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The protection of individuals by means of diplomatic protection : diplomatic protection as a human rights instrument

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Citation

Vermeer-Künzli, A. M. H. (2007, December 13). *The protection of individuals by means of diplomatic protection : diplomatic protection as a human rights instrument*. Retrieved from <https://hdl.handle.net/1887/12538>

Version: Corrected Publisher's Version

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Note: To cite this publication please use the final published version (if applicable).

III | A Matter of Interest: Diplomatic Protection and State Responsibility Erga Omnes

‘When a State admits into its territory foreign investments or foreign national, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment afforded to them. These obligations, however, are neither absolute nor unqualified. 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 in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.’¹

INTRODUCTION

The celebrated paragraph 33 of *Barcelona Traction* inspired the International Law Commission (ILC) in 2001 to draft Article 48, and in particular paragraph 1(b) of this provision, of the Articles on the Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility).² This article provides for the invocation of international responsibility, on the condition that a serious breach of a peremptory norm which is ‘owed to the international community as a whole’ has been violated.³ While this provision was included in the Articles on State Responsibility as an exercise in progressive develop-

1 *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Second Phase)* (Belgium v. Spain), Judgment of 5 February 1970, ICJ Reports 1970, at 32, para. 33. This chapter will be published as an article entitled ‘A Matter of Interest: Diplomatic Protection and State Responsibility Erga Omnes’, in 56 ICLQ 553-583 (2007).

2 Articles on State Responsibility, Article 48. For the purpose of this discussion, the term ‘peremptory norm’ will be used predominantly, consistent with the practice of the ILC. However, in quoting other sources, the term *jus cogens* will not be replaced and will be taken as a synonym for ‘peremptory norm’. The author is aware of debates distinguishing peremptory norms from norms of *jus cogens*. However, it is felt that it is unnecessary to enter into such debates for the present purpose, since invocation *erga omnes* can be based both on rules of *jus cogens* and on peremptory norms.

3 48(1)(b) reads as follows: ‘Any State other than the injured state is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: ... the obligation breached is owed to the international community as a whole.’ Articles on State Responsibility, Article 48.

ment, it builds on existing ideas of the importance of norms of *jus cogens* and the idea that compliance with such norms is the concern of the international community and not just of individual states. The regime created under Article 48 however stands in a complex relation to the long-established mechanism of diplomatic protection or the protection of nationals. There are important distinctions between the two mechanisms, but they also share fields of application. In what follows, these differences and similarities will be analysed and discussed, to demonstrate that while they should be recognised, they do not deprive either mechanism of a role in current international law. Both diplomatic protection and invocation of responsibility *erga omnes* can and should be used for the protection of individuals.

The two regimes for the invocation of international responsibility for injuries to individuals are both based on some measure of indirect injury. In the case of diplomatic protection the injury is indirect because it is inflicted upon a national of the state, not on the state itself. In case of invocation under Article 48 it is indirect because the state invoking responsibility is not itself injured either, as is stipulated in its heading, which reads 'Invocation of responsibility by a State other than an injured State'. Although the ICJ in *Barcelona Traction* attempted to create a dichotomy, indicating that 'an essential distinction should be drawn' between the two mechanisms, it is by no means clear how then they should be interpreted vis-à-vis each other.⁴ Making the distinction based on the nature of the violated rule, as the ICJ seemed to indicate is in any event not feasible: responsibility for a breach of a peremptory norm can be invoked both through diplomatic protection and through application of Article 48. However, since diplomatic protection is based on classical indirect injury, the local remedies rule applies and the protected individual must possess the nationality of the protecting state. Yet in case of invocation under Article 48, while the claiming state is not the injured state, a claim of this kind is presumably to be interpreted as a direct claim where the legal interest is established through membership of the international community, and the conditions for indirect claims are not applicable: the claimant state is not required to show that the injured individuals are its nationals nor is it necessary to exhaust local remedies. This may appear to be a correct way of distinguishing the two mechanisms, but the matter is further complicated by Article 44 of the Articles on State Responsibility which requires exhaustion

4 From this discussion are excluded treaty-based mechanisms such as inter-state complaints procedures under the ICCPR, the ECHR and other human rights treaties. These mechanisms are fundamentally different since their application depends on prior consent of the states parties to the relevant treaties and the specific rules of the treaty regimes. Diplomatic protection is part of customary international law and the Articles on State Responsibility, including the parts that constitute progressive development and in particular Art. 48(1)(b), are also designed to be part of general international law.

of local remedies and nationality of claims.⁵ No explicit exception is made here for invocation under Article 48 and since such invocation not necessarily involves nationals of the claimant state, the obstacles created by Article 44 are not easily disposed of.⁶ The distinction so clearly made in *Barcelona Traction* is not beyond criticism and certainly not as evident as the ICJ intended it to be.⁷ Neither this dictum nor the Articles on State Responsibility convincingly overrule the apparent difficulties inherent in the latter mechanism, since, as has been argued, 'the project [on diplomatic protection] as it stands demonstrates conflict with the state responsibility project' and '[i]ts content, moreover, does not augur well for the admissibility of the invocation of responsibility on behalf of non-national beneficiaries.'⁸ This argument seems to be further strengthened by the application of the *lex specialis derogat legi generali* rule, Article 55 of the Articles on State Responsibility.⁹ State responsibility, as codified in the Articles on State Responsibility is the *lex generalis*, since it provides the general rules on state responsibility that would be applicable if there are no special circumstances defying that applicability, for instance in case of 'actual inconsistency' between the Articles on State Responsibility and the special rules.¹⁰ Indirect injury can be seen as a special circumstance, in particular because it is governed by a special set of rules: the rules on diplomatic protection. Since they do apply to diplomatic protection and are not intended to apply to invocation under Article 48, there is a clear inconsistency. Thus, the special rules on diplomatic protection would prevail over the general rules of state responsibility in case of indirect injury. This is an attractive argument against invocation *erga omnes* without compliance with the nationality of claims and the local remedies rule. Yet, as will be argued below in section 2.A, the nature of a claim brought under Article 48 of the Articles on State Responsibility is not general as opposed to the speciality of diplomatic

5 Articles on State Responsibility, Article 44. It is provided here that any claim is inadmissible if 'the claim is not brought in accordance with any applicable rule relating to the nationality of claims' (sub a) and 'the claim is one to which the rule of exhaustion of local remedies applies ...' (sub b).

6 The Commentary to Article 44 features amongst the shortest in the Commentary to the Articles on State Responsibility and it basically affirms the conditions for admissibility usually applicable to indirect claims. It does however not clarify when those conditions will be applicable nor does it explain the content and scope of these conditions in detail. Instead it refers to the ILC project on diplomatic protection. See Articles on State Responsibility, Commentary to Article 44, at 304-307.

7 See C. Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge 2005, at 158-179 for an excellent analysis of this issue in *Barcelona Traction*.

8 I. Scobbie, 'The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law"' (2002), 13 EJIL 1201-1220, at 1215.

9 See Articles on State Responsibility, Commentary to Article 55, which states that 'article 55 makes it clear that the present articles operate in a residual way', at 357.

10 Articles on State Responsibility, Commentary to Article 55, at 358.

protection. Even though it may relate to the same breach of international law, it is a different kind of claim which does not cause inconsistency.¹¹

The relation between invocation under Article 48 of the Articles on State Responsibility and such invocation by means of diplomatic protection will be explored on the basis of the two sets of (draft) articles which have been prepared by the ILC. At the outset it is however necessary to clarify in detail to what extent these mechanisms may coincide and to narrow down the discussion to those instances in which they both may be applicable. Both diplomatic protection and invocation under Article 48 have applications that are not shared by the other mechanism and that thus do not cause conflicting situations and which will therefore not be considered in the present analysis. The first difference relates to the *subject matter* of the situation. Article 48 is applicable to violations of peremptory norms.¹² Responsibility for injuries resulting from non-peremptory norms can thus not be invoked under Article 48. In addition, Article 48 is only applicable to *serious* breaches of peremptory norms. Yet, it also means that acts of aggression are included, which typically constitute injury to the state subject to the act of aggression and not injury involving individuals, even if individuals may also suffer from the act of aggression. Diplomatic protection in its turn covers all indirect injuries, whether resulting from a peremptory norm or not.¹³ It is thus clear that responsibility for non-serious instances of breaches of peremptory norms may be invoked through diplomatic protection but not through an appeal to Article 48, whereas breaches that do not cause injuries to individuals, even if they are indirect, can result in invocation under Article 48 but not through diplomatic protection.

A second difference concerns the *nationality* of the individuals who have suffered the injury and who may be protected. As has been stated above, invocation of state responsibility under Article 48 should not require nationality of the claimant state whereas diplomatic protection does. Thus, presumably, states can invoke the responsibility of another state regardless of the nationality

11 Note that the Commentary to Article 55 emphasises that 'it is not enough that the same subject matter is dealt with by two provisions' and that if there is no inconsistency, there should at least be 'a discernible intention that one provision is to exclude the other', at 358. The ILC evidently had no intention to subject invocation under Article 48 to the rules on diplomatic protection.

12 Although there is some academic debate on the question of which norms exactly constitute peremptory norms, no attempt will be made in this Chapter to clarify that discussion. For the present purpose the following norms will be assumed to belong to the corpus of peremptory norms: the prohibition on aggression, the basic rules of international humanitarian law applicable in armed conflict such as the prohibition on war crimes and crimes against humanity, the prohibitions on genocide, torture, slavery and apartheid and the right to self determination. This list however, is not exhaustive. See Articles on State Responsibility, Commentary to Article 40, at 283-284. On the status of the prohibition on arbitrary detention, see *infra* note 49, and accompanying text.

13 Articles on State Responsibility, Commentary to Article 40, at 285.

of the victims if they rely on Article 48, but not if they exercise diplomatic protection. There is an additional difference in this respect concerning refugees. Serious violations of peremptory norms may lead to massive refugee influx. Although the draft articles on diplomatic protection contain, as an exercise in progressive development, a provision on the protection of refugees, this protection is excluded 'in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.'¹⁴ The Commentary explains that policy considerations underlie this exception clause:

[m]ost refugees have serious complaints about the treatment at the hand of their State of nationality To allow diplomatic protection in such cases would open the floodgates for international litigation. Moreover, the fear of demands for such action by refugees might deter States from accepting refugees.¹⁵

The exception is however not applicable to invocation of responsibility under Article 48. Moreover, where the serious breaches of peremptory norms by a state cause large numbers of refugees, the invocation of responsibility is in the interest of the community as a whole and the case would clearly fall within the scope of Article 48.¹⁶

Thirdly, the *consequences* of the invocation of responsibility differ. States exercising diplomatic protection have a large discretion with respect to the requested remedies. Although the draft articles suggest in draft article 19 that regard should be had to the wishes of the individual,¹⁷ the general rules of state responsibility on reparation¹⁸ and countermeasures¹⁹ are applicable.

14 Draft Articles on Diplomatic Protection, Art. 8(3).

15 ILC Report 2006, at 51. See also *Al-Adsani v. United Kingdom* [ECHR], Judgment of 21 November 2001, Application no. 35763/97, Concurring Opinion of Judge Pellonpää, joined by Judge Sir Nicolas Bratza, at p. 1 of the Opinion.

16 A similar argument would apply to the local remedies rule. However, considering the non-absolute character of this rule, it is not unlikely that the exhaustion of local remedies will not be considered necessary – because that would be unreasonable – in situations of serious breaches of peremptory norms. See Articles on State Responsibility, Commentary to Article 40, at 285. In addition, the question of nationality has 'legal priority' vis-à-vis the local remedies rule. See Scobbie, 'The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law"' (2002), 13 EJIL 1201-1220, at 1215. It is therefore not necessary to pursue this issue.

17 Draft article 19 provides that states 'should:

(a) give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred;
(b) take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and
(c) transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions...'

See Draft Articles on Diplomatic Protection, Art. 19.

18 Part two, Chapter II of the Articles on State Responsibility, Articles 34-39.

19 Part three, Chapter II of the Articles on State Responsibility, Articles 49-53.

The 'close connection' between diplomatic protection and the general rules on state responsibility has been emphasised in the Commentary:

[m]any of the principles contained in the articles on Responsibility of States ... are relevant to diplomatic protection and are therefore not repeated in the present draft articles. This applies in particular to the provisions dealing with the legal consequences of an internationally wrongful act. ... All these matters are dealt with in the articles on Responsibility of States.²⁰

Thus, regardless of the subject-matter of the claim, the standard rules on reparation and countermeasures will be applicable.

This situation is different with respect to invocation under Article 48. Article 48 specifies, in para. 2(a) and (b), that the state invoking responsibility can claim cessation and guarantees of non-repetition (sub a) and reparation 'in the interest of the injured State or of the beneficiaries of the obligation breached' (sub b). Even if obligations *erga omnes* may 'impose special duties on the offending State which may go beyond the bilateral reparation scheme which applies in reciprocal relationships',²¹ there are limitations with respect to these reparations, which are relevant for the distinction between this mechanism and diplomatic protection. As is explained in the commentary to the Articles on State Responsibility,

a State invoking responsibility under article 48 and claiming anything more than a declaratory remedy and cessation may be called on to establish that it is acting in the interest of the injured party.²²

Although this provision is recognised as being an exercise in progressive development, the fact that the state invoking responsibility cannot itself benefit from reparation received logically follows from the premise that this state is not acting merely in its own interest but in the interest of the international community and the beneficiaries of the obligation breached.²³ This is fundamentally different from the applicable rules on diplomatic protection: as we have seen, states are encouraged to transfer any compensation received to the protected national but they are not obliged to do so and they are explicitly allowed to deduct a reasonable amount. Even if diplomatic protection is based on a fiction, and even if the state cannot be presumed to have actually suffered

²⁰ ILC Report 2006, at 22.

²¹ S. Kadelbach, 'Jus Cogens, Obligations *Erga Omnes* and other Rules – the Identification of Fundamental Norms' in: C. Tomuschat and J.-M. Thouvenin (Eds), *The Fundamental Rules of the International Legal Order, Jus Cogens and Obligations Erga Omnes*, Leiden/Boston 2006, 21-40 at 26.

²² Articles on State Responsibility, Commentary to Article 48, at 323.

²³ See below for further analysis of 'beneficiaries' and 'international community as a whole'.

an injury itself,²⁴ the level of discretion states have in the exercise of diplomatic protection also affects the kind and amount of reparation claimed.

The question of whether third states are entitled to take countermeasures is more complex.²⁵ Due to the exceptional nature of countermeasures, the conditions under which they can be installed are necessarily limited. Amongst others, they must be necessary and proportionate, in response to an earlier breach of international law and directed against the delinquent state.²⁶ It is however difficult to clearly specify when and to what extent countermeasures are necessary and proportionate when they are the result of invocation of responsibility under Article 48. Within the Chapter dealing with countermeasures, a special provision on this issue is included. Article 54 of the Articles on State Responsibility contains a saving clause stating that the entitlements of third states acting under Article 48 to take lawful measures²⁷ in response to breaches of peremptory norms are not prejudiced. The status of such an entitlement under international law is not undisputed and the Articles on State Responsibility deliberately leave the matter undecided. As the ILC noted in the Commentary to this Article, 'there appears to be no clearly recognised entitlement of States referred to in article 48 to take countermeasures in the collective interest.'²⁸ Even if states are considered to be entitled to take such measures, they are limited with respect to beneficiaries: they may only be taken in the interest of the injured state and/or individuals, as is stipulated in Article 54.²⁹ In comparing the two mechanisms on this point, the rules applicable

24 See Chapter I.

25 See generally on countermeasures in response to violations of peremptory norms e.g. D. Alland, 'Countermeasures of General Interest' (2002), 13 EJIL 1221-1239; C. Hillgruber, 'The Right of Third States to Take Countermeasures' in: Tomuschat and Thouvenin (Eds), *The Fundamental Rules of the International Legal Order, Jus Cogens and Obligations Erga Omnes*, Leiden/Boston 2006, 266-293.

26 See also P. Klein, 'Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms in International Law and United Nations Law' (2002), 13 EJIL 1241-1255, who argues in favour of a measure of 'subsidiarity between the response of UN organs and that of states not directly injured acting on an individual or collective basis', at 1254.

27 The Commentary explains that the Article deliberately refrains from using the term 'countermeasures', 'so as not to prejudice any position concerning measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole.' Articles on State Responsibility, Commentary to Article 54, at 355. It should also be noted that this only relates to measures taken by states in their individual capacity and not to measures taken in execution of decisions of international organisations such as the UN, see Articles on State Responsibility, Commentary to Article 54, at 350.

28 Articles on State Responsibility, Commentary to Article 54, at 355 and also at 283. See also L.-A. Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002), 13 EJIL 1127-1145, at 1143, who points to the ambiguities of this particular provision.

29 See also A. Orakhelashvili, *Peremptory Norms in International Law*, Oxford 2006, at 270-2 who supports taking countermeasures *erga omnes* particularly in the light of the decentralised international legal system.

to diplomatic protection are evidently more generous to the protecting state and are well-established, whereas the consequences of these rules related to invocation under Article 48 are much less clear and in the event counter-measures are taken they certainly should not benefit the claiming state individually.

In conclusion, the only situation the two mechanisms share are instances of serious breaches of peremptory norms affecting individuals who have another nationality than the nationality of the host state or who are dual nationals, refugees of a third country or stateless persons. Narrowing down the focus of this study does however not limit its relevance. Considering the large numbers of individuals travelling to other countries, for instance seeking employment, and considering the abuses they may suffer in their host state (racial discrimination, torture or, in case of war, war crimes and crimes against humanity), it is important to outline and – if possible – to enhance existing mechanisms for protection. The first section will discuss the relation between diplomatic protection and peremptory norms. The second section will then turn to the invocation of responsibility under Article 48, which will be followed by a general conclusion on the relationship between the two mechanisms and their position under current international law.

1 INVOCATION OF RESPONSIBILITY BY MEANS OF DIPLOMATIC PROTECTION

The second reading of the draft articles on diplomatic protection resulted in a significant modification in the wording of draft article 1. It now emphasises the strong relation between the law of diplomatic protection and the law of state responsibility and instead of echoing the language of *Mavrommatis*, the provision speaks of the invocation of responsibility for indirect injury caused by an internationally wrongful act.³⁰ It was felt that the phrase ‘in its own right’, which featured prominently in the old draft article 1, no longer reflected reality since the rights that constitute the subject of the claim are international rights of individuals and the only right that belongs to the state is the right to exercise diplomatic protection.³¹ The exercise of diplomatic protection is a response to an indirect injury and allows a state to stand up for its national, whereby the ‘part’, that is, the national, is protection by the ‘whole’, the state. This clearly shows the fictitious nature of diplomatic protection, since the rights that are being protected do not actually belong to the state, but to its parts.³²

30 Draft Articles on Diplomatic Protection, Article 1 reads: ‘For the purpose of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to implementing such responsibility’.

31 See Government Comments and Observations, Add. 2, at 2.

32 For a detailed discussion of the fiction in diplomatic protection see Chapter I.

Although this may sound obvious, it is important to stress the nature of diplomatic protection here, since it will be shown that invocation under Article 48 is fundamentally different in this respect.

Historically, diplomatic protection has been exercised for a wide range of violations of international law. Expropriation of property, as in *Nottebohm* and *Interhandel*, denial of justice and violation of the international minimum standard, as in the *Neer* and *Roberts* claims, and violations of the Vienna Convention on Consular Relations, as in *LaGrand* and *Avena*, feature among the rules the violation of which provided the basis for the exercise of diplomatic protection. Diplomatic protection is not part of international human rights law and international attempts to include it in this corpus of law have not been convincing. Germany and Mexico's effort to receive a declaratory judgment of the ICJ on this point have remained fruitless.³³ However, that does not mean that diplomatic protection has no role to play in the protection of human rights. It may not be a human right *pur sang*, yet it is an important mechanism for the invocation of responsibility for violations of human rights,³⁴ including serious violations of those human rights norms that constitute peremptory norms.

A Draft article 19: recommended practice in case of serious injuries.

The ILC has on various occasions dealt with the enhanced importance of diplomatic protection with respect to violations of peremptory norms. John Dugard, ILC Special Rapporteur on diplomatic protection, first emphasised the importance of diplomatic protection in response to such violations in his First Report. Draft Article 4 provided that a state has an obligation to exercise diplomatic protection 'if the injury [to its national] results from a grave breach of a *jus cogens* norm attributable to another State.'³⁵ This provision created an exception to the discretion states were generally assumed to have with respect to the decision to exercise diplomatic protection, but Dugard explained that this exception was justified based on existing state practice³⁶ and the nature of *jus cogens*:

[t]oday there is general agreement that norms of *jus cogens* reflect the most fundamental values of the international community and are therefore most deserving of international protection. It is not unreasonable therefore to require a State to

33 *LaGrand* case (Germany v. United States), Judgment of 27 June 2001, ICJ Reports 2001 p. 466, at p. 494 (para. 78); *Case Concerning Avena and Other Mexican Nationals* (Mexico v. United States), Judgment of 31 March 2004, ICJ Reports 2004 p. 12, at 60-61 (para. 124).

34 Dugard, First Report, para. 32.

35 *Id.*, para. 74.

36 *Id.*, paras. 81-7.

react by way of diplomatic protection to measures taken by a State against its nationals which constitute the grave breach of a norm of *jus cogens*.³⁷

The Commission was however of the opinion that this article was too progressive to be acceptable and did not include the provision in the 2004 draft articles adopted on first reading.³⁸ The discretionary nature of diplomatic protection was maintained and no specific reference to peremptory norms was included. In 2006, the issue returned to the ILC through the comments and observations submitted by states in response to the draft articles adopted on first reading. Italy specifically called for the inclusion of a provision containing an obligation to exercise diplomatic protection in case of violations of peremptory norms,³⁹ and the ILC again discussed the issue of an obligation to exercise diplomatic protection. Italy's proposal was to insert an extra provision echoing the rejected draft article 4 of the First Report on Diplomatic Protection.⁴⁰ It would support the inclusion of an obligation 'when the protection of fundamental values pertaining to the dignity of the human being and recognised by the community as a whole is at stake.'⁴¹ The term 'fundamental values' would be interpreted narrowly and only encompass a very limited number of norms.⁴²

Not surprisingly, the ILC was not prepared to backtrack on an abandoned path. Yet it did acknowledge the merits of the inclusion of a reference to the relevance of diplomatic protection. The result of all this was the inclusion of draft article 19 which provides, under the heading of *recommended practice*, that states should '[g]ive due consideration to the possibility of exercising diplomatic protection, especially when significant injury has occurred.'⁴³ The precise extent and scope of 'significant injury' is left undetermined in the Commentary to this draft article, although reference is made to 'significant human rights violations'.⁴⁴ In the ILC, the inclusion of a specific reference to peremptory norms was discussed but the members decided to leave the matter open and – while not excluding its application to violations of peremptory norms – not to restrict the recommendation to violations of such

37 *Id.*, para. 89 (footnotes omitted).

38 Diplomatic Protection – titles and texts of the draft articles on Diplomatic Protection adopted by the Drafting Committee on first reading, International Law Commission 56th session, A/CN.4/L/647 (2004). See also *infra* Chapter VI, section 1.

39 Government Comments and Observations, Add. 2, at 2-3.

40 *Id.*, at 3.

41 *Id.*, at 3.

42 It would include serious violations of human rights violations, in particular 'the right to life, the prohibition on torture and inhuman or degrading treatment or punishment, the prohibition on slavery and the prohibition on racial discrimination', see Government Comments and Observations, Add. 2, at 3. War crimes and crimes against humanity thus seem to have been excluded.

43 Draft Articles on Diplomatic Protection, Art. 19(a).

44 ILC Report 2006, at 96.

norms. One of the arguments brought forward against such restriction was that in case of a violation of peremptory norms the exercise of protection would not be limited to the state of nationality. This would provide other means for protection in such cases, which will be absent for less serious breaches. In addition, the provision should not invite discussion on whether or not the relevant breach had the status of a peremptory norm, since this would not contribute to the purpose of the provision, which was to enhance protection for the individual. A related argument was that a breach or a relatively minor rule would result in serious injury to individuals, which would justify the exercise of protection. The focus here should thus be on the individual and not on the breach. The Commission thus decided not to specify the nature of the rule underlying the relevant breach and only to refer to 'significant injury'.

Even if the application of draft article 19 was deliberately not limited to violations of peremptory norms, a wish to strengthen any mechanism of protection in case of violations of such norms did provide the motive for its genesis. The Commentary actually shows that what the Commission had in mind were serious breaches of fundamental human rights norms, if not breaches of peremptory norms. A first reference in the Commentary to support this conclusion is the 2005 World Summit Outcome resolution, adopted by the General Assembly.⁴⁵ The document is referred to in order to 'reaffirm' that '[t]he protection of human beings by means of international law is today one of the principal goals of the international legal order.'⁴⁶ However, the Resolution only speaks of the responsibility to protect in cases of violations of peremptory norms:

[t]he international community ... has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, ... to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.⁴⁷

While draft article 19 is perhaps not limited to such norms, deriving its legitimacy from the Resolution points in their direction. Needless to say, the violation of peremptory norms will invariably lead to 'significant injury'.

In addition, in supporting the recommendation to consider the exercise of diplomatic protection the Commentary refers to various national decisions on the (non-)exercise of diplomatic protection: the *Rudolf Hess* case, the *Abbasi* case and the *Kaunda* case. These cases all concerned (alleged) arbitrary detention. Although the prohibition on arbitrary detention is not generally included in the list of peremptory norms, it has been described as non-

45 2005 World Summit Outcome Resolution, GA 60th Session, UN Doc. A/RES/60/1.

46 ILC Report 2006, at 95.

47 2005 World Summit Outcome Resolution, para. 139.

derogable.⁴⁸ While non-derogability is not the same as being peremptory, there is a clear similarity or connection. Peremptory norms are by definition non-derogable while non-derogable norms are de facto peremptory. This applies in particular to the prohibition on arbitrary detention.⁴⁹ For this reason, the decisions support the idea that the recommendation not only refers to 'serious injuries' but also to serious violations of international law. Whether or not one accepts that this is what the ILC had in mind, the draft articles on diplomatic protection emphasise the relevance of this mechanism for the protection against human rights violations, in particular when on a large scale or involving peremptory norms, rendering serious injury inevitable.⁵⁰

B The saving clause in draft article 16

Before turning to invocation under Article 48 of the Articles on State Responsibility, it should be noted that the draft articles on diplomatic protection contain a saving clause to avoid conflict with other mechanisms of protection: draft article 16 provides that the rights of states and natural or legal persons

to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the ... draft articles [on diplomatic protection].⁵¹

Although the discussions in the ILC have shown that this primarily refers to inter-State proceedings under human rights instruments and investment dispute settlement mechanisms, the Commentary to this draft article refers also to invocation under Article 48. Without much explanation, it is stated that the conditions for diplomatic protection do not apply to such invocation. Thus, the purpose is to restrict the application of the draft articles on diplomatic protection and not to negatively affect the functioning of other mechanisms by imposing rules that would otherwise be applicable for indirect claims. As the ILC had overlooked the friction between invocation *erga omnes* under Article 48(1)(b) and the rules on diplomatic protection, it apparently tried to remedy

⁴⁸ See S. Marks & A. Clapham, *International Human Rights Lexicon*, Oxford 2005, at 78.

⁴⁹ See A. Orakhelashvili, *Peremptory Norms in International Law*, Oxford 2006, at 58-60, who specifically refers to 'illegal deprivation of liberty' as an example of a prohibition that is peremptory because it is non-derogable, at 60. It should be noted that the applicants in *Abbasi* and *Kaunda* also argued that the circumstances of their detention amounted to torture or inhuman or degrading treatment. The Courts in both cases however only considered the arbitrariness of the detention, although they may have weighed the allegations of torture in their assessment of the urgency of the situations.

⁵⁰ It is interesting to note that the ILC, when debating State Responsibility, also found that violations of peremptory norms 'by definition' involve a 'risk of substantial harm'. See ILC Yearbook 2001 (Vol. I), A/CN.4/SER.A/2001, report of the 2682nd meeting, at 105, para. 16.

⁵¹ Draft Articles on Diplomatic Protection, Article 16.

this situation with a simple statement in the Commentary to the Draft Articles on Diplomatic Protection: the Commentary specifically refers to invocation of responsibility under Article 48(1)(b) of the Articles on State Responsibility and simply states that the conditions of diplomatic protection, as contained in the Draft Articles on Diplomatic Protection, do not apply to such invocation.⁵² Furthermore, in a footnote, it states that Article 44 of the Articles on State Responsibility does not apply to Article 48 with reference to Milano.⁵³ Milano however does not conclusively exclude the application of Article 44, but merely states that it creates obstacles and concludes that

from a joint reading of the 2001 Articles on State Responsibility and the ... Draft Articles on Diplomatic Protection, the room left for the enforcement of *erga omnes* human rights obligations beyond the traditional mechanisms of protection appears to be minimal.⁵⁴

It may be true that the clause clearly exclude other 'full' regimes that have rules of their own, but it is problematic for invocation under Article 48(1)(b), since this mechanism precisely lacks rules of its own. If it is interpreted as a direct claim, then indeed the saving clause in the draft articles of diplomatic protection will exclude it from its scope. Yet, if it is interpreted as an indirect claim, there is no reason why it should be, particularly when taking into account Article 44 of the Articles on State Responsibility. In any event, the reasons for non-application of the rules on diplomatic protection to invocation under Article 48 of the Articles on State Responsibility given in the Commentary, by reference to one scholar, do not convincingly overcome the apparent contradiction in the Articles on State Responsibility. The separation of the two mechanisms is not created because the ILC says it is. It remains to be seen whether the distinction between the two mechanisms, and the ensuing non-application of the local remedies rule and the nationality of claims rule, can be found in the nature of invocation *erga omnes* under current international law.

2 INVOCATION OF RESPONSIBILITY UNDER THE ARTICLES ON STATE RESPONSIBILITY

In 2001 the ILC adopted the Articles on State Responsibility. While these Articles largely codify customary international law on state responsibility, they also contain some progressive development. In particular, the Articles on State

⁵² ILC Report 2006, at 87.

⁵³ ILC Report 2006, at 87, note 245.

⁵⁴ E. Milano, 'Diplomatic Protection and Human Rights before the International Court of Justice: Re-Fashioning Tradition' (2004), 35 Netherlands Yb of Int'l Law 85-142, at 107.

Responsibility provide for the invocation of responsibility by a member of the international community in case of a violation of a peremptory norm due to the *erga omnes* character of such a norm regardless of the existence of actual injury to the invoking state as a consequence of the violation.⁵⁵ As will be demonstrated, the interpretation of the *erga omnes* character of peremptory norms is crucial to the proper application of such invocation. As Byers has argued '*erga omnes* rules expand the scope of possible claimants in certain situations, to protect key common interests where traditional rules of standing are insufficient to do so.'⁵⁶ It allows states

not directly affected by an internationally wrongful act to invoke the responsibility of the violator, be it on their own behalf, on behalf of the subjects of international law who are not in a position to bring a claim themselves, or simply as members of the international community.⁵⁷

Membership of the international community to which obligations *erga omnes* are owed provides legal standing in cases concerning violations of norms that are (perceived to be) fundamental to this community,⁵⁸ a violation which will 'shock the conscience of mankind', to borrow the language of Lord Phillips of Worth Matravers in the Pinochet No. 3 decision.⁵⁹

In Part two, Chapter III and Part three, Chapters I and II of the Articles on State Responsibility, Article 41 stipulates the consequences of a breach of an obligation under peremptory norms; Article 48 sets out the conditions under which third states may invoke responsibility and the kind of claim they may present; and Article 54 provides for countermeasures taken by third states. While these provisions are an exercise in progressive development, they also are 'a framework for [such] development, within a narrow compass, of a

55 It should be noted that the ILC deliberately avoided the use of the words '*erga omnes*' because of a perceived lack of clarity. See Articles on State Responsibility, Commentary to Article 48, at 321. Although one clearly can question the preciseness of the term *erga omnes* it will be used here as a synonym to 'owed to the community as a whole'.

56 M. Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules', (1997) 66 Nord. JIL 211-239, at 238.

57 Kadelbach, '*Jus Cogens*, Obligations *Erga Omnes* and other Rules – the Identification of Fundamental Norms' in: C. Tomuschat and J.-M. Thouvenin (Eds), *The Fundamental Rules of the International Legal Order, Jus Cogens and Obligations Erga Omnes*, Leiden/Boston 2006, at 26, and similarly at 35.

58 See also P. Okowa, 'Issue of Admissibility and the Law on International Responsibility' (2006) in: M.D. Evans, *International Law*, Oxford 2006, at 494 who stated that '[a]n implicit feature of this category of obligations [i.e. obligations *erga omnes*] is that the specific requirements of legal interest based either on direct injury or ties of nationality are dispensed with.' No explanation is given here however of the ways in which this can be achieved.

59 *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet Ugarte* (No.3) [1999] 2 W.L.R., 827, per Lord Phillips of Worth Matravers. See also R. Jennings & A. Watts (eds). *Oppenheim's International Law*, Vol. 1 Peace (9th edition), London 1992, at 998.

concept which ought to be broadly acceptable'.⁶⁰ Indeed, in 1986, Meron has stated, which is worth citing in full:

there has been a growing acceptance in contemporary international law of the principle that, apart from agreements conferring on each state party *locus standi* against the other state parties, all states have a legitimate interest in and the right to protest against significant human rights violations wherever they may occur, regardless of the nationality of the victims. This crystallization of the *erga omnes* character of human rights ... is taking place despite uncertainty as to whether a state not directly concerned (e.g., in the protection of its nationals), *ut singuli*, may take up claims against the violating state and demand reparation for a breach of international law. However, the general principle establishing international accountability and the right to censure can be regarded as settled law. Thus, while doubts may persist about the appropriate remedies that can be demanded by a third state ..., the *locus standi* of such a third state, in principle, is not questioned.⁶¹

If invocation under Article 48 is successful and applied worldwide, the mechanism of diplomatic protection may seem redundant and overly cumbersome due to the extra conditions that apply.

Not surprisingly, these provisions have yet to be applied in practice. Even if the Court has recently acknowledged the existence of rules of *jus cogens*,⁶² it rejected a counterclaim brought forward by Uganda concerning the inhuman treatment of individuals by the Democratic Republic of the Congo. The Court found that Uganda had failed to establish the relevant, Ugandan, nationality of the individuals concerned and that, as a consequence, it could not exercise diplomatic protection on behalf of these individuals.⁶³ From the perspective of diplomatic protection, this approach is of course correct, since legal interest is created through the bond of nationality.⁶⁴ However, Judge Simma, in a strong separate opinion to the judgment, has argued that diplomatic protection was not the only mechanism available to invoke responsibility for the treatment of these individuals. Despite the fact that Uganda itself did not argue along these lines

⁶⁰ Crawford, Fourth Report, at para. 52.

⁶¹ T. Meron, 'On a Hierarchy of International Human Rights' (1986), 80 AJIL 1-23, at 11-12 (footnotes omitted). Note that Meron clearly makes a distinction between invocation *erga omnes* and invocation *erga omnes partes*. See for this difference *infra* section 2.A.3.

⁶² *Case Concerning Armed Activities on the Territory of the Congo (New Application 2002)*, paras. 64 and 125; *Genocide case*, para. 162.

⁶³ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, judgment of 19 December 2005, available at www.icj-cij.org, para 333. See also *infra* notes 84 and 86 and accompanying text.

⁶⁴ See *Panevezys-Saldutiskis Railway case (Estonia v. Lithuania)*, PCIJ, Series A/B, No. 76 (1937), at 16.

it would have been possible for the Court in its Judgment to embrace the situation in which these individuals found themselves, on the basis of international humanitarian and human rights law, and that no legal void existed in their regard.⁶⁵

In his opinion, the nature of the breaches of international law provided Uganda with legal standing:

The specific construction of the rights and obligations under the Fourth Geneva Convention as well as the relevant provisions of Protocol I Additional to this Convention not only entitles every State party to raise these violations but even creates an obligation to ensure respect for the humanitarian law in question. The rules of the international law of State responsibility lead to an analogous result as concerns the violations of human rights of the persons concerned by the Congolese soldiers.⁶⁶

Judge Simma pointed out that Article 48 of the Articles on State Responsibility is applicable: these obligations, that is, obligations under international human rights law, 'are instances *par excellence* of obligations that are owed to a group of States including Uganda.'⁶⁷ Such obligations are the concern of the international community as a whole and ensuring compliance is to be taken seriously:

[i]f the international community allowed such interest to erode in the face not only of violations of obligations *erga omnes* but of outright attempts to do away with these fundamental duties, and in their place to open black holes in the law in which human beings may be disappeared and deprived of any legal protection whatsoever for indefinite periods of time, then international law, for me, would become much less worthwhile.⁶⁸

One cannot but sympathise with Judge Simma's concern with the protection of the individuals concerned and share his implicit criticism of the fact that

⁶⁵ *Congo – Uganda* case, Separate Opinion Judge Simma, at para. 19.

⁶⁶ *Ibid.*, at para. 37. It is interesting to note that the Court, in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, at 136, decided in the *dispositif* sub D, not only that the international community is under an obligation not to recognise the situation in violation of international humanitarian law, but that all States Parties to the Fourth Geneva Convention 'have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.' (at 202).

⁶⁷ *Congo – Uganda* case, Separate Opinion Judge Simma, at para. 35.

⁶⁸ *Ibid.*, at para. 41. See also *Congo – Uganda* case, Dissenting Opinion of Judge Kateka, at para. 69 who stated that 'the Court should have invoked international humanitarian law to protect the rights of these persons. The Court would seem not to have given enough weight to violations of the rights of these persons at Ngili Airport by the DRC.'

the World Court refused to entertain a claim that concerned the world community.

However, Judge Simma's analysis of the situation, the application of the relevant provisions of the Articles on State Responsibility and the ensuing conclusion regarding such invocation are by no means clear and this lack of clarity is instrumental to the inherent obscurities in Article 48. The first question is what constitutes the legal interest in cases of Article 48 invocation as different from diplomatic protection. The ensuing question is then what constitutes a claim *erga omnes*. Only if it is clear how and to what extent a state invoking responsibility under Article 48, and in particular Article 48(1)(b), is doing something else than exercising diplomatic protection, we may be able to properly distinguish the two mechanisms and answer the question of whether Article 44, the traditional requirements for indirect claims, really creates the obstacles it is said to create.

In any event, the conclusion that Article 48 read in conjunction with Article 44 is a dead letter is not very satisfactory. Applying principles of the law of treaties by analogy to the Articles on State Responsibility, it is also wrong: one must try to interpret the treaty in a way that all provisions are meaningful. In addition one should have regard to the principle of effectiveness and attempt to uphold the purpose of the provision in light of the purpose of the treaty as a whole.⁶⁹ Excluding the application of Article 48 where it concerns non-nationals because of the application of Article 44 is thus not the preferred interpretation and was certainly not the intention of the ILC. In what follows, the analysis of the question of legal interest will show that diplomatic protection, and the traditional requirements for its exercise, can and should co-exist with invocation of responsibility under Article 48. Secondly, it will be argued that the purpose of Article 48 is to transcend the level of traditional bilateralism and that the interpretation of the Articles on State Responsibility as a whole should acknowledge that.

It is thus clear that the *erga omnes* nature of the obligation, which in turn derives from its peremptory status, must create the capacity to invoke responsibility. However, whether this is acceptable will depend on the interpretation of legal interest and the idea of membership of the international community: do states really have a legal interest in defending the fundamental rules of the international community at large? It is submitted that they do and that we must accept this premises, at least if we aspire to transcend the bilateral nature of international law towards multilateralism.

69 For these principles see G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and other Treaty Points', (1957) 33 Brit. Y.B. Int'l Law 211.

A. Injury and interest

Byers has noted that '[g]enerality of standing, rather than non-derogable character, is the essence of *erga omnes* rules.'⁷⁰ The question of legal interest and standing, even if it concerns a peremptory norm, should however not be confounded with the question of the availability of a judicial forum: having a legal interest in a certain matter does not imply access to a certain judicial forum. On this point, Tams has argued that while 'all States have standing to institute ICJ proceedings in response to *erga omnes* breaches ... [and] to take countermeasures ...',⁷¹ the *erga omnes* character of the norm to cannot overcome the necessity of states' consent to the relevant dispute settlement mechanism.⁷² Judge *ad hoc* Dugard similarly found that

there are limits to be placed on the role of *jus cogens*. The request to overthrow the principle of consent as the basis for [the ICJ's] jurisdiction goes beyond these limits.⁷³

Orakhelashvili, assuming that the very nature of *jus cogens* rules allows them to trump everything else, would go one step further and support invocation of responsibility for obligations *erga omnes* regardless of consent on the relevant forum. He has argued that

in the case of norms protecting the community interest ... tribunals must safeguard such community interest not only in terms of substance but also at the jurisdictional level.⁷⁴

Thus, given the nature of peremptory norms, '[t]he principle of consent comes here into apparent clash with the principle of non-derogability of *jus cogens*.'⁷⁵

70 Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules', (1997) 66 Nord. JIL 211-239, at 230.

71 Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge 2005, at 310-311.

72 Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge 2005, stated that 'proceedings could only be brought against States that have accepted the Court's jurisdiction to entertain claims based on breaches of customary international law', at 311. Considering that this group of states is rather small, the statement referred to in the text accompanying note 71, is less generous than it seems to be. See also Meron, 'On a Hierarchy of International Human Rights' (1986), 80 AJIL 1-23, at 12.

73 *Case Concerning Armed Activities on the Territory of the Congo*, Separate Opinion Judge *ad hoc* Dugard, at para. 14.

74 Orakhelashvili, *Peremptory Norms in International Law*, Oxford 2006, at 490.

75 *Id.*, at 492. A similar point has been made by Ruffert, who noted, in relation to the ICJ's refusal to give the peremptory nature of *jus cogens* prevalence over the principle of consent that 'this state of the law seems to be scandalous from the standpoint of modern international law, which has moved away from bilateral consensual relationships towards the promotion of the interest of the international community. Fundamental norms are as a matter of principle independent of individual consent. On the contrary, obligations derived

Even if the peremptory nature of a norm cannot create jurisdiction of a certain court where it does not exist, it can, when jurisdiction exists but is limited by reservations or other limiting clauses, determine the application, or rather the non-application, of such limitations.⁷⁶ Whereas it is correct to note that it would be meaningless to grant the status of peremptory norms without simultaneously providing for enforcement, it is important to recognise that this does concern two different questions. More importantly, the invocation of responsibility *erga omnes* is not restricted to applications at the ICJ. As is made clear in the Articles on State Responsibility, it may also lead to the taking of countermeasures or other mechanisms to induce compliance with the relevant norm.

A.1 *Obligations erga omnes and the actio popularis*

When considering the legal interest in, and the reasons for, invoking obligations *erga omnes*, there is another kind of claim that often comes to mind: the *actio popularis*.⁷⁷ Although invocation *erga omnes* and an *actio popularis* have some elements in common, it is convenient to distinguish invocation *erga omnes* and *actio popularis*, in order to ensure that the invocation *erga omnes* does not evoke the same negative response the *actio popularis* has.

It should be emphasised that the term *actio popularis* in Roman law refers to a plurality of actions and that our 'modern' conception of this term is not necessarily accurate with respect to its origin.⁷⁸ In ancient Rome, what all forms of the *actio popularis* had in common was 'l'attribution générale d'une qualité pour agir.'⁷⁹ This, however, gives a first indication of the most important difference between the two mechanisms. The *actio popularis* is a municipal law phenomenon, where the existence of a legal system, indeed a

from peremptory norms ... are deliberately designed to apply to States without consent or against their will.' M. Ruffert, 'Special Jurisdiction of the ICJ in the Case of Infringement of Fundamental Rules of the International Legal Order' in: C. Tomuschat and J.-M. Thouvenin (Eds), *The Fundamental Rules of the International Legal Order, Jus Cogens and Obligations Erga Omnes*, Leiden/Boston 2006, 295-310, at 296-297 (footnotes omitted). See however H. Thirlway 'Injured and Non-Injured States before the ICJ', in: M. Ragazzi (ed.), *International Responsibility Today, Essays in Memory of Oscar Schachter*, Dordrecht 2005, at 311-328, who shows the complexities of applications to the ICJ of non-injured states.

⁷⁶ Orakhelashvili, *Peremptory Norms in International Law*, Oxford 2006, at 499-508.

⁷⁷ On *actio popularis* see generally F. Voefray, *L' Actio Popularis ou la Défense de l'Interêt Collectif devant les Juridictions Internationales*, Paris 2004; see also A.P. Rubin, 'Actio Popularis, Jus Cogens and Offences Erga Omnes', (2001) 35 New Eng. L. Rev. 265-280; P.P. Mercer, 'The Citizens Right to Sue in the Public Interest: the Roman *Actio Popularis* revisited' (1983) 21 U. W. Ontario L. Rev. 89-103; W.J. Aceves, 'Actio Popularis? The Class Action in International Law' (2003) 2003 U. Chicago L. F. 353-402.

⁷⁸ See Voefray, *L'Actio Popularis ou la Défense de l'Interêt Collectif devant les Juridictions Internationales*, Paris 2004, at 6-13.

⁷⁹ *Id.*, at 13.

functioning judiciary, is presupposed. The *actio popularis* is distinguished from other actions based on the merits of the claim (it is a claim on behalf of others instead of the claimant individually), but the person (or entity) bringing the claim has an inherent access to the judiciary. Apart from the fact that the transposition of municipal law principles to public international law usually requires fundamental changes in application of the principle, the absence of inherent access to the judiciary is a serious obstacle to the application of *actio popularis* in public international law. This obstacle is absent in the invocation *erga omnes*, where no such presupposition applies.⁸⁰

From this difference flows another difference: the *actio popularis* is limited to adjudication, whereas invocation *erga omnes* is not. Invocation *erga omnes* can be established through the taking of countermeasures or other mechanisms available to states in this respect, such as unilateral sanctions short of countermeasures or even requests for action by the UN Security Council. This difference also relates to the difference in scope of the terms *actio popularis* and obligations *erga omnes*. While *actio popularis* presupposes a judicial forum, it contains no prepositions with respect to the norms which may be invoked through an *actio popularis*. Invocation *erga omnes* however does rely on the nature of the underlying norms, that is, the *erga omnes* nature of peremptory norms. Yet, it is independent of the question of jurisdiction and legal forum.

The notion of absence of individual or direct injury is common to both invocation *erga omnes* under Article 48(1)(b) of the Articles on State Responsibility and an *actio popularis*, but another difference is created by the applicable legal interest. A claimant invoking responsibility *erga omnes* has a direct legal interest in the claim, even if there is no direct injury, and can even bring a claim on behalf of an entity that has no standing.⁸¹ This claimant is a definable part of the community that is represented in the claim and the claim is not primarily on behalf of someone else or some other entity but in the interest of the community including the claimant. The emphasis is on a violation of a right owed to the claimant, which may be shared by others. An *actio popularis* is intrinsically a representative claim where the claimant takes up someone else's cause. The represented person or entity would have the same access to the judiciary in principle, but is unable (e.g. because of death) or unwilling to bring the claim. The legal interest may be the greater good, the addressing of universal wrongs or the advancement of society, but an *actio popularis* is characterised by an absence of direct legal interest invested in the claimant.

Considering its nature, it is perhaps understandable that the *actio popularis* has not enjoyed much popularity in international law. The ICJ has not allowed

80 See *Id.*, at 261-262; Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge 2005, at 161.

81 This would be the case when responsibility is invoked for violation of the prohibition on genocide against a state's own population. The population would not have standing under international law in the way a third state has under the Articles on State Responsibility.

any *actio popularis* so far: the rejection of the *actio popularis* in the South-West Africa cases is well-known,⁸² as are the *Nuclear Tests* cases,⁸³ but the Court also refused to entertain such claims more recently brought forward in *LaGrand*,⁸⁴ *Avena*,⁸⁵ and in the *Oil Platforms* case.⁸⁶ It is curious to note that Orakhelashvili has argued the contrary, relying on *Barcelona Traction*.⁸⁷ Pursuant to this decision, he stated, the Court would not require proof of individual interest. However, his finding relies not on the decision itself but on the Separate Opinion of Judge Ammoun.⁸⁸ Judge Ammoun in turn relies on

82 *South-West Africa* case (Ethiopia *v.* South Africa; Liberia *v.* South Africa), Judgment of 18 July 1966, ICJ Reports 1966 p. 6, at 47 (para. 88). But see Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge 2005, who shows that the applicant states in this case were not in fact arguing on the basis of *actio popularis*, but on the interpretation of a special treaty-based jurisdiction clause, at 63-69.

83 *Nuclear Tests* case (New Zealand *v.* France; Australia *v.* France), Judgments of 20 December 1974, ICJ Reports 1974 p. 457 and 253, where arguments related to the *erga omnes* character of the claim, brought forward both by New Zealand and by Australia, were not referred to in the judgment which was narrowed down to the existence of a legal dispute. In the 1995 Request made by New Zealand, the applicant specifically referred to its own rights and those of other states. See *Request for an Examination of the Situation in Accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case* (Order of 22 September 1995), ICJ Reports 1995 p. 288, at 291 (para.6). The Request was found inadmissible, because of the difference in subject-matter between the 1974 case and the current request.

84 *LaGrand*, Oral Pleadings, CR 2000/26, 13 November 2000, Agent for the Federal Republic of Germany, para. 9, who stated that Germany was presenting this claim 'not only for the sake of the citizens of our two countries, but for the benefit of human beings worldwide.'

85 *Avena*, Oral Pleadings, CR 2003/24, 15 December 2003, Agent for the United Mexican States, para. 38, who stated that the Court 'fait face à une responsabilité dont la gravité ne peut être dissimulée. Autant pour le sort des cinquante-deux ressortissants mexicains visés dans notre requête et dans notre mémoire, que pour les millions de personnes qui, tous les jours, traversent les frontières et se rendent dans un pays qui n'est pas le leur, il est indispensable de savoir, en définitive, quelle est la portée des droits reconnus par l'article 36 et le contenu précis de la réparation qui découle de leur violation, et dont l'arrêt *LaGrand* est l'indéniable précurseur.'

86 *Oil Platforms* case (Islamic Republic of Iran *v.* United States), Judgment of 6 November 2003, ICJ Reports 2003 p. 161, at 208 and 211 (paras. 101, and 108-9). The United States claimed that Iran endangered maritime commerce in general and gave examples of ships flying the flag of other states that had suffered. Iran objected to this claim and the Court responded by stating that it 'recalls that the first submission presented by the United States in regard to its counter-claim simply requests the Court to adjudge and declare that the alleged actions of Iran breached its obligations to the United States, without mention of any third States. Accordingly, the Court will strictly limit itself to consideration of whether the alleged actions by Iran infringed freedoms guaranteed to the United States under Article X, paragraph 1, of the 1955 Treaty' (para. 109). See also J.-M. Thouvenin, 'La Saisine de la CIJ en cas de violation des règles fondamentales' in: C. Tomuschat and J.-M. Thouvenin (Eds), *The Fundamental Rules of the International Legal Order, Jus Cogens and Obligations Erga Omnes*, Leiden/Boston 2006, 311-334, who offers a brief analysis of the issue of consent and fundamental rules of international law.

87 Orakhelashvili, *Peremptory Norms in International Law*, Oxford 2006, at 524.

88 *Barcelona Traction* case, Separate Opinion of Judge Ammoun, at 326-7.

the Dissenting Opinion of Judge Foster in the *South-West Africa* case.⁸⁹ While one may share the criticism on the outcome of the *South-West Africa* case and welcome the opinion of Judge Ammoun, it should be borne in mind, perhaps regrettably, that none of this supports the argument that the ICJ has accepted *actio popularis*. It is in fact hardly likely that the Court would accept such a claim lacking both direct injury and legal interest.

A.2 *States other than the injured state*

Article 48 should be read in conjunction with Article 42(b)(ii), which stipulates that a state will be considered an 'injured' state when

the breach of the obligation is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.⁹⁰

This is the case when it concerns an obligation 'breach of which must be considered as affecting *per se* other States to which the obligation is owed.'⁹¹ At first sight, this seems to be very similar to Article 48(1)(a), which allows for invocation of responsibility if a collective interest of the group is threatened. The Commentaries to both Article 42 and Article 48 however explain the difference: states acting under Article 42 are *injured* states, whereas states acting under Article 48 are states with a *legal interest* but not necessarily injured states.⁹² The Commentaries further explain that the two provisions are not mutually exclusive⁹³ and that the rights under Article 48 are 'more limited' than those under Article 42.⁹⁴ On the other hand, invocation under Article 42 is only possible 'where each parties' performance is effectively conditioned upon and requires the performance of each of the others.'⁹⁵ As Sicilianos has explained,

[t]his distinction tends to reflect the idea that the commission of a wrongful act, while it may affect a number of states, does not necessarily affect them all in the

⁸⁹ *South-West Africa* case, at 479-482.

⁹⁰ Articles on State Responsibility, Article 42.

⁹¹ *Id.*, Commentary to Article 42, at 300.

⁹² Articles on State Responsibility, Commentary to Article 42, at 294, and Commentary to Article 48, at 319; see also Commentary to Article 33, at 234.

⁹³ Articles on State Responsibility, at 293.

⁹⁴ *Id.*, Commentary to Article 48, at 322.

⁹⁵ *Id.*, Commentary to Article 42, at 300.

same way. The wrongful act, while violating a genuine subjective right of one or several states, may affect the legal interests of other states.⁹⁶

Sicilianos' explanation corresponds to the idea that while the invocation under Article 42 and Article 48 is similar, the consequences are not. As has been outlined in the introduction, reparations and countermeasures to which states acting under Article 48 may be entitled differ from those applicable to directly injured states.⁹⁷

One of the effects of this distinction is that Article 48, and in particular Article 48(1)(b), is separated from direct injuries, and brought within the field of indirect injuries for which the traditional conditions of nationality of claims and exhaustion of local remedies apply. Even if we accept that the distinction between directly injured states and states not directly injured but with a legal interest may seem logical considering the internal structure of the Articles on State Responsibility, the explanations given are not entirely satisfactory. The Articles on State Responsibility do not themselves answer the question of how to distinguish legal interest in Article 48(1)(b) from legal interest while exercising diplomatic protection. In both instances, states are not directly injured but do have legal standing based on legal interest. A complicating factor is that the examples given in the Commentary for the two situations (i.e. injured states under Article 42(b)(ii) and states with a legal interest under Article 48) are the same and include both a nuclear free zone treaty and marine pollution also affecting coastal states and a cross-reference with respect to the meaning of 'collective interest'.⁹⁸ How, then, does one classify invocation of responsibility for a violation of a non-proliferation treaty: is the invoking state an 'injured' state under Article 42(b)(ii), or is it one with a 'legal interest' under Article 48(1)(a)?⁹⁹ In addition, the Commentary to Article 42(b)(ii) clarifies that 'the interdependent obligations covered by [this provision] will usually arise under treaties establishing particular regimes.'¹⁰⁰ This limitation with respect to the origin of the obligation is not included in the Commentaries

96 L.-A. Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002), 13 EJIL 1127-1145, at 1138. See also E. Brown Weiss, 'Invoking State Responsibility in the Twenty-First Century', 96 AJIL 798-816 (2002), at 802-808.

97 See *supra* Introduction to this Chapter.

98 Articles on State Responsibility, Commentary to Article 42, at 300 and Commentary to Article 48, at 320-321 and 322. The Commentary to Article 48 directly refers to Article 42 with respect to the term 'collective interest' at note 764.

99 Perhaps this question is less pertinent with respect to the peremptory norms to which the present study is limited: it is not necessary that state A complies with the prohibition on racial discrimination for state B to be able to perform its obligations under this rule and although the international community has an interest in ensuring compliance with this prohibition, it is not the case that the performance of one state is 'effectively conditioned upon or requires' compliance of other states. However, the collective interest, which goes beyond the sum of bilateral obligations, will be threatened by any breach.

100 Articles on State Responsibility, Commentary to Article 42, at 301.

to Articles 48(1) (a) and (b). However, as will be explored below, the admissibility of invocation under Article 48(1)(a) will usually depend on the existence of a treaty-regime establishing a collective interest. It is submitted that it will be difficult to determine the position of a state invoking responsibility for a breach of a multilateral treaty establishing a collective interest where this state is clearly affected in the sense that the performance of the obligations under the treaty are threatened or that the collective object is threatened by the breach but not individually affected.

It may be easier to distinguish an Article 42(b)(ii) situation from invocation under Article 48(1)(b) because of the difference in the applicable source of the violated rule (respectively a multilateral treaty and general international law) and absence of individual injury to the state invoking responsibility. However, as said above, this brings such invocation very close to invocation by means of diplomatic protection.

A.3 *Erga omnes and erga omnes partes*

There is another reason why Article 48(1)(b) stands very close to the customary rules on diplomatic protection. Article 48 distinguishes two kinds of invocation for states other than the injured state. Under Article 48(1)(a), invocation is possible when the obligation breached is an obligation *erga omnes partes*. Such obligations are different from obligations *erga omnes*, the invocation of which is provided for in Article 48(1)(b). As Tams has pointed out, '[t]he legal regime governing obligations *erga omnes partes* first and foremost depend on the terms of the treaty of which they form part.'¹⁰¹ These are treaties whereby all parties to the treaty have a legal interest in its performance.¹⁰² Obligations *erga omnes*, however, find their origin in general international law.¹⁰³ Although this distinction may not be relevant for all purposes, it is relevant for our present inquiry.¹⁰⁴ It is submitted that states parties to a treaty creating obligations *erga omnes partes*, such as a disarmament treaty and most

¹⁰¹ Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge 2005, at 125.

¹⁰² See Crawford, Third Report, at paras. 92 and 106; Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge 2005, at 120.

¹⁰³ Whereas James Crawford (Third Report, at para. 106) had noted that obligations *erga omnes* arise both under general international law and under 'generally accepted multilateral treaties (e.g. in the field of human rights)', Tams (*Enforcing Obligations Erga Omnes in International Law*, Cambridge 2005, at 121-128) has convincingly demonstrated that, in order to be obligations *erga omnes* capable of creating legal interest in the interest of the international community as a whole, they must derive from general international law, even if they may also be contained in multilateral treaties.

¹⁰⁴ See also Meron, 'On a Hierarchy of International Human Rights' (1986), 80 AJIL 1-23, cited *supra*, note 61 and accompanying text.

of the humanitarian law treaties, have an stronger entitlement to claim responsibility of another state in case of a violation that states acting *erga omnes*. The nature of the regime created by the respective treaties requires compliance by all states parties for the proper functioning of the regime. Even if the states invoking responsibility under Article 48(1)(a) are not directly injured, the collective interest is threatened by non-compliance of others as is the enjoyment of their rights.¹⁰⁵ Some treaties may specifically provide for this common interest, such as the Geneva Conventions in Common Article 1 which obliges the states parties to these conventions to ensure respect for the convention.¹⁰⁶ In other treaties it is generally assumed to exist.¹⁰⁷ Regardless of whether states would in reality act on such obligations, it is important to realise that the possibility is not created in the Articles on State Responsibility, or general international law, but exists based on the respective treaty regimes.

It is instructive to return to Judge Simma's Opinion. Bearing in mind the difference outlined above between obligations *erga omnes* and obligations *erga omnes partes*, one could question whether Judge Simma is correct in classifying the relevant breaches of international human rights law and international humanitarian law as obligations *erga omnes* and not as obligations *erga omnes partes*, or rather in not making the distinction at all. In fact, Judge Simma appears to confuse Article 48(1)(a) and (b): he derives legal standing for Uganda from the various treaties both Uganda and the DRC are parties to,¹⁰⁸ that is the States Parties to the Fourth Geneva Convention and the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights and the Convention against Torture.¹⁰⁹ These are all treaty-regimes creating obligations within a certain group of states for the purpose of achieving a collective interest. The obligations here are however obligations *erga omnes partes* and not *erga omnes*. It is thus invocation under Article 48(1)(a) and not under 48(1)(b). While obligations *erga omnes* may derive from the universal nature of obligations *erga omnes partes*,¹¹⁰ which may be the case with universally ratified human rights treaties, it is necessary to refer to their customary status in order to invoke responsibility *erga omnes*. A correct application of Article 48 in Judge Simma's Opinion would have called for invocation *erga omnes partes*. One could even argue that Uganda was an injured state

¹⁰⁵ See e.g. P. Okowa, 'Issues of Admissibility and the Law on International Responsibility' in: M.D. Evans, *International Law*, Oxford 2006, at 495-496.

¹⁰⁶ Geneva Conventions of August 12, 1949, International Committee of the Red Cross, Geneva. See on this point also the *Wall Advisory Opinion*, at 199-200, para. 158.

¹⁰⁷ For instance in non-proliferation of nuclear weapons treaties and environmental treaties. See Crawford, Third Report, at para. 106; Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge 2005, at 70-78 and 120; Orakhelashvili, *Peremptory Norms in International Law*, Oxford 2006, at 84.

¹⁰⁸ *Congo – Uganda* case, Separate Opinion Judge Simma, at para. 32.

¹⁰⁹ *Id.*, at para. 31.

¹¹⁰ Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge 2005, at 122.

under Article 42(b)(ii), given the close relationship between this state and the breaches of the relevant norms. Judge Simma's sweeping paragraph cited above in reality only refers to obligations *erga omnes*, which shows that the Separate Opinion had not contemplated the difference between the various kinds of invocation. It would have been preferable to distinguish clearly, as the ICJ did in the *Wall Advisory Opinion*.¹¹¹

Contrary to what a superficial reader may conclude, Judge Simma's Opinion has thus not presented an argument in favour of invocation of responsibility *erga omnes* under Article 48(1)(b). In addition, the few legal scholars who have expressed their views on the matter, have only criticised the provision, claiming that it either constitutes a seriously impaired and limited provision.¹¹²

Since Article 48(1)(b), which creates the possibility of invocation of responsibility in the interest of the community as a whole (*erga omnes*), is an exercise of progressive development, there is a marked difference between the first and the second provision in Article 48(1). Even if, as the Special Rapporteur has said, it builds on existing ideas, the very possibility of invocation is not articulated in any other instrument nor is it a well-established part of general international law. It is therefore difficult to set aside other rules applicable to the same subject in particular the customary rules on diplomatic protection and the reminder of them in Article 44 of the Articles on State Responsibility. In order to ensure the proper interpretation and application of Article 48(1)(b), one must do so within the context of other, related, rules of international law, in particular the rules on obligations *erga omnes*. One may agree with Orakhelashvili, who stated that '[i]t would be pointless if a norm was endowed with peremptory status, but its effects and legal consequences were governed by the criteria of other rules.'¹¹³ However, the fact that a certain rule is recognised as a peremptory norm does not place it in a legal vacuum without any link to other parts of international law. The mere fact that certain existing norms are granted a special status, that is, the status of being peremptory, suggests that they are part of the system as a whole. Hence, they do not exist beyond that system. This applies all the more to invocation *erga omnes*. Part

111 *Wall Advisory Opinion*, at paras. 155-159, where it distinguished the character of the right to self determination and some of the rules under international humanitarian law from specific obligations under the Fourth Geneva Convention. The former were to be complied with by all states *erga omnes* because of their status in customary international law; the latter only by all states parties to this convention. Although the Court refrained from using the language of *erga omnes* and *erga omnes partes* it is clear from the text and the specific reference to 'states' in the former case and 'states parties' in the latter that it categorised the obligations differently.

112 See e.g. Scobbie, 'The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law"' (2002), 13 EJIL 1201-1220, and E. Milano, 'Diplomatic Protection and Human Rights before the International Court of Justice: Re-Fashioning Tradition' (2004), 35 Netherlands Yb of Int'l Law 85-142.

113 Orakhelashvili, *Peremptory Norms in International Law*, Oxford 2006, at 80.

of the secondary rules of international law they apply to an existing body of primary rules.

B Beyond bilateralism: owed to the international community as a whole

In a preponderantly bilateralised view of international law, where multilateral obligations are considered as a web of bilateral relations, the 'international community' is naturally interpreted as the community of states who have obligations vis-à-vis each other on a bilateral basis.¹¹⁴ Diplomatic protection is typically a mechanism that relies on bilateral obligations between states. States are obliged to treat the nationals of another state in accordance with certain standards, but can only be held responsible for breaches of such standards by one state: the state of nationality of the injured individual(s). With the creation of Article 48(1)(b) the ILC has attempted to develop this view. On the one hand it has included other participants in the concept of the international community and the beneficiaries of claims made on behalf of this community¹¹⁵ and other hand it has emphasised the existence of collective interests, thereby abandoning this strict bilateralism. As was clearly stated by the ILC's Special Rapporteur on State Responsibility, the purpose of including a specific regime covering serious breaches of peremptory norms was to 'recognise that there can be egregious breaches of obligations owed to the community as a whole, breaches which warrant some responses by the community and by its members.'¹¹⁶ When states invoke responsibility *erga omnes*,

114 For such a view see e.g. Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules', (1997) 66 Nord. JIL 211-239, at 232-238.

115 A natural language interpretation of the 'beneficiaries' of claims in the interest of the international community would suggest that these include individuals and other private parties since they are part of the international community as a whole. Crawford has stated, 'our conception of "the international community as a whole" needs to be an inclusive and open-ended one,' (see J. Crawford, 'Responsibility to the International Community as a Whole; the Earl Snyder Lecture in International Law' (2001), 8 Ind. J. Global. Leg. Stud. 303-322, at 315), not least because violations of peremptory norms will mostly affect individuals and not just states. This interpretation is supported by the fact that the ILC deliberately did not adopt the language of the Vienna Convention on the Law of Treaties, which contains the phrase 'International Community of States' (Article 53), but omitted the words 'of States' in favour of other entities. The ILC clearly included private parties such as the ICRC in the international community as a whole. See Crawford, Fourth Report, at paras. 36-37. See also Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002), 13 EJIL 1127-1145, at 1140. The 'international community of states as a whole' was considered a 'subset' of the international community as a whole (see ILC Yearbook 2001, report of the 2682nd meeting, at 105, para. 15). The inclusion of other entities in the 'beneficiaries' of such claims has however not been universally accepted and it has been argued that this matter should have been further clarified by the ILC. See e.g. See R. Pisillo Mazzeschi, 'The Marginal Role of the Individual in the ILC's Articles on State Responsibility' (2004), 14 Italian Yb of Int'l Law 39-51, at 44-45.

116 Crawford, Fourth Report, at para 52.

a claim is brought by a part on behalf of the whole: invocation under Article 48(1)(b) is in the interest of the international community as a whole. The state claiming responsibility is not the directly injured state and shall not be the primary beneficiary of the claim.¹¹⁷ The emphasis on the membership of the international community and the collective interest that this membership generates for individual states also shows that invocation under Article 48 was intended to be of a different nature than ‘ordinary’ invocation,¹¹⁸ and that the conditions to the latter kind of invocation should not be applied as if they were two of a kind. The words ‘*mutatis mutandis*’ in the commentary to Article 48(3) are thus to be taken seriously. Although the ILC failed to clarify where exactly the difference was to be found, it must rest in the *erga omnes* nature of the obligation and the legal interest it creates. A claim under Article 48, even if it concerns individual injury and not direct injury to a state, is a direct claim, since the claimant state as a member of the international community has a direct legal interest in compliance with the relevant rule by virtue of its membership of the international community and not, as in diplomatic protection, through the bond of nationality.

The term ‘international community’ is admittedly rather vague, even if it is often used in legal documents such as resolutions by the General Assembly¹¹⁹ and the Security Council¹²⁰ and ICJ decisions.¹²¹ Tomuschat has argued that many of these references are as informative as the phrase ‘to whom it may concern’.¹²² This is rather accurate: an appeal to the international community is meant to induce those that are willing and able to respond, *erga omnes*. Often, however, this will primarily be directed at states, because, in Tomuschat’s words,

die Staaten dieser Erde – und darüber hinaus auch die von ihnen gebildeten Internationalen Organisationen, teilweise sogar die Internationalen Verbände – seien zu einem rechtlichen Gebilde zusammengeschlossen, das in seiner Gesamtheit die Verantwortung für die Sicherheit der Existenzgrundlagen der Menschheit trage.¹²³

¹¹⁷ See *supra* note 22 and accompanying text.

¹¹⁸ Articles on State Responsibility, Commentary to Article 48, at 319-324.

¹¹⁹ E.g. A/RES/60/288 (2006): ‘*Reaffirming* that ... the international community should take the necessary steps to enhance cooperation to prevent and combat terrorism’, at 2.

¹²⁰ E.g. S/RES/1718 (2006): ‘*Underlining* the importance that the Democratic People’s Republic of Korea respond to other security and humanitarian concerns of the international community’, at 1.

¹²¹ See *Barcelona Traction*, cited *supra* note 1 and accompanying text, and numerous references to this dictum in other decisions.

¹²² C. Tomuschat, ‘Die Internationale Gemeinschaft’ (1995), 33 *Archiv des Völkerrechts* 1-20, at 4.

¹²³ *Id.*, at 6. It should be noted that the world’s Civil Society can also have a significant role in the protection against violations *erga omnes* even if this role is hardly ever legal and even if they cannot invoke state responsibility the way other states can.

Perhaps it is not desirable to define the international community too strictly since definitions tend to constrain development, or expansion, of the concept they define. The international community is a concept *par excellence* that should be allowed to develop.¹²⁴

The vagueness of the concept however does not decrease standing *erga omnes*. Even if states invoking responsibility for a breach of a peremptory norm may 'act in the collective interest',¹²⁵ it is not necessary to accurately define the 'collective' for the claim to be admissible. It is sufficient that states invoking the responsibility for an obligation *erga omnes* are entitled to do so because the obligation is owed to the international community *including the invoking state*. That is to say a state invoking responsibility for an obligation *erga omnes* is claiming its own right, a right that it shares with other states. It is thus a kind of invocation of responsibility that is rightly distinguished from diplomatic protection, a distinction inherent in the *erga omnes* nature of such invocation. Although this is sometimes a subtle distinction, it may be clarified by the example of the prohibition on torture. A violation of this prohibition may be claimed either by exercising diplomatic protection on behalf of a national or *erga omnes*. In the former case, the rights that are claimed are rights that are not primarily owed to the claimant state. Although the claimant state may have agreed with the defendant state not to practice torture, the obligation not to subject individuals to torture is owed to the individual (foreign) nationals and this is the right that is claimed. It is an indirect claim and the customary rules for such a claim apply. If the claim is brought *erga omnes*, the obligation is owed to the international community, including the claimant state, which makes it a direct claim. This in turn ensures the non-application of the traditional requirements of diplomatic protection. Judge Simma, then, was correct in saying that diplomatic protection is not the only means for invoking responsibility in such instances.

3 CONCLUSION

International law has long recognised that certain rules are so fundamental, and breaches of such rules so offensive, to the international community that they warrant a special response. The ICJ, in 1970, articulated this concern by stating that certain rules 'are the concern of all States ...; they are obligations *erga omnes*'.¹²⁶ This position was further developed by the ILC and resulted in the adoption of Article 48 and in particular paragraph (1)(b) which provides

124 See also the rather sophisticated article by N. Tsagourias, 'The Will of The International Community as a Normative Source of International Law', in: I.F. Dekker and W.G. Werner (eds.), *Governance and International Legal Theory*, Leiden 2004, at 97-121.

125 Articles on State Responsibility, Commentary to Article 48, at 319.

126 *Barcelona Traction*, at 32, para. 33.

for the invocation of responsibility for serious breaches of peremptory norms. In the preceding analysis it has been demonstrated that there are considerable difficulties with the way in which the ILC has failed to expressly clarify the legal framework in which such invocation should operate. In particular its relation to diplomatic protection has been left unexplained even though invocation of obligations *erga omnes* is similarly based on indirect injury, as is stipulated in the heading of Article 48. This has lead some to believe that the traditional conditions for claims based on indirect injury, as codified in Article 44, would apply and cause Article 48 to be of little importance. These critics may feel strengthened in their position by the reluctance of the ICJ to accept claims *erga omnes*.

Yet the distinction between invocation of responsibility by means of diplomatic protection and such invocation *erga omnes* is not to be found in the nature of the injury inflicted upon the individuals concerned. As has been demonstrated, claims *erga omnes* are inherently direct claims, since the obligation *erga omnes* is owed to the community as a whole, including the claimant state. A state invoking responsibility under Article 48(1)(b) is thus claiming its own right. This is markedly different from the exercise of diplomatic protection, where states, while relying on their own right to exercise diplomatic protection, are not claiming their own rights but rights owed to their nationals. States invoking responsibility *erga omnes* have legal standing because they have a direct legal interest in compliance with the obligations *erga omnes*. States exercising diplomatic protection also have a legal interest, but it is indirect because it is conditioned upon the bond of nationality. Considering these differences, it is clear that invocation under Article 48(1)(b) is must be distinguished from invocation by means of diplomatic protection. Accordingly, the rules applicable to diplomatic protection do not apply to such claims.

We now have two regimes for the invocation of responsibility and it is important to strengthen both. Diplomatic protection is a well-established mechanism for the protection of individual rights and may be very effective due to its long-standing recognition in international law. In practice, it may be easier to induce states to invoke responsibility when it concerns their nationals because of the national political repercussions if they refuse to do so.¹²⁷ However, because of its bilateral nature, states may also, perhaps unjustifiably so, be reluctant to exercise their right to protect their nationals for fear of deterioration of the relation with the host state.¹²⁸ In such cases,

127 A good example of this is provided by the case of Mr Arar in Canada. For details see <http://www.ararcommission.ca>. Mr Arar initially did not receive any protection from Canada after the US extradited him to Syria where he allegedly was subjected to torture. However, when his situation was made known by Canadian media, the Canadian Government eventually set up an inquiry commission to investigate what had happened to Mr Arar and why the Canadian Government had failed to react.

128 This would, it is submitted, be particularly unjustifiable in case of breaches of peremptory norms.

invocation for breaches of obligations *erga omnes* under Article 48(1)(b) may be an attractive alternative. Such invocation not so much emphasises the bilateral relations and the desire for individual compensation, but the multilateral concern with the situation and the desire to bring it to an end. These two means of invoking responsibility for breaches of peremptory norms can occur simultaneously.¹²⁹ Although multiplied litigation may be considered undesirable, it should be stressed that neither invocation of responsibility by means of diplomatic protection nor actions under Article 48 is limited to adjudication. Within the limits of permissible responses to such breaches, that is, excluding the unilateral resort to the use of force, any means to induce compliance would be available. If we aspire to protect against such egregious violations of international law, we should welcome, and enhance, all means of protection, including the new, multilateral, invocation of responsibility of obligations *erga omnes*.

¹²⁹ Perhaps it is instructive in this respect to note that proceedings before the European Court of Human Rights do not exclude other means of protection. When a national of state A is complaining for violations of his rights against state B, state A is allowed to simultaneously exercise diplomatic protection. States have on occasion actively supported their national claimants in cases against other states, short of exercising diplomatic protection. This was the case in *Selmouni v. France*, Appl. No. 25803/94 [ECHR], and *Soehring v. the United Kingdom*.

