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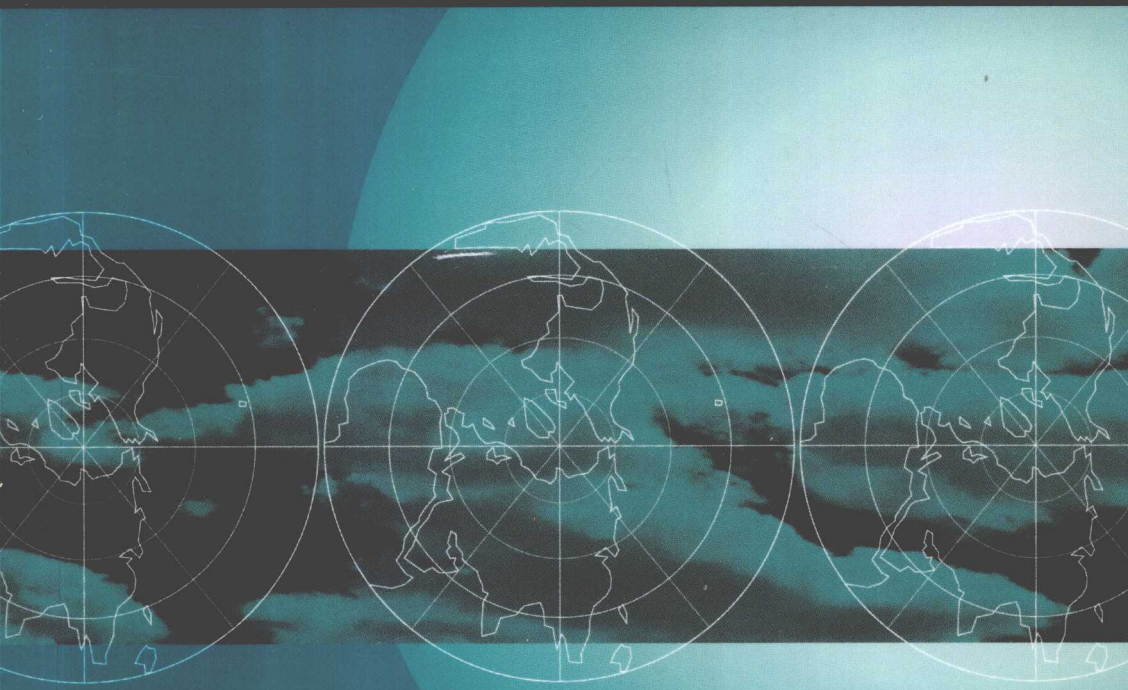
Enforcing Obligations *Erga Omnes* in International Law



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Foreword

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

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

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

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

James Crawford
Lauterpacht Research Centre for International Law
16 July 2004

Preface

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

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

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

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

Finally, my deepest thanks are owed to my parents, Christa and Dr Gerhard Tams, and to Ina Wiesner, for all their support and encouragement. This work is dedicated to them.

Notes on citation

Citations in the book follow a modified social sciences (Harvard) style, with abbreviated references in the footnotes and full references in the bibliography.

A full bibliographical reference such as

Delbrück, Jost, 'Laws in the Public Interest - Some Observations on the Foundations and Identification of erga omnes Norms in International Law', in: *Liber Amicorum Günther Jaenicke - Zum 85. Geburtstag* (Götz *et al.* eds., 1998), 17

therefore is given in the footnotes as

Delbrück (1998), 17

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

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

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

Websites were checked on 20 December 2004.

Table of cases

1. International Court of Justice

2. Permanent Court of International Justice

3. Arbitral Awards

4. Judgments of the ICTY and ICTR

The relevant decisions are available at: http://www.un.org/icty/cases/indictindex-e.htm and http://wwww.ictr.org respectively

5. European Court/ Commission of Human Rights

European Commission of Human Rights

European Court of Human Rights

6. GATT/ WTO Reports

7. Other International Decisions/ Proceedings

8. National decisions

a. Germany

b. United Kingdom