N. Bobbio, *Essais de théorie du droit* (1998), at 185-186.

⁶ On general principles as general norms see N. Bobbio, *Teoria generale del diritto* (1993), at 148.

⁷ See N. Bobbio, *Teoria generale del diritto*, at 45; N. Bobbio, *Essais de théorie du droit*, at 117-118.

⁸ See A. Sériaux, *Le droit – Une introduction* (1997), at 254.

⁹ See R. Guastini, ‘Norberto Bobbio, ou de la distinction’, in N. Bobbio, *Essais de théorie du droit*, at 2-3, 7-8.

¹⁰ See A. Sériaux, *Le droit – Une introduction*, at 19, 24 *et seq.*

(action/inaction),¹¹ consubstantial with the concept of right, which can be defined as the rule, or measure, of interpersonal behaviour: it is necessary to behave ‘rightly’, i.e. normally.

From the analytical viewpoint,¹² I divide up synthetically the norm into three basic elements (right-duty relation (1), behaviour (2), subjects (3), and I think of the norm as a right-duty relation that regulates behaviour (action/inaction) among subjects. Hence, law (as the sum of rights) traces an ideal line among subjects that defines their behaviour as exactly as possible.

Lastly, norms are valid in space (4) and time (5), the conception of which is linear in law: these two other elements are the limits of the normative effectiveness.¹³

Therefore, I think synthetically of the *norm as a right-duty relation (1) that regulates behaviour (action/inaction) (2) among subjects (3) in definite space (4) and time (5)*.

Consequently, I conceive of the norm on the basis of five simple elements (necessary and sufficient conditions), through which I pass from the language of words into a language of forms. In this sense I can assert that the logic of law, or normative logic, is a formal logic:¹⁴ *law is form*.

As N. Bobbio correctly asserted, the logic is formal simply because it concerns the structure of the norm, which is universal and permanent.¹⁵ Hence, I see in the formal sense not only Hartian ‘secondary’ norms (norms of production), but also ‘primary’ norms (norms of regulation). To some extent, from this perspective it is possible to reconcile the normative conception of law, of which the most important exponent is H. Kelsen, with the institutional theory, reducing to the norm the institutional aspect, especially the subjective one, prevailing for S. Romano.¹⁶

Right, duty, claim, obligation

Having schematically defined what a norm is for me, it is now necessary to specify its essential constitutional elements, especially considering the number of subjects to whom the norm is addressed. Indeed, it is possible that a norm regulates a right-duty

¹¹ See M. Virally, *La pensée juridique* (1960), at 47-49.

¹² The analytical approach to law seeks to ‘guardar dentro le macchine del diritto e della cultura giuridica, riconoscerne i pezzi, smontarli e rimontarli, disegnarne i modelli e determinarne le relazioni’ (U. Scarpelli, ‘Filosofia e diritto’, in *La cultura filosofica italiana dal 1945 al 1980 nella sue relazioni con altri campi del sapere* (1981), at 177), and thus ‘penetra nell’intimo del diritto, ne scruta le strutture logiche e la forme espressive’, making possible ‘un dialogo dei filosofi coi giuristi’ (U. Scarpelli, ‘Prefazione’, in U. Scarpelli, C. Luzzati, *Compendio di filosofia del diritto*, at X).

¹³ See H. Kelsen, *General Theory of Norms* (1979), tr. by M Hartney (1996), at 144-146, § 36.

¹⁴ In this sense see E. di Robilant, ‘Realtà e figure nella scienza giuridica’, in U. Scarpelli, R. Treves, *La teoria generale del diritto – Problemi e tendenze attuali*, at 70 *et seq.*; U. Scarpelli, C. Luzzati, *Compendio di filosofia del diritto*, at 12, 42.

¹⁵ See N. Bobbio, *Teoria generale del diritto*, at 45.

¹⁶ See S. Romano, *L’ordinamento giuridico* (1945) – *L’ordre juridique* (2002), trad. fr. L. François, P. Gothot, at 10. See also J. Dabin, *Théorie générale du droit* (1969), at 99, § 85.

relation among two or more persons, so that some clarifications are indispensable, especially with regard to the concepts of right, duty, claim¹⁷ and obligation.¹⁸

H. Kelsen, a very clear author, finds and distinguishes six fundamental correlative concepts, by reason of the number of the addressees of the norm, i.e. the absolute right, the relative right, the absolute duty, the relative duty, the absolute obligation, and the relative obligation. According to Kelsen, the right is relative when it links a person to a determinate person or a determinate number of persons, whereas it is absolute when it links a person to an indeterminate number of persons or to all the persons of a particular legal order. Symmetrically, the duty and the obligation, identical concepts for Kelsen, are relative when they link a subject to a determinate subject or a determinate number of subjects, whereas they are absolute when they link a subject to an indeterminate number of subjects or to all the subjects of a given legal order.¹⁹ Following this approach, the literature employs the concepts of right, duty, claim and obligation alternatively, especially in the domain of international law. Thus, dealing with the relational aspect of law, the correspondence between the notions of right and claim, on one side, duty and obligation, on the other, is highlighted.²⁰

Sharing the essence of the Kelsenite view on this point and following the common approach of the literature, I employ the concepts of right, duty, claim and obligation alternately in the relative and absolute sense. Nevertheless, I point out that in legal language the terms ‘right’ and ‘duty’ are more commonly used in the absolute sense, whereas ‘claim’ and ‘obligation’ are more commonly employed in the relative sense, and I think that a constant distinction between relative and absolute concepts would lead to a clearer comprehension of legal situations.²¹

The literature dwells on the notion of subjective right, correctly conceived of as a prerogative of the right-holder protected by law, endowing him with the faculty of reaction in case of breach.²² Therefore, I can outline this pattern: an absolute right-duty relation binds a subject towards all the other subjects of a specific legal order and is composed of an ensemble of claim-obligation relations.²³ In other words, it is argued that the absolute right is composed of the ensemble of the claims, having a determinate content, that a subject holds towards all the other subjects of a given legal order,

¹⁷ I intend ‘claim’ in a purely substantive sense.

¹⁸ See M. Virally, *La pensée juridique*, at 49-50.

¹⁹ See H. Kelsen, *General Theory of Law and State* (1945), at 75 *et seq.*, especially at 136-137. Accordingly see J. Salmon, *Dictionnaire de droit international public* (2001), *Droit au sens subjectif*, at 368, *Prétention*, at 873, *Obligation (internationale)*, at 765.

²⁰ See S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États*, at 298, 300, note 1058, 304; M. Virally, *La pensée juridique*, at 43-44, who speaks of ‘unité dialectique entre le droit et l’obligation’.

²¹ See J. Cardona Llorens, ‘Deberes jurídicos y responsabilidad internacional’, in M. Pérez González *et al.*, *Hacia un nuevo orden internacional y europeo*, Estudios en homenaje al Profesor Manuel Díez de Velasco (1993), at 165.

²² Thus, the subjective right is defined as ‘*le pouvoir de prétendre (vis-à-vis d’un, de plusieurs ou de l’ensemble des autres sujets de l’ordre juridique) le respect de son intérêt*’ so that ‘*le droit subjectif trouve son pendant dans une obligation incombant aux autres sujets et qui est due au titulaire du droit subjectif (en ce sens que celui-ci peut en prétendre le respect)*’ (S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États*, at 300-301).

²³ See R. Drago, ‘La notion d’obligation: droit public et droit privé’, 44 *APD* (2000), at 43.

whereas the absolute duty is composed of the ensemble of the obligations, having a determinate content, that a subject holds towards all the other subjects of a given legal order.

It can be concluded that the foundation, i.e. the basic unit (principle), of every legal construction, is the right-duty relation or claim-obligation relation, concepts that can be understood in the relative or absolute sense.²⁴ Therefore, I specify that a *norm is a right-duty (or claim-obligation) relation (1) that regulates behaviour (action/inaction) (2) among subjects (3) in definite space (4) and time (5).*

The legal order as a normative system

Norms do not exist alone except for in two imaginary legal orders: the one where all is permitted and the one where all is prohibited (necessarily contradictory?). These two systems, which can be defined as ‘mono-normative’, are placed at the opposite extremities of a spectrum where several norms, the number of which can be comprised between two and infinity, compose each other. When several norms relate to each other, a normative system comes into being, and we pass from the study of the norm as the basic unit of the legal logic to the analysis of the ensembles into which norms gather.²⁵

The ascertainment that norms can compose each other systematically supposes that they entertain reciprocal relations, constituting an ordered, i.e. not thoroughly chaotic, totality. From the analytical viewpoint, given that the norm is conceived of as a claim-obligation relation that regulates behaviour (action/inaction) among subjects, consequently a normative system consists of an ordered ensemble of claim-obligation relations that regulate behaviour (action/inaction) among subjects in determinate space and time. In this sense I can say that the *ensemble of the claim-obligation relations (1) that regulate behaviour (action/inaction) (2) among all the subjects (3) in a definite space (4) and time (5) constitutes the juridical (legal) order, i.e. law, in the objective sense, as an ensemble of (subjective) rights. In fact, this ensemble (juridical cosmos) is called ‘objective right’ (law), in order to distinguish it from the ‘subjective right’ as an individual position.*²⁶ Therefore, I formally conceive of not only the norm but also law as a whole on the basis of five simple elements (necessary and sufficient conditions).

The linear view of time generates the concept of *procedure*, which I define as an *ensemble of behaviour (active/inactive conducts) performed in a specific interval of time, regulated by and, eventually, regulating legal relations.* Hence, it is also possible to conceive of the legal order (law) as a procedural system.

The basic horizontal criterion to relate norms is the principle of imputation, according to which a norm prescribing a duty always entails a norm establishing another duty sanctioning the violation of the primary duty. Actually, this principle expresses the idea

²⁴ According to R. Drago, ‘La notion d’obligation: droit public et droit privé’, at 44, the notion of obligation ‘occupe les tréfonds de la théorie juridique’ in public as well as in private law, so it simply constitutes the foundation of law.

²⁵ See N. Bobbio, *Teoria dell’ordinamento giuridico* (1960), at 3.

²⁶ On the distinction between the subjective and objective right see R. Ago, Addendum to the Eight Report on State Responsibility, *YBILC* (1980-II-1), at 18, § 9; J. Salmon, *Dictionnaire de droit international public, Droit au sens objectif*, at 367-368.

that the logical form of the norm is necessarily hypothetical: 'If *a*, *b* ought to be'.²⁷ In this pattern, *a* is the violation of a right-duty relation, whereas *b* is the right-duty relation sanctioning the violation.²⁸ the conditional conception of the legal norm simply means that the violation of a duty entails the imposition of a duty by way of sanction. Moreover, only because of the transgression one can better become aware of the existence of a logically prior measure, so much so that Heraclites asserted: 'Men would not have known the name of justice [from Latin '*ius*', '*iustum*', i.e. '*rectum*', 'straight', 'right'] if these things [- instances of injustice -] had not occurred'.²⁹ The principle of imputation is a procedural, and thus dynamic, concept.

The basic vertical principle to order norms is hierarchy: norms are connected to each other in a relationship from superior to inferior, according to a static or dynamic criterion. The static criterion, derived from naturalism and taken to its furthest limit by G. W. von Leibniz, provides that norms are naturally ranged following the pattern superior-inferior, so that a legal system could be regarded as a *more geometrico demonstrandum* model, where rules would derive from one another by reason of their content.³⁰ Instead, the dynamic criterion, derived from positivism and taken to its furthest limit by H. Kelsen, provides that norms are ranged following the pattern superior-inferior by reason of the acts-sources, so that the exercise of power would be the decisive element to shape the legal order as a normative pyramid.³¹ Conceived of in the dynamic sense, hierarchy is a procedural concept. However, these two criteria are not necessarily conflicting: if the act-source remains the fundamental principle for the vertical organization of legal orders, yet other hierarchically ordered norms can statically derive from such set rules.³²

On the basis of the compound criteria, norms can be distinguished from each other and ranged in different categories. The most common classification relies on the distinction between primary and secondary norms. As N. Bobbio clearly demonstrated, this categorization can assume different meanings,³³ especially following the principle of imputation and hierarchy. According to H. Kelsen and most of the literature, by reason of the horizontal criterion consisting in the principle of imputation, primary norms simply regulate obligations, whereas secondary norms regulate sanctions in the case of a breach of primary obligations.³⁴ Since the principle of imputation expresses nothing else than the hypothetical logical form of the norm, it is possible to bring primary norms into

²⁷ See H. Kelsen, *Pure Theory of Law*, at 89 *et seq.*, 114 *et seq.* In truth, three obligations exist: *a* (primary obligation), *b* (secondary obligation), and *c* 'ought to' (the obligation of the judge to impose *b* in case of *a*) (see N. Bobbio, *Essais de théorie du droit*, at 233; U. Scarpelli, *Il problema della definizione e il concetto di diritto* (1955), at 27-28, especially note 2). Specifically, it is extremely interesting to remark that the 'principle' of imputation is conceived of in terms of the 'ought'.

²⁸ See R. Drago, 'La notion d'obligation: droit public et droit privé', at 43-44.

²⁹ See Heraclites, *The Fragments*, 23.

³⁰ See G. W. von Leibniz, *Nova Methodus discendae docendoque jurisprudentiae*, II, 25; G. W. von Leibniz, *Monita quaedam ad Samuelis Pufendorf principia*, IV; G. W. von Leibniz, *Nouveaux essais sur l'entendement*, II, 28, 5; G. W. von Leibniz, 'On Natural Law', in P. Riley, *The Political Writings of Leibniz* (1972), at 77-80.

³¹ See H. Kelsen, *Pure Theory of Law*, at 195 *et seq.*

³² *Ibid.*, at 197-198.

³³ See N. Bobbio, *Essais de théorie du droit*, at 159 *et seq.*

³⁴ See H. Kelsen, *General Theory of Norms*, at 142, § 35.

the category of secondary norms: an obligation cannot be conceived of but in presence of the sanction of its violation, so thinking of a unique category of norms. On the contrary, according to H. Hart, by reason of the vertical hierarchical criterion, primary norms regulate obligations and sanctions, whereas secondary norms regulate the capacity to exercise rights (legal competency, i.e. the power).³⁵ This less common interpretation can be useful to define the concept of power in the normative sense.

In principle, although the different existing categories of norms can prove useful tools for legal logic, it is always better to keep the analysis simple where possible.³⁶ Thus, even in differentiation, we should recall that the elementary concepts (subject, relation, behaviour) inhere without exception in all legal norms and constitute its constant formal pattern. The distinguishing criteria, multipliable to infinity, can always be brought back to the essential elements, so to the hypothetical pattern: 'If *a*, *b* ought to be'. This simplification in thinking allows us to achieve a unitary representation of the legal matter. Particularly, in the theory of H. Hart the concept of power is the basic principle justifying secondary norms, but it can be reabsorbed, as in the theory of H. Kelsen, in that of faculty, and the latter can be regarded as 'a right to act upon rights'. Although the Kelsenite solution is probably less elegant than the Hartian one, it is conceptually more economic, so simpler.

Normative general principles in international law

Having briefly explained my perception of some fundamental concepts necessary to define and understand law synthetically, I can apply them to general principles in international law.³⁷

At least after the signature of the 1648 Westphalian Treaty, from the subjective viewpoint it became indispensable to grasp the notion of state in order to define international law. Actually, the state subject is a legal person endowed with peculiar features, especially because of the sovereign power, introducing a break in the continuity, i.e. the difference between internal and external law, giving rise to modern international law. I think of the state as an ensemble of subjects linked by claim-obligation relations regulating behaviour (action/inaction) in definite space and time, so as a particular normative order. Therefore, I can define international law as the whole claim-obligation relations regulating behaviour (action/inaction) among legal state orders and subjects belonging to different state orders.³⁸ This is a broad outlook, especially from the subjective viewpoint, resuming the idea of '*ius gentium*' proposed by G. Scelle.³⁹

General principles constitute a particular category in the domain of international legal relations. Assuming that the concept of obligation is the principle, i.e. the fundamental

³⁵ See H. L. A. Hart, *The Concept of Law* (1961), at 1 *et seq.*

³⁶ '*Frustra fit per multa quod potest fieri per pauciora*' (W. of Ockham, *Summa totius logicae*, I, 12).

³⁷ In the same sense see the Study Group of the ILC, Report on Fragmentation of International Law, Addendum (Draft Conclusions), A/CN.4/L.682/Add.1, at 4, § 1.

³⁸ See J. Salmon, *Dictionnaire de droit international public, Droit au sens subjectif*, at 368.

³⁹ Therefore I employ equally the expressions 'international law' and '*ius gentium*' (see G. Scelle, *Précis de droit des gens. Principes et systématique* (1932), at 27 *et seq.*).

element, of legal logic, I especially consider them as ‘general norms’, so absolute claim-obligation relations, i.e. rights-duties, linking a subject to all the other subjects of international law. Thus, general principles can be conceived of as the absolute multilateral element of international law.⁴⁰ More particularly, considering general principles from the viewpoint of the obligation, I can define them as absolute obligations *erga omnes* (obligations towards everyone: duties), so as obligations binding a subject to all the other subjects of international law.⁴¹ This definition is valid if we consider international law holistically, in the absolute sense. So conceived of general principles constitute the foundation of the international legal order, insofar as they determine its organization. From this perspective, the obligation *erga omnes* becomes the necessary pendant of the concept of right, jointly with whom it forms the ensemble of the absolute legal relations.⁴² Thus, I speak alternatively of ‘right’ or ‘duty’, referring respectively to the active and passive position in the legal relation. In international law this correspondence is highlighted by the ILC’s Project on State Responsibility; in fact, according to R. Ago, first *Rapporteur* on the issue, the violation of an obligation is the perfect equivalent of the infringement of someone else’s subjective right.⁴³ On this point the intersection is realized between primary and secondary norms in the Kelsenite sense; thence derives the crucial importance of the ILC’s work on state responsibility in order to shed light on the structure of the obligations, especially the general ones, in international law; indeed, the Project is basically a precious synthesis of general international law.⁴⁴ The natural complement of the Project is the 1969 Vienna Convention on the Law of Treaties, which provides essential information concerning the organization of the sources and their influence on primary rules, so assuming a remarkable impact on the structure of general obligations.⁴⁵

The prescriptive notion of ‘general principle’ encompasses ‘general principles of international law’ as well as ‘general principles of law’ (article 38 of the ICJ Statute). Usually, the literature clearly distinguishes the two concepts,⁴⁶ but the formal approach

⁴⁰ In this sense see the Study Group of the ILC, Report on Fragmentation of International Law, A/CN.4/L.682, at 205, § 407. On the validity *erga omnes* of norms see F. Kratochwil, ‘Thrasymachos revisited: on the Relevance of Norms and the Study of Law for International Relations’, in M. Koskeniemi *et al.*, *International Law* (1992), at 50. Contrary to the identification of general principles with general norms see S. Villalpando, *L’émergence de la communauté internationale dans la responsabilité des États*, at 106, note 379.

⁴¹ On obligations *erga omnes* as legal structures grounded in adherence to the normative system see the Study Group of the ILC, Report on Fragmentation of International Law, A/CN.4/L.682, at 198, § 392.

⁴² On the necessary interdependence between the concepts of right and duty see N. Bobbio, *Teoria generale del diritto*, at 117, 250; W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923), at 14; J. Salmon, *Dictionnaire de droit international public, Obligation (internationale)*, at 765, who defines the international obligation as ‘une situation subjective qui est la contrepartie d’un droit’.

⁴³ See R. Ago, Second Report on State Responsibility, *YBILC* (1970-II-1), at 192, § 46.

⁴⁴ Under article 55 (*Lex specialis*) of the Text adopted by the ILC in 2001, the articles of the Project are applicable solely in the absence of special rules of international law.

⁴⁵ See P.-M. Dupuy, ‘Avant propos’, in P.-M. Dupuy *et al.*, *Obligations multilatérales, droit impératif et responsabilité internationale des États* (2003), at 1; M. Spinedi, ‘D’une codification à l’autre – Bilatéralisme et multilatéralisme dans la genèse de la codification du droit des traités et du droit de la responsabilité des États’, *ibid.*, at 26.

⁴⁶ See P.-M. Dupuy, *Droit international public* (2004), at 322 *et seq.*

of general norms facilitates the development of a unitary discourse, involving the two notions, nevertheless paying attention to differences.⁴⁷

International law, as an absolute system, encapsulates several relative sub-systems. Therefore the normative notion of 'general principle' can be relativized in order to define the obligation of a subject towards all (*erga omnes*) the other subjects of a relative international legal system. However, according to unanimous literature, I confine this expression to general international law, whereas on the relative plane it is better to speak of 'obligations *erga omnes partes*' or '*erga omnes contractantes*'.⁴⁸

Finally, I focus on the formal structure of general principles in the realm of absolute international law, taking into account the relative plan inasmuch as it is necessary to understand the general system. My enquiry is simple: the fundamental idea is to engage in a basic formal analysis of the structure of general principles in (international) law from the prescriptive viewpoint. I just intend to investigate what light a prescriptive formal approach can shed on general principles of (international) law, which should facilitate better understanding of how general principles, as obligations *erga omnes*, shape the configuration of the (international) legal system.⁴⁹

Brief overview of norms, cases and literature concerning obligations *erga omnes* and *ius cogens*

Universality is the essential feature of the general principles regarded as norms, so the approach both to the discipline of the power and responsibility in general international law depends on its comprehension; nevertheless, this notion, often invoked by the literature, is not clearly defined.⁵⁰

Generality can be defined from the perspective of the sources (Hartian secondary norms). Thus, an international norm is considered general when it binds all the states (and the other subjects) even if they have not participated in its making process and it is unavailable; in fact, general principles are regarded as an emanation of universal custom.

⁴⁷ Accordingly see the Study Group of the ILC, Report on Fragmentation of International Law, A/CN.4/L.682, at 254.

⁴⁸ See C. J. Tams, *Enforcing Obligations erga omnes in International Law* (2005), at 156; L-A. Sicilianos, 'Classification des obligations et dimension multilatérale de la responsabilité internationale', in P.-M. Dupuy *et al.*, *Obligations multilatérales, droit impératif et responsabilité internationale des États*, at 63; H. Kelsen, *Principles of International Law*, at 188.

⁴⁹ The successive step would consist in seeking to ascertain precisely what place general principles occupy in the framework of international law, which should facilitate the determination of whether and how they permit to think of the international legal order in a unitary way.

⁵⁰ Accordingly see IIL, Fifth Commission, Replies and Observations to the First Report on Obligations and Rights *erga omnes* in International Law, 71 *IILYB* (2005-1), K. Skubiszewski, at 179; C. Dominicé, 'The International Responsibility of States for Breach of Multilateral Obligations', 10 *EJIL* (1999), at 354.

This interpretation derives from the definition of *ius cogens* provided by article 53 (Treaties conflicting with a peremptory norm of general international law (*ius cogens*) of the 1969 Vienna Convention on the Law of Treaties, stating that:

‘... 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.’⁵¹

Generality can also be defined from the viewpoint of the structure of the principles. This interpretation is based on the jurisprudence of the ICJ, which, in the course of the well-known *Barcelona Traction* case, stated that:

‘In particular, an essential distinction should be drawn between *the obligations of a State towards the international community as a whole*, and those arising vis-à-vis another State [...] 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.*’⁵²

The concepts of *ius cogens* and obligations *erga omnes* are often linked or related,⁵³ especially considering that obligations *erga omnes* are integral, as highlighted by the expression ‘as a whole’ referred to ‘the international community’.⁵⁴ However, this equivalence is not immediately apparent and the expression ‘obligation *erga omnes*’ is more ambiguous than it seems.

From the linguistic perspective, in providing its definition of obligations *erga omnes* the ICJ employs the same terminology as the ILC in defining *ius cogens* in article 53 of the 1969 Vienna Convention on the Law of Treaties. However, notwithstanding the similarity between the two definitions, a fundamental difference exists. In article 53 of the Vienna Convention the expression ‘international community of States as a whole’ refers to the general consent on norms *cogentes* from the viewpoint of the act-sources; so the perspective is that of Hartian secondary norms. Instead, the ICJ opines that the expression ‘international community as a whole’ concerns the form of the obligation, as confirmed by the reference to the generalized reaction in case of infringement; so the perspective is that of Kelsenite primary and secondary norms. This transposition is reaffirmed by the 2001 ILC’s Project on State Responsibility, which, at article 48 (Invocation of Responsibility by a State Other than an Injured State) of Part Three (The

⁵¹ *Emphasis added.*

⁵² See ICJ, *Barcelona Traction, Light and Power Company, Limited*, judgment of 4 February 1970, ICJ Rep. (1970), at 32, § 33, (*emphasis added*). On the relationship between the concepts of *ius cogens* and obligation *erga omnes* in the jurisprudence of the ICJ see L.-A. Sicilianos, ‘Classification des obligations et dimension multilatérale de la responsabilité internationale’, at 67-68. For a brief overview of the jurisprudence of the ICJ on obligations *erga omnes* see C. Annacker, ‘The Legal Regime of *erga omnes* Obligations in International Law’, 46 *Austrian Journal of International and Public Law* (1994), at 132-134.

⁵³ See ILC, Report to the GA, A/56/10 (2001), at 281, § 7. See also S. Kadelbach, ‘*Jus cogens*, Obligations *erga omnes* and Other Rules – The Identification of Fundamental Norms’, in C. Tomuschat, J.-M. Thouvenin, *The Fundamental Rules of the International Legal Order* (2006), at 27 *et seq.*; J. A. Frowein, ‘Reactions by not Directly Affected States to Breaches of Public International Law’, 248 *RCADI* (1994-IV), at 364.

⁵⁴ See B. Simma, ‘From Bilateralism to Community Interest in International Law’, 250 *RCADI* 1994 (VI), at 300, according to which ‘the character of a rule as *ius cogens* symbolizes the concern of the *omnes* in the sense of all States taken together’.

Implementation of the International Responsibility of a State – Chapter One – Invocation of the Responsibility of a State), provides that:

‘Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: [...] b) *The obligation breached is owed to the international community as a whole.*⁵⁵

From the objective perspective, if all obligations *cogentes* necessarily have a scope *erga omnes*, the opposite is not inevitably true, because some norms apply to everyone not being *cogentes*.⁵⁶

From the subjective perspective, the idea of the obligation *erga omnes* as a purely inter-state relation deserves to be analyzed in the light of the position of other subjects of international law. This is valid not only from the active viewpoint (as highlighted by the literature, especially because the wording of article 48 of the 2001 Project on State Responsibility avoids the reference to ‘States’), but also from the passive perspective.⁵⁷

In fact, article 53 of the 1969 Vienna Convention on the Law of Treaties, the ICJ statement in the *Barcelona Traction* case, and article 48 of the 2001 Project on State Responsibility reflect a pattern providing: sources of *ius cogens*, obligations *erga omnes*, violation of obligations *erga omnes* and reaction. To shed light on problems related to this model an analysis must be developed, distinguishing the plane of secondary rules in the Hartian sense, concerning customary or conventional act-sources, from that of primary and secondary rules in the Kelsenite sense, concerning general principles seen as norms regulating behaviour, their violation, the subsequent sanction and its enforcement. Moreover, a clear investigation must be undertaken regarding the form of the obligation *erga omnes*.

A pattern to describe obligations *erga omnes*: absolute or relative, indivisible or divisible

‘Obligation *erga omnes*’ means ‘obligation towards everyone’: an obligation *erga omnes* is a general duty to behave or not to behave in a specific way.⁵⁸ Thus, we can think of the obligation *erga omnes* as the position of a subject burdened with a number of passive relations, all having the same content in terms of behaviour, equal to the number of the other subjects that constitute a given legal order.

⁵⁵ *Emphasis added.* Note also that article 40-bis § 1 a) proposed by J. Crawford in his Third Report to the ILC concerning the Project on State Responsibility provides: ‘a State is injured by the internationally wrongful act of another State if: [...] b) the obligation in question is owed to the international community as a whole (*erga omnes*)’ (see J. Crawford, Third Report to the ILC on State Responsibility, A/CN.4/507 (2000), <http://www.un.org>, at 54).

⁵⁶ See G. Gaja, First Report to the IIL on Obligations and Rights *erga omnes* in International Law, 71 *IILYB* (2005-1), at 128; G. Gaja, Second Report to the IIL on Obligations and Rights *erga omnes* in International Law, 71 *IILYB* (2005-1), proposition C, at 192; S. Kadelbach, ‘*Jus cogens*, Obligations *erga omnes* and Other Rules – The Identification of Fundamental Norms’, at 25; P.-M. Dupuy, ‘L’obligation en droit international’, 44 *APD* (2000), at 226.

⁵⁷ *En passant*, it is noteworthy that in article 48 of the 2001 Project on State Responsibility the suppression of the reference to ‘States’ provided by article 53 of the Vienna Convention of 1969 is correct because of the shift from the viewpoint of the act-sources to that of the form of the obligation.

⁵⁸ See S. Villalpando, *L’émergence de la communauté internationale dans la responsabilité des États*, at 304.

From the perspective of the structure the obligation *erga omnes* can be indivisible or divisible. An indivisible obligation *erga omnes* links jointly a subject to all the other subjects of a given legal order: it is a unitary duty; hence I think of this obligation as an ensemble of interdependent claim-obligation relations. The indivisibility entails two corollaries. Firstly, from the vantage point of the power, the indivisible obligation is unavailable, indeed the passive subject cannot regulate it without the consent of all the persons to which he is linked by the obligation in a given legal order. Secondly, from the perspective of the responsibility, the violation of this obligation contemporaneously breaches the correlative claims of all the other subjects of the legal order.⁵⁹ On the contrary, a divisible obligation *erga omnes* binds separately a subject towards all the other subjects of a given legal order. The divisible obligation *erga omnes* is a non-unitary duty, composed of an ensemble of disjointed bilateral claim-obligation relations, having the same content in terms of behaviour. The divisibility entails two corollaries. Firstly, from the viewpoint of the power, the divisible obligation *erga omnes* is available, which means that the passive subject can regulate it through the consent of one or some of the persons to whom he is linked. Secondly, from the vantage point of the responsibility, the violation of this obligation breaches only the correlative claim of the directly injured subject.⁶⁰

In terms of scope, the obligation *erga omnes* can be absolute or relative. An obligation *erga omnes* is absolute when it binds a passive subject to all the other subjects of a given legal order, either internal or international.⁶¹ In domestic orders obligations *erga omnes* are unilaterally established by the superior power of institutions, ensuring the uniformity of law. Criminal norms are examples of absolute indivisible obligations *erga omnes*, whereas civil norms prohibiting physical injury are examples of absolute divisible obligations *erga omnes*. In the international legal system, lacking a central power, the existence of absolute obligations *erga omnes*, indivisible (*ius cogens*) or divisible, is justified through consent in the positivist theory, and through natural law in the naturalist doctrine: these obligations are the general principles of international law.⁶² An obligation *erga omnes* is relative (obligation *erga omnes contractantes*) when it binds a passive subject to all the other subjects of a specific sub-system, either within internal or international law.⁶³ These obligations, indivisible or divisible, rise from consent, expressed by contract in domestic systems, and by relative custom and treaties

⁵⁹ In the sense that the character of primary rules determines the nature of secondary rules see the Study Group of the ILC, Report on Fragmentation of International Law, A/CN.4/L.682, at 203, § 402.

⁶⁰ On the distinction between divisible and indivisible obligations *erga omnes* see C. Dominicé, 'The International Responsibility of States for Breach of Multilateral Obligations', at 357; G. Carella, *La responsabilità dello Stato per crimini internazionali* (1985), at 242.

⁶¹ See the Study Group of the ILC, Report on Fragmentation of International Law, A/CN.4/L.682, at 200, § 395; S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États*, at 101, note 355.

⁶² In this sense see O. Lopez Peña, 'Counter-claims and Obligations *erga omnes* before the ICJ', 9 *EJIL* (1998), at 731. On the definition of the obligation *erga omnes* in international law see L.-A. Sicilianos, 'Classification des obligations et dimension multilatérale de la responsabilité internationale', at 67-68; M. Ragazzi, *The Concept of International Obligation erga omnes* (1997), at 189 *et seq.*; B. Simma, 'From Bilateralism to Community Interest in International Law', at 298 *et seq.*; J. A. Frowein, 'Reactions by not Directly Affected States to Breaches of Public International Law', at 405 *et seq.*

⁶³ See the Study Group of the ILC, Report on Fragmentation of International Law, A/CN.4/L.682, at 203, § 403; IIL, Resolution on Obligations *erga omnes* in International Law, 71 *IILYB* (2005-2), article 1, at 287.

in international law.⁶⁴ A ‘common’ obligation, not *erga omnes*, is the position of a subject linked by a sole passive relation to another subject, or by several passive relations, divisible or indivisible, to several subjects, but not to all the subjects of the general (internal or international) legal system or of a specific sub-system. These obligations, either indivisible or divisible, rise from contract in domestic orders, and from relative custom or treaties in international law.⁶⁵

General principles of international law as absolute obligations *erga omnes*

From the passive viewpoint I think of the general principles *iuris gentium* as absolute obligations *erga omnes*. This conception is possible also for general principles of law inferred from domestic orders, considered as an autonomous category under article 38 of the ICJ Statute.⁶⁶ In the absolute sense, an obligation *erga omnes* is the position of a subject of international law (individual, non-state legal entity, state, international organization) linked by a bundle of passive relations to all the other subjects of the international community. All these passive relations have the same content in terms of behaviour, and thus in terms of the interest safeguarded.⁶⁷ Hence, on the general plane we can envisage the obligation *erga omnes* as a duty binding a subject to all the other subjects of international law.⁶⁸ From the absolute perspective obligations *erga omnes* coincide with prescriptive general principles in international law. From the active viewpoint the absolute obligation *erga omnes* of a subject is matched by the correlative claims of all the other subjects of international law. These claims relate to the same behaviour imposed by the general obligation, according to the lines of the interdependence implicit in the general theory of law and highlighted in international law by the literature.⁶⁹ In a reflexive way the ensemble of the absolute claims, having the same content, held by a subject of international law towards all the other subjects, constitutes a general subjective right, matched by the obligations of all the other subjects of the international community. From the absolute perspective the rights *erga omnes* coincide with the general principles in international law. Thus, the ensemble of the general obligations binding all the subjects towards all the other subjects of the international legal order is matched by the ensemble of the general subjective rights

⁶⁴ On the distinction between absolute and relative obligations *erga omnes* see H. Kelsen, *General Theory of Law and State*, at 85-86.

⁶⁵ See L.-A. Sicilianos, ‘Classification des obligations et dimension multilatérale de la responsabilité internationale’, at 64.

⁶⁶ See IIL, Fifth Commission, Replies and Observations to the First Report on Obligations and Rights *erga omnes* in International Law, G. Schermers, at 175.

⁶⁷ From the ontological perspective, by ‘interest’ I mean the value attached by a subject to a given behaviour, i.e. a purely subjective mental element.

⁶⁸ In this sense see J. Salmon, *Dictionnaire de droit international public, Obligation (internationale)*, at 772.

⁶⁹ See S. Villalpando, *L’émergence de la communauté internationale dans la responsabilité des États*, at 311.

held by all the subjects towards all the other subjects of international law: the overlap is complete.⁷⁰

Although the proposed outlook seems coherent and complete, other interpretations of the obligation *erga omnes* are provided, especially with regard to indivisible obligations. According to a first opinion it would be possible to conceive of the bundle of relations that constitute a general obligation as a unique bilateral claim-obligation relation between a subject of international law and the entire community, following the model of domestic law. Hence, the international community would be the sole holder of the general claim, no subjective situation regarding the states and the other subjects.⁷¹ From the substantive viewpoint this outlook is possible, but only for indivisible general obligations, not for the divisible ones, because the unique bilateral obligation would be the result of the sum of the obligations included in the duty *erga omnes*, which would safeguard its universality. From the procedural viewpoint one could object that the international community lacks central organs empowered to act as a unity in international relations, making it incapable of united reaction in case of breach.⁷² However, this objection does not seem decisive, because we could acknowledge that states can act as agents of the international community, in defence of the general bilateral obligation breached, so defending the unitary bilateral claim instead of exercising their own claim.⁷³ Nevertheless, this hypothesis must be rejected because, at present, the subjectivity of the international community as such is not an unquestionable idea; in fact, the notion of ‘international community’ itself is highly controversial.⁷⁴ Given that there is no consensus in the literature on the recognition of the legal personality of the international community as such and since international norms tend to have, as their addressees, all its members, especially states, rather than the community as one, for the time being it is better to follow a multilateral conception of the general principles, not only divisible but also indivisible.

Part of the literature assumes that the obligation *erga omnes*, general from the passive perspective, would entail solely simple bilateral claims, *omnium*, but not rights *erga omnes*, from the active viewpoint.⁷⁵ This explanation, clear from the passive perspective, is incomplete from the active viewpoint of the relation, envisaging only the passive position of a subject towards all the other subjects of the international

⁷⁰ See G. Gaja, First Report to the IIL on Obligations and Rights *erga omnes* in International Law, at 129, 135; G. Gaja, Second Report to the IIL on Obligations and Rights *erga omnes* in International Law, proposition B, at 191.

⁷¹ In this sense, for a judicial viewpoint, see ICJ, *International Status of South-West Africa*, advisory opinion of 11 July 1950, dissenting opinion of Judge Alvarez, ICJ Rep. (1950), at 177. For a juristic viewpoint see A. De Hoog, *Obligations ‘erga omnes’ and International Crimes: a Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (1996), at 94 *et seq.*

⁷² See S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États*, at 313 and note 1098.

⁷³ See A. Bleckmann, ‘The Subjective Right in Public International Law’, 28 *GYBIL* (1985), at 160-161.

⁷⁴ Accordingly see G. Gaja, First Report to the IIL on Obligations and Rights *erga omnes* in International Law, at 124; P. Cahier, ‘Changements et continuité du droit international’, 195 *RCADI* (1985-VI), at 96; J. Barberis, ‘La personnalité juridique internationale’, 179 *RCADI* (1983-I), at 176-177. See also P. Dailler, A. Pellet, *Droit international public* (2005), at 401-402.

⁷⁵ See S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États*, at 100.

community. Hence, it does not carefully consider the strict implication between obligation and claim and, by reason of the multiplication of the number of subjects, between right and duty. It is as if light was not shed but on a part of the legal relations taken into account, leaving in the shadow another considerable portion. Considering two, several, and lastly all the passive subjects of the international system, instead of thinking of a sole passive subject as centre of attribution, we realize that the active subject has a claim not only towards one, but all the subjects of the international community.

Following another interpretation, instead of reasoning in terms of ‘obligations *erga omnes*’, it would be necessary to think of ‘legal duties’ at the level of primary norms.⁷⁶ This is perfectly logical in passive terms, given the coincidence between obligation *erga omnes* and duty. Instead, the outlook of the same theory on the active position corresponding to the duty in issue is surprising, because the duty would match the claim of the subject directly injured, but only the general interest of the subjects indirectly injured. Reference is made to the ‘legal interest’ or ‘objective interest’ of all the (state) subjects to the observance of the indivisible obligations *erga omnes*, considering that ‘third’ subjects are only indirectly ‘injured’ or simply interested by the breach, but not injured in their subjective rights.⁷⁷ With regard to ‘third’ subjects, a possible infringement would violate solely the duty and the interest safeguarded, which would be enough to give rise to right-duty relations from the viewpoint of the sanction; at the level of the primary rule no ‘third’ (state) subject would be holder of a right safeguarding the general interest, everyone acquiring a right only at the moment of the violation of a general obligation. In other words, the active situation of ‘third’ (state) subjects would remain ‘in suspense’ until the moment of the breach, when secondary rules would assume the double function of (a) determining the (state) subjects to whom the obligation is due and (b) establishing their procedural rights.⁷⁸ Although ingenious, the conception of the relation *erga omnes* in terms of interest-obligation is incomplete and not acceptable from the active viewpoint as far as it clashes with the fundamental postulate of the necessary correspondence between right and duty, so casting shadows on the active part of the legal relation. Interests represent just the finality achieved through the behaviour imposed by the legal relation; not having formal relief, the mere

⁷⁶ See J. Cardona Llorens, ‘Deberes jurídicos y responsabilidad internacional’, at 150-151.

⁷⁷ See J. Crawford, Third Report on State Responsibility, at 46 *et seq.*, §§ 106 (a), 109, 113; L.-A. Sicilianos, ‘Classification des obligations et dimension multilatérale de la responsabilité internationale’, at 69; P.-M. Dupuy, ‘General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility’, 13 *EJIL* (2002), at 1073; I. Scobbie, ‘The Invocation of Responsibility for the Breach of ‘Obligations under Peremptory Norms of General International Law’, 13 *EJIL* (2002), at 1207-1208; G. Abi-Saab, ‘The Concept of ‘International Crimes’ and Its Place in Contemporary International Law’, in J. Weiler, A. Cassese, M. Spinedi, *International Crimes of States. A Critical Analysis of the ILC’s Draft Articles 19 on State Responsibility* (1989), at 149; P.-M. Dupuy, ‘Implications of the Institutionalization of International Crimes of States’, *ibid.*, at 179-180; P.-M. Dupuy, ‘Le fait générateur de la responsabilité internationale des États’, 188 *RCADI* (1984-V), at 101-102.

⁷⁸ See A. De Hoog, *Obligations erga omnes and International Crimes. A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States*, at 22, 67-68; J. Cardona Llorens, ‘Deberes jurídicos y responsabilidad internacional’, at 156, 160-161, 165-166. For a critical view of this interpretation see K. Zemanek, ‘New Trends in the Enforcement of *erga omnes* Obligations’, 4 *Max Planck Yearbook of UN Law* (2000), at 28-30; W. Riphagen, Sixth Report on State Responsibility, *YBILC* (1985-II-1), at 8, §§ 22-26.

interest cannot justify the emergence of sanctions. In truth, when the literature speaks of 'objective' or 'legal interest', formal relief is given to the interest safeguarded, after all thinking of a subjective right.⁷⁹ Therefore, from the viewpoint of secondary norms, the conditions for active participation of states in the relation of responsibility are determined by the violation of their subjective rights.⁸⁰

The addressees of the general principles

General principles address subjects, both from the active and the passive viewpoints.

Since the state is the core element in defining international law, a possible pattern of the international subjectivity cannot do without it. Hence, I consider as subjects of international law natural persons, non-state legal entities, states and international organizations. Given that states remain the pre-eminent subjects of international law, my reasoning especially focuses on them, but, at the same time, I try to take into account the position of the other persons of the international legal system. The basic assumption is that international subjectivity entails, at least, the possibility to be holder of legal positions on the international plane, in the active or passive way, which means that the subjects of international law are holders of rights and duties.

From the passive viewpoint, in principle, all the subjects of international law can be bound by general norms, but the applicability of a general principle depends on its content and the nature of persons.⁸¹ States and international organizations are certainly bound by general principles, *cogentes* and *non-cogentes*.⁸² Some general obligations, especially *cogentes*, as basic human rights, are becoming binding also for individuals; thus, for instance, the prohibition of genocide is a general obligation *cogens* imposed primarily on individuals (article 6 of the ICC Statute) and, possibly, also on other subjects, in particular the states (article 19 § 3 a) of the 1996 Project on State Responsibility).⁸³ The prohibition of resort to armed force binds states (article 19 § 3 a) of the 1996 Project on State Responsibility) and possibly also individuals acting on their behalf (article 5 § 1 c) of the ICC Statute).⁸⁴ Theoretically, general principles, especially

⁷⁹ See B. Stern, 'Et si on utilisait le concept de préjudice juridique ? Retour sur une notion délaissée à l'occasion de la fin des travaux de la CDI sur la responsabilité des États', 48 *AFDI* (2001), at 14; P.-M. Dupuy, 'Responsabilité et légalité', in SFDI, *La responsabilité dans le système international*, Colloque du Mans (1991), at 289-290; F. Lattanzi, *Garanzie dei diritti dell'uomo nel diritto internazionale generale* (1983), at 136.

⁸⁰ See G. Barile, 'La structure de l'ordre juridique international', 161 *RCADI* (1978-III), at 45.

⁸¹ See G. Gaja, First Report to the IIL on Obligations and Rights *erga omnes* in International Law, at 124; IIL, Fifth Commission, Replies and Observations to the First Report on Obligations and Rights *erga omnes* in International Law, A Cançado Trinidad, at 156.

⁸² The ICJ has clearly recognized that international organizations are bound by general principles (see ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, advisory opinion, ICJ Rep. (1980), at 89-90, § 37).

⁸³ See G. Barile, '*Obligationes erga omnes* e individui nel diritto internazionale umanitario', 68 *RDI* (1985), at 19, 23.

⁸⁴ See P.-M. Dupuy, 'International Criminal Responsibility of the Individual and Individual Responsibility of the State', in A. Cassese, P. Gaeta, J. R. D. W. Jones, *The Rome Statute of the International Criminal Court: a Commentary* (2002), at 1085 *et seq.*; O. Quirico, *Réflexions sur le*

cogentes, bind also other legal entities: the case of basic human rights obligations is again exemplary.⁸⁵

From the active viewpoint, all the subjects of the international legal order must be considered holders of the rights having a general scope, because the content does not influence the formal position;⁸⁶ the subjective active generality is the reflection of the objective universality of the principles. However, the content is important in order to define the specific position of every subject with respect to the general right, i.e. primary and accessory beneficiaries. Hence, we have to jettison a purely state viewpoint, because some 'extra-state' interests, set for the benefit of entities third as to states, are protected by general claims;⁸⁷ in several cases the primary beneficiaries of a general international obligation are not states, but individuals, peoples or other entities. The main examples are the right of peoples to self-determination and natural persons' human rights. In this vein, article 33 § 2 of the 2001 Project on State Responsibility provides the possibility that a state breach gives rise to rights 'which may accrue directly to any person or entity other than a State', and the ILC has specified that it is possible to identify a certain number of hypotheses where 'the primary obligation is owed to a non-State entity'.⁸⁸ In these situations states hold 'accessory' claims that take part in the composition of the general obligation, safeguarding interests not only similar, but identical to those protected by primary claims, because of the correspondence between obligations and claims. It is considered that the content of a general right is identical for all its holders, regardless of the direct or indirect position in respect of the protected interest. Thus, not only natural persons, directly shielded, but also the other subjects, including states, are holders of human rights, and, besides peoples, all the other subjects are entitled to the right of self-determination. In other words, every subject of international law holds the claim in that every other subject respects the human person and self-determination.⁸⁹

système du droit international pénal – La responsabilité « pénale » des États et des autres personnes morales par rapport à celle des personnes physiques en droit international (2005), at 322 et seq.

⁸⁵ See A. Clapham, *Human Rights Obligations of Non-State Actors* (2006), at 82.

⁸⁶ See the Study Group of the ILC, Report on Fragmentation of International Law, A/CN.4/L.682, at 199, § 393; G. Gaja, First Report to the IIL on Obligations and Rights *erga omnes* in International Law, at 126-127, 134; IIL, Fifth Commission, Replies and Observations to the First Report on Obligations and Rights *erga omnes* in International Law, A. Cançado Trindade, at 156.

⁸⁷ See S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États*, at 298; W. Riphagen, Fourth Report on State Responsibility, *YBILC* (1983-II-1), at 21, § 114.

⁸⁸ See ILC, Report to the GA, doc. A/56/10, at 234, § 4. Accordingly for a judicial viewpoint see ICJ, *East Timor, Portugal/Australia*, judgment of 30 June 1995, <http://www.icj-cij.org>, at 102, § 29. For a juristic viewpoint see L.-A. Sicilianos, 'Classification des obligations et dimension multilatérale de la responsabilité internationale', at 63.

⁸⁹ On the contrary, one should not estimate that, whereas the directly protected individual has a specific right to the respect for his life, states and the other subjects have only the right in that every subject complies with the obligation to respect the life of that specific individual. Indeed, this interpretation presupposes variable general rights, where indirect claims defend the interest to the respect of a different obligation protecting another interest. Besides, in this construction indirect claims are mixed up with the specific general principle *alterum non laedere*, establishing the universal duty to comply with law (see S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États*, at 310, 321-322, 327, 347-348; B. Stern, 'Et si on utilisait le concept de préjudice juridique ? Retour sur une notion délaissée à l'occasion de la fin des travaux de la CDI sur la responsabilité des États', at 13; F. Lattanzi, *Garanzie dei diritti dell'uomo nel diritto internazionale generale*, at 87).

Some literature remarks that states are always and *in primis* entitled to impose sanctions, so that, regardless of international organizations, individuals and other entities could not hold international rights, but only situations recognized by states in domestic orders.⁹⁰ Nevertheless, no real impasse exists at the substantive level, because, according to most of the authors the principle of state reaction in case of infringement does not clash with the generality of the active formal position, simply entailing that primarily states intervene in order to safeguard the rights infringed.⁹¹ Besides, other forms of reaction are not excluded, such as the mechanisms implemented by the ICC Statute at the individual level.⁹² Moreover, this pattern is perfectly conceivable in international law, which often seeks the satisfaction of extra-state interests without attributing to the beneficiaries the means directly to defend their claims. After all, given that their rights are provided with sanctions, even taken by ‘third’ state subjects, non-state persons, especially individuals and peoples, are holders of general rights; it just happens that not all the holders of the general claims are enabled to adopt measures of reaction in case of breach.⁹³

Indivisible general principles (obligations *erga omnes cogentes*)

Some norms of international law are indivisible general obligations, owed to the international community ‘as a whole’. This type of relation marks the passage from the purely bilateral conception of legal international relations, exposed by D. Anzilotti, to the unitary multilateral view, defined by R. Ago.⁹⁴ From the passive viewpoint, the formal position defined by these norms is that of a subject linked to all the other subjects of international law by unitary interdependent obligations having the same content. From the active perspective, the obligation of a subject is matched by the sum of the claims of all the other subjects of international law, but not by their absolute subjective rights. Instead, the ensemble of the absolute indivisible obligations *erga omnes*, having the same content, linking all the subjects to another subject of international law, matches exactly the indivisible subjective right *erga omnes* of the latter, because the subjective right *erga omnes* is a bundle of joint claims of the holder

⁹⁰ See S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États*, at 330-331.

⁹¹ This is implicitly acknowledged by the 2001 ILC's Project on State Responsibility. Indeed, whereas the first part of the Project makes general reference to the constitutive elements of the breach, whatever can be the beneficiary of the infringed obligation, the second and third part concern the consequences and the implementation of the responsibility solely from the inter-state viewpoint (see the commentary of the ILC on this point in ILC, Report to the GA, A/56/10, at 214, § 3, 234, § 4). For a judicial viewpoint see ICJ, *LaGrand*, Germany/United States of America, judgment of 27 June 2001, <http://www.icj-cij.org>, at 494, § 77.

⁹² See the Study Group of the ILC, Report on Fragmentation of International Law, A/CN.4/L.682, at 200, § 396.

⁹³ *Contra* see F. Lattanzi, *Garanzie dei diritti dell'uomo nel diritto internazionale generale*, at 153-155.

⁹⁴ See G. Nolte, ‘De Dionisio Anzilotti à Roberto Ago – Le droit international classique de la responsabilité des États et la prééminence de la conception bilatérale des relations interétatiques’, in P.-M. Dupuy *et al.*, *Obligations multilatérales, droit impératif et responsabilité internationale des États*, at 5 *et seq.*

vis-à-vis the other subjects.⁹⁵ Consequently, the ensemble of the indivisible obligations *erga omnes*, having the same content, linking all the subjects to all the other subjects of international law, corresponds to the ensemble of the indivisible subjective rights *erga omnes* of the latter.⁹⁶

Absolute indivisible obligations *erga omnes* constitute the category of *ius cogens*. According to article 53 of the 1969 Vienna Convention on the Law of Treaties, the fundamental feature of *ius cogens* is the recognition of a non-derogable rule (i.e. of a right regulating a determined behaviour) by the collection of the states of the international community, so that a peremptory norm establishes an unavailable obligation linking a subject to all the other subjects of international law.⁹⁷ Thus, the 1969 Vienna Convention on the Law of Treaties defines *ius cogens* starting from its unavailability, not focussing on its formal structure.⁹⁸ Now, unavailability concerns the relationship between the power and the legal relation, but peremptory obligations are unavailable from the viewpoint of the power precisely because they are indivisible. Hence, the *ratio* of *ius cogens* is the indivisibility of the obligation, whereas the unavailability is the logical consequence.⁹⁹ In fact, since the obligation engages a subject in a unitary way towards all the other subjects of the international legal order, the agreement of all (state) subjects would be necessary to modify a position *cogens*, that is to say that the obligation cannot be altered bilaterally.¹⁰⁰ Correspondingly, article 64 of the 1969 Vienna Convention on the Law of Treaties provides the nullity of all bilateral agreements conflicting with a peremptory norm, retroactively suppressing its effects. Therefore, we must think that the consent of all the (state) subjects of the international community permits the modification of a rule *cogens* not only definitively, so establishing a new peremptory norm, as expressly provided by article 53 of the Vienna Convention, but also on a case-by-case basis.

⁹⁵ Accordingly for a judicial viewpoint see ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004, <http://www.icj-cij.org>, at 199, § 156; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina/Yugoslavia*, judgment of 11 July 1996, <http://www.icj-cij.org>, at 616, § 31; ICJ, *West Timor, Portugal/Australia*, judgment of 30 June 1995, <http://www.icj-cij.org>, at 102, § 29, and dissenting opinion of Judge Weeramantry, at 213-214; ICJ, *Military and Paramilitary Activities in and against Nicaragua, Nicaragua/United States of America*, order of 10 May 1984, dissenting opinion of Judge Schwebel, <http://www.icj-cij.org>, at 196.

⁹⁶ See Y. Dinstein, 'The *erga omnes* Applicability of Human Rights', 30 *Archiv des Völkerrechts* (1992), at 18.

⁹⁷ See J. B. Acosta Estévez, 'Normas de *ius cogens*, efecto *erga omnes*, crimen internacional y la teoría de los círculos concéntricos', 11 *Ann. Der.I.* (1995), at 14.

⁹⁸ On the unavailability as essential feature of *ius cogens* see the Study Group of the ILC, Report on Fragmentation of International Law, A/CN.4/L.682, at 184 *et seq.*; P.-M. Dupuy, 'L'unité de l'ordre juridique international – Cours de droit international public', 297 *RCADI* (2002), at 275; R. Kolb, *Théorie du ius cogens international: essai de relecture du concept* (2001), at 83 *et seq.*

⁹⁹ Accordingly see ILC, Fifth Commission, Replies and Observations to the Second Report on Obligations and Rights *erga omnes* in International Law, 71 *IILYB* (2005-1), K. Keith, at 205; S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États*, at 105. See also the Study Group of the ILC, Report on Fragmentation of International Law, Addendum (Draft Conclusions), A/CN.4/L.682/Add.1, at 6, § 10.

¹⁰⁰ Accordingly see B. Simma, 'From Bilateralism to Community Interest in International Law', at 300; G. Gaja, 'Obligations *erga omnes*, International Crimes and *ius cogens*: a Tentative Analysis of Three Related Concepts', in J. Weiler, A. Cassese, M. Spinedi, *International Crimes of States. A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, at 158-159.

The category of *ius cogens* is highly controversial. In particular, the upholders of extreme relative positivism assert that it is very difficult to formulate norms *cogentes*, considering that custom and treaties are forms of consent, necessarily relative, and assuming that there are not superior organs capable of enjoining general rules valid for all the subjects of the international community.¹⁰¹ Furthermore, the domain of *ius cogens* would be neither determined nor easily determinable, being very difficult to ascertain which norms fall within its domain.¹⁰² Lastly, if the notion of ‘secondary norm’ is indispensable to define legal orders, it would be impossible to think of rights as absolute and peremptory for all the subjects of the international community, given that sanctions are decentralized and thoroughly uncertain: no sanction being assured in case of breach, no peremptory obligation would exist.¹⁰³

Radical criticism of *ius cogens* is not convincing. As for sources, by means of generalized practice it is possible to justify the existence of both *cogentes* and *non-cogentes* general principles of international law; in fact, custom is the privileged way to introduce in the positive order fundamental ethic values protected by peremptory norms.¹⁰⁴ Concerning sanctions, one should not reason from the perspective of practice, otherwise denying also the existence of international law, but rather from a theoretical viewpoint, where sanctions are possible for every type of breach, also for violations of *ius cogens*. However, most of the literature acknowledges the existence of *ius cogens* in the framework of the general principles of international law and viewpoints converge enough on the core rights of this category. In summary, broadly speaking, I consider *cogentes*: (1) The principle *consuetudo est servanda* (2) The principle *alterum non laedere* (prohibition of the use of force as source of international law of peace), entailing (3) The principle *pacta sunt servanda* (founding relative custom and treaties);¹⁰⁵ (3) The rights of states to existence, sovereignty,¹⁰⁶ equality, abstention from resort to armed force (in the framework of international law of peace) (4) The right of peoples to self-determination and basic human rights (in both the laws of peace and war).¹⁰⁷

¹⁰¹ See M. Chemiller-Gendrau, ‘La Cour internationale de justice entre politique et droit’, 512 *Le Monde Diplomatique* (1996), at 11.

¹⁰² See P. Daillier, A. Pellet, *Droit international public* (2002), at 205.

¹⁰³ See C. De Visscher, ‘Positivisme et ‘*jus cogens*’, 75 *RGDIP* (1971), at 7.

¹⁰⁴ See C. Dominicé, ‘The International Responsibility of States for Breach of Multilateral Obligations’, at 357.

¹⁰⁵ The nature of these rules deserves further analysis.

¹⁰⁶ The principle of sovereignty, *inter alia*, allows a state to pretend that the other subjects respect its autonomously established territory, but it lets the state free to regulate its territory by consent, for instance through merger or cession.

¹⁰⁷ See the Study Group of the ILC, Report on Fragmentation of International Law, A/CN.4/L.682, at 189, § 374, and Addendum (Draft Conclusions), A/CN.4/L.682/Add.1, at 13, § 35; P.-M. Dupuy, ‘L’unité de l’ordre juridique international’, at 303; L. Hannikainen, *Peremptory Norms (ius cogens) in International Law* (1988), at 315 *et seq.*; L. Delbez, *Les principes généraux du droit international public – Droit de la paix, droit préventif de la guerre, droit de la guerre* (1964), at 525-526. See also the UN General Assembly Resolution 2625 (XXV) of 24 October 1970, regarding Principles of International Law concerning Friendly Relations and Co-operation among States, and the Universal Declaration on Human Rights adopted by the UN General Assembly Resolution 217 A (III) of 10 December 1948.

Opinions differ also on the relationship between *ius cogens* and obligations *erga omnes*. According to some authors, only *ius cogens* would be composed of absolute obligations *erga omnes*, because all other forms of international law would be relative, so that the domain of *ius cogens* would coincide with that of obligations *erga omnes*.¹⁰⁸ Another interpretation, which I share, is based on the divisibility and the availability of the obligations. Thus, the concept of *ius cogens* is more limited than that of absolute obligation *erga omnes*, because *ius cogens* exclusively comprises indivisible obligations *erga omnes* protecting fundamental interests of the international community, but also some divisible norms could be absolutely effective *erga omnes*.¹⁰⁹ Hence, among absolute obligations *erga omnes* some are indivisible, such as sovereignty, whereas others result from the addition of autonomous bilateral obligations, for example the duty not to interfere with the freedom of the high seas. Therefore, the image describing the relationship between the category of obligations *erga omnes* and that of *ius cogens* consists of two concentric circles: obligations *erga omnes* constitute a wider ensemble encompassing all peremptory norms, but not coinciding with them.¹¹⁰

The breach of indivisible obligations *erga omnes* and the procedure to invoke responsibility

Given that an absolute indivisible obligation *erga omnes* (*ius cogens*) links a subject to all the other subjects of the international community in a unitary way, its breach violates the corresponding claims of all the other subjects of the international community.

With regard to breaches perpetrated by states this conception is provided by the ILC's Project on State Responsibility (articles 19 § 2 and 40 of the 1996 Project, article 40 § 1 of the 2001 Project).¹¹¹ In fact, article 19 § 2 of the 1996 Project on State Responsibility, concerning the general validity of crimes, is inspired by the concept of peremptory norm of international law (*ius cogens*) as formulated in article 53 of the Vienna Convention on the Law of Treaties of 1969.¹¹² Article 40 § 1 of the 2001 Project explicitly refers to the breaches of peremptory norms.¹¹³ In defining major state responsibility, article 41 of the 2000 Project temporarily adopted by the ILC's Drafting Committee relied upon the notion of 'serious breach by a State of an obligation owed to the international community as a whole and essential for the protection of its

¹⁰⁸ See C. Dominicé, 'The International Responsibility of States for Breach of Multilateral Obligations', at 358-359; B. Simma, 'From Bilateralism to Community Interest in International Law', at 300.

¹⁰⁹ See G. Abi-Saab, 'The Uses of Article 19', 10 *EJIL* (1999), at 348-349; J. B. Acosta Estévez, 'Normas de *ius cogens*, efecto *erga omnes*, crimen internacional y la teoría de los círculos concéntricos', at 13.

¹¹⁰ See S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États*, at 106-107; L.-A. Sicilianos, 'Classification des obligations et dimension multilatérale de la responsabilité', at 69.

¹¹¹ See also ILC, Resolution on Obligations *erga omnes* in International Law, article 1 a), at 287.

¹¹² See G. Gaja, 'Should All References to International Crimes Disappear from the ILC's Draft Articles on State Responsibility?', 10 *EJIL* (1999), at 367.

¹¹³ See P.-M. Dupuy, 'Quarante ans de codification du droit de la responsabilité internationale des États – Un bilan', 107 *RGDIP* (2003), at 329; J. Crawford, J. Peel, S. Olleson, 'The ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading', 12 *EJIL* (2001), at 978.

fundamental interests'.¹¹⁴ In this framework, the wording employed in the 2001 Project on State Responsibility, speaking of state 'injured' and 'other than an injured State' (article 48 § 1), is somewhat problematic, because it could indicate that 'third' states are not injured by the violation. Therefore, it is better to speak of state(s) 'directly' and 'indirectly injured', in order to distinguish the position of the state especially injured by the breach and that of the other injured states.¹¹⁵ In fact, it is contended that the violation of an obligation *cogens* formally injures all the states, so that the position of every state as for the consequences of the wrongful act must be considered differently according to the nature and degree of the injury suffered, taking into account the material damage.¹¹⁶ For instance, in case of armed aggression the situation of the state whose territory is invaded is materially graver than that of the other members of the international community, although the violation remains collective.¹¹⁷ As for the responsibility of international organizations, it is necessary to follow the development of ILC's work to see the bigger picture. That said, logically the infringement of *ius cogens* should follow the same lines of state responsibility. On the contrary, currently there are not clearly defined rules with respect to the responsibility of non-state entities. From the viewpoint of individual responsibility, the absolute scope of the breach of peremptory norms is the underpinning of the development of international criminal law since Nuremberg and is clearly provided by the ICC Statute. Indeed, the Preamble to and article 5 § 1) of the ICC Statute speak of 'crimes of concern to the international community as a whole'. Now, given that a crime is nothing else but a particularly serious breach of a relevant obligation, it concerns the international community as a whole because it violates an absolute indivisible obligation *erga omnes*.

From the procedural viewpoint, in principle, the absolute and unitary conception of the breach entails that every subject can invoke the responsibility in view of the sanction; nevertheless, rules can provide different mechanisms.

State responsibility can be invoked and sanctioned by every state, as provided by articles 42 b) and 48 § 1 b) of the 2001 Project on State Responsibility.

Article 42 b) provides that:

'A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to: [...] b) [...] the international community as a whole, and the breach of the obligation: [...] ii) Is of such a character as radically to change the position of all

¹¹⁴ Doc. A/CN.4/L.600.

¹¹⁵ See L.-A. Sicilianos, 'Classification des obligations et dimension multilatérale de la responsabilité', at 70.

¹¹⁶ See P.-M. Dupuy, 'General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility', at 1073; G. Arangio-Ruiz, Fourth Report on State Responsibility, *YBILC* (1992-II-1), at 43, § 129, at 45, §§ 135-139; B. Graefrath, 'Responsibility and Damages Caused: Relationship between Responsibility and Damages', 185 *RCADI* (1984-II), at 47.

¹¹⁷ On this point the ILC speaks of 'particular adverse effects on one State or a small number of States [...] to be assessed on a case by case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case. For a State to be considered injured it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed' (ILC, Report to the GA, A/56/10, commentary to article 42, at 299, § 12). For a judicial viewpoint see ICJ, *Nuclear Tests*, Australia/France, judgment of 20 December 1974, joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Humphrey Waldock, <http://www.icj-cij.org>, at 370, § 118.

the other States to which the obligation is owed with respect to the further performance of the obligation.’

Article 48 § 1 b) provides that:

‘Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: [...] b) The obligation breached is owed to the international community as a whole.’

Hence, even the consent or acquiescence of the state directly injured does not prevent other states from judging the breach.¹¹⁸ Theoretically, it is possible to presume that every state is enabled to invoke every type of sanction against the author of the violation. Reasonably, invocation by states indirectly injured seems to concern cessation and non-repetition in particular, whereas reparation for the injury caused (restitution, compensation, satisfaction) should be normally demanded by the directly injured state or, at least, the other states should make a request on its behalf.¹¹⁹ Nevertheless, under article 48 § 2 b) of the 2001 Project on State Responsibility reparation can be invoked ‘in the interest of the injured State or of the beneficiaries of the obligation breached’, so either in favour of the directly or indirectly injured state(s), but this remains troublesome with respect to restitution and compensation.¹²⁰ According to some literature, the bilateral obligation of the responsible state to make full reparation in favour of the directly injured state should be distinguished from the general obligation to make full reparation in favour of the international community as a whole;¹²¹ rather, there seems to be no reason to justify this separation, because it is simply possible to think of a general obligation to make full reparation. Invocation of responsibility can also be institutionalized, specifically through consensual judicial settlement or, for instance, following the procedures provided by the UN Charter, like those based on the Security Council.¹²² In this regard, some literature tells us that the right of every state to invoke the responsibility would entail the consequence that every state could resort unilaterally to international jurisdictional organs, at least in order to obtain reparation of the collective damage.¹²³ Normally, resort to international jurisdictional organs is a

¹¹⁸ See ILC, Report to the GA, A/56/10, commentary to article 45, at 308, § 4. According to S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États*, at 408-409, pursuant to article 41 of the 2001 Project on State Responsibility, the *obligation* should be set for all the states to invoke the responsibility in order to establish a more effective regime.

¹¹⁹ See ILC, Report to the GA, A/56/10, commentary to article 48, at 322-323, § 11; J. Crawford, Third Report on State Responsibility, at 48, § 109 *et seq.* See also IIL, Resolution on Obligations *erga omnes* in International Law, article 2, at 287-289.

¹²⁰ See further ILC, Report to the GA, A/55/10 (2000), at 105-106, §§ 351-352; J. Crawford, Third Report on State Responsibility, at 48, § 108 *et seq.*; G. Gaja, First Report to the IIL on Obligations and Rights *erga omnes* in International Law, at 136-139; B. Simma, ‘International Crimes: Injury and Counter-measures. Comments on Part 2 of the ILC’s Work on State Responsibility’, in J. Weiler, A. Cassese, M. Spinedi, *International Crimes of States. A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility*, at 301; B. Graefrath, ‘Responsibility and Damages Caused: Relationship between Responsibility and Damages’, at 81-84.

¹²¹ See S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États*, at 347, 355-357.

¹²² This is valid, at least, for the states parties to the UN system, regardless of a possible universal effectiveness of the Charter on the basis of an extensive interpretation of article 2 § 6. For an overview of the problems related to institutionalized procedures see S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États*, at 377-378.

¹²³ See S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États*, at 364-365. This is also the view expressed in IIL, Resolution on Obligations *erga omnes* in

procedural question, requiring the consent of the conflicting states, except for the provision under article 9 of the Convention on the Prevention and Punishment of the Crime of Genocide.¹²⁴ Nevertheless, the fact that breaches of peremptory obligations allow invocation of the responsibility by all the community exceeds the consensual principle, as shown by article 66 of the 1969 Vienna Convention on the Law of Treaties, concerning the procedure for applying or interpreting a rule *cogens*, which allows resort to the ICJ or the Secretary-General of the UN by any of the parties involved in a dispute concerning a peremptory rule. The literature tends also to reflect the consensus that international organizations and peoples can invoke state responsibility, when they are the primary beneficiaries of the infringed general obligation.¹²⁵ As for violations specifically against individuals, although states remain the primary holders of the right to invoke the violation and impose sanctions, natural persons can summon states through international procedures, especially into advisory organs, such as the Human Rights Committee.¹²⁶ The same pattern should apply to the liability of international organizations. Individual responsibility can be claimed by every subject before domestic jurisdictions, or before international criminal jurisdictions, enabled to impose sanctions; in particular, the indivisible nature of the obligation breached gives rise to the mechanism of the universal competence.¹²⁷

The sanction of the breach of indivisible obligations *erga omnes* and the procedure of enforcement

The infringement of general obligations entails a sanction. Sanctions provided for states are the duty to cease the wrongful behaviour, to offer guarantees of non-repetition (article 30 of the 2001 Project on State Responsibility), and to make full reparation (restitution, compensation, satisfaction) for the injury caused (articles 31 and 34 of the 2001 Project on State Responsibility), in the interest of the directly or indirectly injured state(s) (article 48 § 2 b) of the 2001 Project on State Responsibility). Concerning international organizations, the work of ILC on their responsibility will help us visualize the picture, but basically we must think along the lines of sanctions for states. As for non-state entities, at present there is a lack of general coherent rules, regardless of domestic remedies, essentially based on reparation. Sanctions provided for individuals are imprisonment, fines, forfeiture (especially article 77 of the ICC Statute) and reparation for the injury caused.

International Law, article 3, at 289. See further G. Gaja, First Report to the ILC on Obligations and Rights *erga omnes* in International Law, at 140-142.

¹²⁴ See ICJ, *East Timor*, Portugal/Australia, judgment of 30 June 1995, <http://www.icj-cij.org>, at 102, § 29; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Bosnia and Herzegovina/Serbia and Montenegro, judgment of 26 February 2007, <http://www.icj-cij.org>, at 55, § 147.

¹²⁵ See J. Crawford, Third Report on State Responsibility, at 42, § 94; S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États*, at 351-352.

¹²⁶ See ILC, Report to the GA, A/56/10, commentary to article 48, at 323, § 12; S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États*, at 352; G. Abi-Saab, 'The Concept of International Crimes and Its Place in Contemporary International Law', in J. Weiler, A. Cassese, M. Spinedi, *International Crimes of States. A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, at 150.

¹²⁷ See K. Zemanek, 'New Trends in the Enforcement of *erga omnes* Obligations', at 25.

In principle, the infringement of an indivisible general obligation should give rise to a unitary and general sanction-relation, specifically indivisible and *erga omnes* from the passive viewpoint, indivisible, *omnium* and *erga omnes* from the active viewpoint. Hence, from the normative perspective, the obligation in issue should be considered as an indivisible general principle of international law, so that in the pattern 'If *a*, *b* ought to be', *a* and *b* would have the same nature.

Concerning states, article 33 (Scope of international obligations) § 1 of the 2001 Project on State Responsibility provides that:

'The obligations of the responsible State [...] may be owed [...] to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligations and on the circumstances of the breach.'¹²⁸

So we can think that the sanction of the breach of an indivisible general norm is also an indivisible general norm. Therefore, the duty to cease the wrongful behaviour, to offer guarantees of non-repetition, and to make reparation for the injury caused should bind a state in a unitary way towards all the other subjects of international law, who enjoy the corresponding claims. The same pattern should probably be valid also for international organizations. Regarding individuals, the duty to endure the imprisonment, to pay a fine, and to bear forfeitures, binds in a unitary way a natural person towards all the other subjects, holders of the corresponding claims to the execution.

Theoretically, the absolute and unitary conception of the sanction entails that, in case of breach, every subject can enforce it, but rules can provide different mechanisms.¹²⁹

Concerning state responsibility, every state could adopt centralized or decentralized executive counter-measures to enforce its claim, at the same time defending the common interest.¹³⁰ It is better to consider these actions as '*omnium*', i.e. 'general', counter-measures, neutrally, more than 'collective', as some literature does, because the latter adjective seems to refer only to the (possibly institutionalized) centralized reaction, excluding decentralized action.¹³¹ This interpretation is supported by article 53 § 1 c) of the 1996 Project on State Responsibility,¹³² in the absence of precise

¹²⁸ *Emphasis added.*

¹²⁹ See C.J. Tams, *Enforcing Obligations erga omnes in International Law*, at 198 *et seq.*

¹³⁰ See S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États*, at 372; P.-M. Dupuy, 'Observations sur la pratique récente des 'sanctions' de l'illicite', 87 *RGDIP* (1983), at 538-539.

¹³¹ See ILC, Report to the GA, A/56/10, at 36, § 54; ILC, Report to the GA, A/55/10, at 112, § 367. For a juristic viewpoint see L.-A. Sicilianos, 'Classification des obligations et dimension multilatérale de la responsabilité', at 73 *et seq.*; P.-M. Dupuy, 'General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility', at 1066; D. Alland, 'Counter-measures of General Interest', 13 *EJIL* (2002), at 1222. However, the centralized or decentralized application of these counter-measures seems to require the coordination of states (article 41 § 1 of the 2001 Project on State Responsibility) (see also article 54 § 3 of the 2000 Preliminary Project adopted by the ILC's Drafting Committee (doc. A/CN.4/L.600) and the commentary by the President of the Committee (doc. A/CN.4/SR.2662, at 37) and S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États*, at 413).

¹³² See also article 54 of the Project adopted by the Drafting Committee in 2000 (doc. A/CN.4/L.600), which allowed counter-measures *omnium* in the interest of the beneficiaries of the infringed obligation.

indications by the 2001 Project. Indeed, article 54 (Measures taken by States other than an injured State) of the 2001 Project confines itself to establish:

‘... the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take *lawful measures* against the State, to ensure cessation of the breach in the interest of the injured State or of the beneficiaries of the obligation breached.’¹³³

The provision is controversial and leaves unsolved the question of the possibility of general counter-measures in case of violation of indivisible general norms. In particular, it is possible to understand the provision in issue in a restrictive sense, as referring to the sole measures of reprisal (unfriendly but primarily and secondarily licit behaviour), which would mean that the Project does not regulate the question of the general counter-measures (primarily illicit and secondarily licit behaviour).¹³⁴ Otherwise, the wording ‘lawful measures’ could relate to both the measures of reprisal and counter-measures, given that the latter are secondarily licit actions or inactions (article 22) inasmuch as they are in conformity with the procedures provided in articles 49-53.¹³⁵ The practice, still ‘embryonic’ according to the opinion of the ILC, tends to confirm the latter interpretation.¹³⁶ However, taking into account the criterion of proportionality, we should not be scared of the consequences in terms of counter-measures entailed by *ius cogens*. On the contrary, individual sanctions are executed through domestic procedures.

An alternative substantive and procedural pattern consists in thinking that the sanction of the breach of an obligation *erga omnes cogens* can be either an indivisible general obligation or a bilateral obligation, depending on the gravity of the violation. Thus, the unitary general sanction would entail universal reactions, whereas the relative sanction would imply bilateral reactions, especially state counter-measures.¹³⁷ Admitting that the sanction can be a bilateral obligation entails relinquishing the unitary character of the primary rule at the level of the secondary rule, so that the unavailable primary obligation is finally handled bilaterally from the viewpoint of the responsibility.¹³⁸ Furthermore, unless we see the invocation as a simple notification of the responsibility without legal effectiveness, we must figure out a paradoxical situation in which all the states can sanction the violation of the primary indivisible obligation *erga omnes*, but only some states hold the right to enforce the sanction.¹³⁹ Nevertheless, the necessity to think of norms in a flexible way, especially with regard to the rules *consuetudo est*

¹³³ *Emphasis added*. See also ILC, Report to the GA, A/56/10, commentary to article 54, at 355, §§ 6-7. Doubtfully see D. Alland, ‘Counter-measures of General Interest’, at 1233-1236; J. Crawford, J. Peel, S. Olleson, ‘The ILC’s Draft Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading’, at 981-982.

¹³⁴ See L.-A. Sicilianos, ‘Classification des obligations et dimension multilatérale de la responsabilité’, at 75.

¹³⁵ See G. Gaja, First Report on Obligations and Rights *erga omnes* in International Law, at 147.

¹³⁶ See ILC, Report to the GA, A/56/10, commentary to article 54, at 351, § 3. For an overview of the practice see ILC, Report to the GA, A/56/10, commentary to article 54, at 351-354, §§ 3 *et seq.* For a critique of the ILC’s opinion see L.-A. Sicilianos, ‘Classification des obligations et dimension multilatérale de la responsabilité’, at 75.

¹³⁷ See IIL, Resolution on Obligations *erga omnes* in International Law, article 5 c), at 289.

¹³⁸ See J. A. Frowein, ‘Reactions by not Directly Affected States to Breaches of Public International Law’, at 423.

¹³⁹ See S. Villalpando, *L’émergence de la communauté internationale dans la responsabilité des États*, at 371.

servanda, pacta sunt servanda and *alterum non laedere* (probably primarily *cogentes* and secondarily *non-cogentes*, although on the basis of criteria other than the gravity of the breach) could lead to differentiate between the structure of indivisible primary obligations and that of their sanctions.

Divisible general principles (obligations *erga omnes*)

Some international norms are divisible general obligations, i.e. obligations *erga omnes*, owed towards the international community, but less rigid than norms *cogentes*. In the framework of Anzilotti's bilateral conception of international relations, these can be conceived of as absolute bilateral obligations.¹⁴⁰ From the passive viewpoint the formal position is that of a subject bound towards all the other subjects of the international legal order by obligations having the same content; nevertheless, this is not a single obligation, but rather an ensemble of bilateral separated obligations, i.e. a bundle of bilateral relations. The subject bound by the obligation owes a bundle of behaviour (conducts of the same type) to every other subject individually; although the form of the obligation is absolute, the interest protected is split.¹⁴¹ From the active viewpoint the obligation *erga omnes* of a subject is matched by the simultaneous claims of all the other subjects of the international community. Correctly, the literature remarks that an obligation *erga omnes* entails the claim of all the other subjects, i.e. a claim *omnium*, but not necessarily the right of every one of them towards all the others, i.e. *erga omnes*, considering the passive position of a sole subject towards all the other subjects of the international community.¹⁴² However, the ensemble of the divisible obligations *erga omnes* having the same content and binding all the subjects towards another subject of international law perfectly matches the subjective right *erga omnes* of the latter. Therefore, the whole divisible obligations *erga omnes* having the same content and binding every subject towards all the other subjects of international law perfectly match the whole divisible subjective rights *erga omnes* of the latter. The right *erga omnes* presupposes a bundle of separated claims of the holder vis-à-vis every other subject, because every relation has a bilateral structure from the active viewpoint symmetrically to the passive viewpoint. The active and passive positions are formally equal to those of the holder of an indivisible right or duty, but the claims and obligations composing the right and duty are divisible and not unitary.

Although the jurisprudence of the ICJ and part of the literature employ the wording 'obligation *erga omnes*' only with reference to peremptory norms, we can also use it to indicate the obligations in issue. Indeed, these obligations can be considered '*erga omnes*' as far as a subject must behave in a determinate way vis-à-vis all the others in international law.¹⁴³ Furthermore, limiting the expression 'obligation *erga omnes*' to *ius cogens* we would lack a suitable wording to define general obligations *non-cogentes*.

¹⁴⁰ See C. J. Tams, *Enforcing Obligations erga omnes in International Law*, at 152-153.

¹⁴¹ See ICJ, *Barcelona Traction, Light and Power Company, Limited*, Belgium/Spain, 5 February 1970, separate opinion of Judge Morelli, ICJ Rep. (1970), at 226.

¹⁴² See S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États*, at 99-100; B. Simma, 'From Bilateralism to Community Interest in International Law', at 300.

¹⁴³ See S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États*, at 97-98; R. Ago, 'Obligations *erga omnes* and the International Community', in J. Weiler,

Being bilateral, divisible obligations *erga omnes* are available from the viewpoint of the power, because a subject, bilaterally bound to every other subject of the community, can regulate the obligation by consent vis-à-vis every one of them; so, this is *ius generale dispositivum*.¹⁴⁴

In summary, broadly speaking, I recognize as basic divisible general obligations of international law: (1) The principle *ius omnium contra omnes* (founding international law of war)¹⁴⁵ (2) The principle *pacta tertiis neque prosunt neque nocent* and the effectiveness *pro tertiis* of rights provided by treaties so long as the contrary is not indicated (in the framework of international law of peace) (3) The principles imposing respect for states' reputation, diplomatic immunities, freedom of commerce, environment, freedom of the high seas, freedom of free airspace and freedom of Polar Regions (in the framework of international law of peace).

The breach of divisible obligations *erga omnes* and the procedure to invoke responsibility

The violation of a divisible obligation *erga omnes* is not a unitary breach against all the claims of the other subjects of the international community, but rather the violation of solely one or some of these claims.

From the procedural viewpoint, only the subject(s) directly injured by the breach is (are) enabled to invoke the responsibility in view of a sanction.

In the case of state responsibility, the sole state(s) whose claim is breached can invoke the responsibility, all the other states cannot, as provided by article 42 a) and b) of the 2001 Project on State Responsibility, pursuant to which:

‘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 [...] and the breach of the obligation: i) Specifically affects that State...’¹⁴⁶

Invocation of responsibility can also be institutionalized, specifically through consensual judicial settlement, or, for instance, in the framework of the WTO. However, also non-state subjects possibly injured should be enabled to invoke state responsibility; for example, the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States allows individuals' agreements with states in order to submit a dispute to a Conciliation Commission (article 28) or an Arbitral Tribunal (article 36). The pattern valid for state responsibility should apply also to the liability of

A. Cassese, M. Spinedi, *International Crimes of States. A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, at 237-238; L. Hannikainen, *Peremptory Norms (jus cogens) in International Law. Historical Development, Criteria, Present Status*, at 276, note 245; G. Gaja, 'Jus cogens beyond the Vienna Convention', 172 *RCADI* (1981-III), at 280.

¹⁴⁴ See the Study Group of the ILC, Report on Fragmentation of International Law, A/CN.4/L.682, at 193, § 380; G. Gaja, Second Report to the ILC on Obligations and Rights *erga omnes* in International Law, at 193; L.-A. Sicilianos, 'Classification des obligations et dimension multilatérale de la responsabilité internationale', at 64.

¹⁴⁵ See L. Delbez, *Les principes généraux du droit international public – Droit de la paix, droit préventif de la guerre, droit de la guerre*, at 396.

¹⁴⁶ See also ICJ, *East Timor*, judgment of 30 June 1995, dissenting opinion of Judge Weeramantry, <http://www.icj-cij.org>, at 172, referring to rights 'opposable *erga singulum*'.

international organizations, whereas the responsibility of non-state entities and individuals can be invoked by the subject directly injured following domestic procedures.

Other theoretical interpretations are proposed with respect to states, especially in the light of the wording of the 2001 ILC's Project on State Responsibility, never quoting expressly 'obligations *erga omnes*', maybe because of the different visions of the ILC's members on the relationship between peremptory and general norms.¹⁴⁷ Obviously, authors who use the expression 'obligation *erga omnes*' solely to identify *ius cogens* conclude, from the viewpoint of secondary norms, that all breaches of obligations *erga omnes* perpetrated by a state entail its responsibility towards all the other (state) subjects of international law, entitled to invoke the responsibility.¹⁴⁸ Instead, according to another part of the literature, a common regime towards the international community as a whole could apply in case of violation of both peremptory and non-peremptory obligations *erga omnes*. In fact, the grave breach of a *cogens* or *non-cogens* obligation *erga omnes* would give rise to the responsibility of a state towards all the other subjects. This interpretation assumes that some general obligations, divisible from the viewpoint of the power, so available, could be indivisible from the viewpoint of the infringement; in fact, grave breaches would 'unify' the obligation, making it indivisible and consequently violating the correlative claims of all the (state) subjects of the international community, allowed to invoke the cessation of the illicit behaviour and other sanctions.¹⁴⁹ This view relies upon the text of article 48 § 1 b) of the 2001 Project on State Responsibility, allowing every state to invoke the responsibility if 'the obligation breached is owed to the international community as a whole', whereas article 40 simply speaks of violation of 'peremptory norms', assuming that the concept of international community 'as a whole' is wider than *ius cogens*.¹⁵⁰ Although this interpretation is interesting, it contains some problems. Firstly, the reference in article 48 § 1 b) to the 'international community *as a whole*'¹⁵¹ could be understood as nothing else but a recall of *ius cogens*. Secondly, unless we see the invocation as a simple notification of the responsibility without legal effectiveness, we should think that every state has the right of imposing sanctions on the responsible state for an obligation

¹⁴⁷ See L.-A. Sicilianos, 'Classification des obligations et dimension multilatérale de la responsabilité', at 77.

¹⁴⁸ See A. De Hoog, *Obligations erga omnes and International Crimes. A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States*, at 53-54.

¹⁴⁹ See the Study Group of the ILC, Report on Fragmentation of International Law, A/CN.4/L.682, at 197, § 389, at 204-205, §§ 404-406, and Addendum (Draft Conclusions), A/CN.4/L.682/Add.1, at 13-14, §§ 37-38; G. Gaja, First Report to the IIL on Obligations and Rights *erga omnes* in International Law, at 132; L.-A. Sicilianos, 'Classification des obligations et dimension multilatérale de la responsabilité', at 69, 71; S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États*, at 334, 337-339. See also IIL, Resolution on Obligations *erga omnes* in International Law, article 2, at 287.

¹⁵⁰ According to the ILC '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' (ILC, Report to the GA, A/56/10, Text and Commentaries of the Draft Articles on State Responsibility – Introduction to Chapter 3, at 281-282, § 7).

¹⁵¹ *Emphasis added.*

originally divisible, which is highly problematic.¹⁵² Thirdly, this logic, instead of focussing on the divisible or indivisible nature of the general obligation breached, seems to involve the violation of the principle *alterum non laedere*.

The sanction of the breach of divisible obligations *erga omnes* and the procedure of enforcement

Breaches of divisible general obligations give rise to bilateral sanction-relations. Thus, in international law the sanction raised by the violation of a divisible general obligation is a bilateral obligation, however relative. The scheme 'If *a*, *b* ought to be' is asymmetrical because, whereas the obligation breached in *a* is a general principle of international law, *b* is a relative relation, the asymmetry being due to the divisible nature of the obligation breached.

From the viewpoint of states, the obligation to cease the wrongful behaviour, to offer assurances and guarantees of non-repetition, and to make full reparation for the injury caused binds a state only towards the directly injured subject(s). This pattern is provided by article 33 (Scope of international obligations) of the 2001 Project on State Responsibility, pursuant to which:

'The obligations of the responsible State [...] may be owed *to another State, to several States* [...] depending in particular on the character and content of the international obligation and on the circumstances of the breach.'¹⁵³

The development of the ILC's work on this matter will hopefully shed light on the position of international organizations, whose responsibility, however, should follow the principles regulating state responsibility. Concerning non-state entities, at present there are not clearly defined rules, except for domestically imposed bilateral sanctions, basically based on reparation. Also from the perspective of individuals, the domestically established obligation to make reparation for the injury caused binds a natural person only towards the subject(s) directly injured.

The relative conception of the sanction entails that, in the case of a breach, only the subject(s) directly injured can enforce it.

Concerning state responsibility, only the directly injured state(s) are allowed to apply executive counter-measures. Thus, for instance, the violation of the sanction consequent to the infringement of the freedom of the high seas gives rise to the responsibility of a state only towards the directly injured state(s), allowing its (or their) (possibly institutionalized) counter-measure reaction. This pattern is provided by article 49 (Objects and Limits of Counter-measures) § 1 of the 2001 Project on State Responsibility, establishing that:

'An injured State may only take counter-measures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations.'¹⁵⁴

¹⁵² In this sense see ILC, Fifth Commission, Replies and Observations to the First Report on Obligations and Rights *erga omnes* in International Law, C. Tomuschat, at 159-160, 162, K. Skubiszewski, at 181.

¹⁵³ *Emphasis added*.

¹⁵⁴ In fact, states indirectly injured are considered 'other than the injured State' under article 48 of the 2001 Project on State Responsibility.

Still on a bilateral basis, sanctions for non-state entities as well as individuals are executed by means of domestic procedures.

Specifically from the viewpoint of states, thinking that a common regime of responsibility towards the international community as a whole would apply in case of grave violations of both peremptory and non-peremptory obligations *erga omnes* leads to the acknowledgement of the possible existence of an indivisible sanction and universal counter-measures also in the latter case.¹⁵⁵ The same logic could apply identifying *ius cogens* and obligations *erga omnes*.

Brief formal conclusion on the structure of the general principles of (international) law

Assuming that the concept of obligation is the basis of legal logic, analytically speaking, a *norm* can *formally* be regarded as a *right-duty* (or *claim-obligation*) *relation* (1) that regulates *behaviour* (*action/inaction*) (2) among *subjects* (3) in definite *space* (4) and *time* (5). Hence, from the normative perspective general principles (the ‘basis’) of (international) law are general obligations, i.e. obligations *erga omnes* (owed to everyone).

Although differences exist in enjoying full personality in the international legal system, individuals, non-state legal entities, states and international organizations hold rights and duties, so they are subjects of international law.

Obligations *erga omnes* link a subject to every other subject of international law, endowed with a correlative claim. Although it is possible that some obligations do not concern all categories of subjects from the passive standpoint by reason of their content, the whole obligations *erga omnes* are matched by the whole claims *erga omnes* of all the subjects of international law from the active standpoint.

Because of their content obligations *erga omnes* can be either indivisible or divisible. An indivisible obligation *erga omnes* is a general unitary duty. A divisible obligation *erga omnes* is a general ensemble of bilateral relations. This structural feature entails fundamental consequences from the viewpoint of power at the level of primary norms, as well as from the perspective of the breach, invocation of the responsibility, sanction and its enforcement on the plane of secondary rules.¹⁵⁶

Indivisible obligations *erga omnes* are unavailable from the viewpoint of the power, so *cogentes*, because a (state) subject cannot regulate them without the consent of all the other (state) subjects. Breaches necessarily violate all the correlative claims, possibly enabling every subject to invoke the responsibility and impose sanctions. Accordingly, sanctions should be regarded as indivisible obligations *erga omnes*, the violation of which allows universal enforcement, especially by means of state counter-measures. Nevertheless, in particular concerning states, specifically by reason of the gravity of the breach it is possible to split primary and secondary norms, conceiving of the sanction as

¹⁵⁵ See IIL, Resolution on Obligations *erga omnes* in International Law, article 5 c), at 289; G. Gaja, First Report to the IIL on Obligations and Rights *erga omnes* in International Law, at 147-148.

¹⁵⁶ Adopting Kelsenite categorization.

a bilateral relation allowing solely reciprocal enforcement in the case of an infringement.

Divisible obligations *erga omnes* are available from the viewpoint of the power, so *dispositivae*, because a (state) subject can regulate them by bilateral consent. Breaches must be conceived of on a relative basis, enabling only the subject(s) injured to invoke the responsibility and impose sanctions. Correspondingly, sanctions should also be regarded as bilateral obligations, the infringement of which gives rise to reciprocal enforcement, especially by means of state counter-measures. Nevertheless, and particularly in the case of states, it is possible to figure out that specifically the gravity of the breach 'unifies' the primary obligation, allowing universal invocation of the responsibility; hence, the secondary obligation could be either bilateral or a general indivisible one, respectively permitting relative or absolute enforcement in the case of a breach.