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THE MOVE BEYOND A BILATERAL VIEW OF LEGAL RELATIONS IN THE INTERNATIONAL LAW OF OBLIGATIONS

The international legal system's structural change from a system of coexistence to a system of cooperation has been prompted by a growing awareness of trans-border problems that cannot be solved within a strictly bilateral paradigm. Indeed, many of the problems that are addressed by international law are no longer limited to problems between pairs of states only. This development has brought about a change not only in the subject matter of legal rules, but also in the way in which international legal relations are perceived.¹⁰⁵ Legal relations are no longer exclusively bilateral and reciprocal, existing between pairs of states only.¹⁰⁶ While it is not denied that bilateral legal relations still exist and are most likely here to stay, it is also perfectly possible for a legal relation to exist between more than two international actors.

In the context of the international law of obligations, the question whether an international obligation gives rise to bilateral or multilateral legal relations has implications for the (non-)performance of international obligations. Indeed, several authors have pointed out the need to distinguish between an international obligation that gives rise to 'bundles' of bilateral legal relations and an international obligation that 'transcend[s] the sphere of bilateral relations' and gives rise to legal relations that are 'genuinely multilateral in character',¹⁰⁷ mainly for the purpose of determining which state(s) and/or IO(s) are entitled to respond to an internationally wrongful act or material breach of treaty.

The move beyond a bilateral view of legal relations in the international law of obligations is a topic that has certainly not been neglected by legal scholars. It has

¹⁰⁵ Villalpando (n 3) 400; Bernhard Graefrath, 'Responsibility and Damages Caused: Relationship between Responsibility and Damages' (1984) 185 *Recueil des Cours* 19, 54.

¹⁰⁶ Simma (n 3) 223; Marina Spinedi, 'From One Codification to Another: Bilateralism and Multilateralism in the Genesis of the Codification of the Law of Treaties and the Law of State Responsibility' [2002] *EJIL* 1099, 1101; K Sachariew, 'State Responsibility for Multilateral Treaty Violations: Identifying the "Injured State"' [1988] *NILR* 273, 273. Simma describes community interests as the 'antithesis' of bilateralism; Spinedi speaks of the 'abandonment of an exclusively bilateralist conception of international legal relations'; Sachariew refers to the 'growing awareness that the traditional bilateralist approach is inadequate for the solution of problems such as the maintenance of international peace and security, ensuring world-wide respect for human rights, democratizing international economic relations, preserving the human environment, etc. These problems generate 'community interests' on a global and regional level and require co-ordinated multilateral effort for their solution.'

¹⁰⁷ See §2.1.3 below.

been addressed by the International Law Commission (ILC) in the context of the law of international responsibility and, to a lesser extent, the law of treaties.¹⁰⁸

This chapter examines the way in which the international law of obligations has addressed the problems raised by the move beyond a bilateral view of legal relations. It focuses mainly on legal concepts that aim to address the problems relating to the (non-)performance of international obligations, such as the concepts of 'interdependent obligations' and 'obligations *erga omnes*'. By doing so, this chapter shows that the international law of obligations has engaged with the idea that legal relations do not necessarily involve two states only, and that this has implications for responsibility and treaty relations. However, the legal concepts that have been developed in this context focus solely on the possibility of and potential problems raised by a plurality of right-holders; *not* on the possibility of and potential problems raised by a plurality of duty-bearers. The present study's conceptualization of shared obligations aims to fill this gap.

The chapter starts by providing a framework for distinguishing between bilateral and multilateral legal relations in international law in sections 2.1 and 2.2. As a first step, section 2.1 briefly discusses that the protection of common interests and the rise of multilateral treaties have contributed to the move beyond a bilateral view of legal relations. However, the bilateral or multilateral character of a legal relation does not automatically follow from the type of interest protected by a rule of the multilateral character of a treaty.

Subsequently, section 2.2 sets out the present study's understanding of the distinction between bilateral and multilateral legal relations by building on Hohfeld's analysis of legal relations. It asserts that each legal relation in international law consists of an obligation on the one end and a correlative right on the other end. In a bilateral legal relation, only one duty-bearer holds the obligation and only one right-holder holds the corresponding right. A legal relation is multilateral if the obligation is held by *multiple* duty-bearers or the correlative right is held by *multiple* right-holders (or both). Accordingly, there are two perspectives from which to approach multilateral legal relations: the perspective of the right-holders and the perspective of the duty-bearers.

Sections 2.3 and 2.4 focus on legal concepts that acknowledge the existence of multilateral legal relations in the law of treaties and the law of international responsibility, and which address some of the problems raised by the move beyond a bilateral view of legal relations. In doing so these sections rely on the framework for distinguishing between bilateral and multilateral legal relations set out in sections 2.1

¹⁰⁸ See Spinedi (n 106).

and 2.2. Section 2.3 examines the distinction between reciprocal, interdependent and integral obligations and the notion of peremptory norms in the law of treaties. These concepts in the law of treaties have influenced the approach to multilateral legal relations in the law of international responsibility. Section 2.4 examines the distinction between bilateral and multilateral obligations (of which *erga omnes (partes)* obligations are considered to be a subcategory) and the notion of a serious breach of obligations arising under peremptory norms in the law of international responsibility.

Sections 2.3 and 2.4 show that the ILC's work on international responsibility and, to a lesser extent, the law of treaties recognizes that certain international obligations are owed *to* multiple or even all states simultaneously, with the principal consequence that multiple states are entitled to respond to a breach of an international obligation or a material breach of treaty. Such obligations give rise to multilateral legal relations where the corresponding right is held by multiple right-holders. It follows that the international law of obligations has approached the move beyond a bilateral view of legal relations exclusively from the perspective of the right-holders in legal relations. Concepts such as interdependent obligations, integral obligations, multilateral obligations and obligations *erga omnes (partes)* all convey that an international obligation is owed to multiple states and/or IOs simultaneously, which means that multiple states and/or IOs have a right or legal interest when it comes to the performance of that obligation.

It should be emphasized that the focus of the legal concepts discussed in the present chapter is different from the focus of the concept of shared obligation. Indeed, the concept of shared obligation focuses on the possibility of and potential problems raised by a plurality of duty-bearers (rather than a plurality of right-holders). Nonetheless, this chapter has an important role in the overall design of the present study. Before proceeding to the substance of this chapter, some observations are in order on the role of the present chapter in the conceptualization of shared obligations.

First, the move beyond a bilateral view of legal relations is a development that has taken place in the context of the increasing interdependence of international society. In such a context of interdependence, cooperation and common interests one might expect that states and/or IOs do not only share rights and legal interests but that they also share international obligations. This chapter shows that existing concepts in the international law of obligations solely address the sharing of rights and not the sharing of obligations. This is rather remarkable, considering that there are an increasing number of situations in which multiple states and/or IOs are bound to an

international obligation in the context of cooperative activities and the pursuance of common goals.

Second, the categories of multilateral and *erga omnes (partes)* obligations discussed in this chapter serve as an important source of inspiration and analogy in the conceptualization of shared obligations. Initially, the current project defined the concept of shared obligations as a mirror image of the categories of multilateral and *erga omnes (partes)* obligations, with the consequence that the concept of shared obligations solely covered what are now referred to as indivisible shared obligations.¹⁰⁹ Now that the concept of shared obligation has been broadened to include both indivisible *and* divisible shared obligations, the categories of multilateral and *erga omnes (partes)* obligations serve primarily as a source of analogy for the category of indivisible shared obligations. The concept of indivisible shared obligations is, quite literally, the mirror image of the concept of multilateral or *erga omnes (partes)* obligations.¹¹⁰ An indivisible shared obligation gives rise to a multilateral legal relation where the obligation is held by multiple duty-bearers; whereas a multilateral or *erga omnes (partes)* obligation gives rise to a multilateral legal relation where the right is held by multiple right-holders.

2.1 Common interests, multilateral treaties and multilateral legal relations

The move beyond an exclusively bilateral view of legal relations in the international law of obligations has not occurred in a vacuum. This development has been a part of international law's move beyond the exclusively bilateral character of the classical Westphalian international legal system, whose sole function was to enable the peaceful coexistence of states by keeping them peacefully apart.¹¹¹ This change has been taking place since at least 1815.¹¹²

The international legal system's move away from bilateralism is a rather broad theme, and this section does not aim to address the full range of (often interrelated) topics that can be associated with this general development. In legal literature the 'from bilateralism to...'¹¹³ narrative has been applied to a great number of topics, such

¹⁰⁹ See Chapter 1, §1.2.1.

¹¹⁰ See Chapter 4, §4.1.1.

¹¹¹ Wolfgang Friedmann, *The Changing Structure of International Law* (Stevens & Sons 1964); James Crawford, 'Chance, Order, Change: The Course of International Law' (2013) 365 *Recueil des Cours* 204.

¹¹² Crawford, 'Chance, Order, Change: The Course of International Law' (n 111) 204.

¹¹³ Various authors have observed that in its move away from exclusive bilateralism, international law has been moving *towards* something else, such as a move towards 'multilateralism', 'community interests', 'publicness' or 'constitutionalization'. See e.g. Spinedi (n 106); André Nollkaemper, 'Unilateralism/Multilateralism', *Max Planck Encyclopedia of Public International Law [MPEPIL]* (2011) <www.mpepil.com>; Crawford, 'Chance, Order, Change: The Course of International Law' (n 111); Simma (n 3); Benedict Kingsbury and Megan Donaldson, 'From Bilateralism to Publicness in International Law' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno*

as the rise of international organizations and other non-state actors, the emergence of a 'responsibility to protect', the increase in multilateral treaties, international law's accommodation of common interests, the rise of multilateral legal relations and the development of concepts such as *jus cogens* norms and obligations *erga omnes*.¹¹⁴

At this point, three of these topics are directly relevant for a full understanding of the distinction between bilateral and multilateral legal relations presented in this chapter. This section discusses the relationship between the protection of common interests, (§2.1.1) the rise of multilateral treaties (§2.1.2) and the emergence of multilateral legal relations (§2.1.3). It briefly outlines the way in which the protection of common interests and the increase in multilateral treaties have contributed to the move beyond a bilateral view of legal relations. More importantly, however, it shows that the bilateral or multilateral character of a legal relation does not automatically follow from the type of interest protected by a rule or from the bilateral or multilateral character of a treaty. This constitutes the first component of the framework for distinguishing between bilateral and multilateral legal relations developed in the present chapter.

2.1.1 The protection of common interests

Traditionally, the rules of international law served to protect (individual) national interests only. In terms of substance, the rules of classical international law consisted primarily of rules of abstention that delimit the spheres of sovereignty of states,¹¹⁵ and rules concerning 'the reconciliation of opposed national interests or the reciprocal exchange or benefits between sovereign states.'¹¹⁶ Examples include rules pertaining to the delimitation of boundaries and rules regulating diplomatic or consular relations. These rules focus on unilateral interests of states rather than on interests that are held in common by multiple states. In this sense, it is the nature of the subject of regulation that can be qualified as bilateral (or even unilateral).

Rules that serve to achieve and protect individual interests of states still form an important part of international law today. But in addition, international law has broadened its reach to include rules that serve to achieve and protect interests that

Simma (OUP 2011); Anne Peters, 'Are We Moving towards Constitutionalization of the World Community' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012).

¹¹⁴ Simma's 1994 Hague lecture, as well as the contributions to the Festschrift dedicated to Simma, cover all of these topics and more. See Simma (n 3); Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011).

¹¹⁵ Villalpando (n 3) 390; Georges Abi-Saab, 'Whither the International Community?' (1998) 9 EJIL 248, 252.

¹¹⁶ Feichtner (n 3) 2.

transcend individual state interests and are shared across borders.¹¹⁷ Such interests are often referred to as ‘community interests’ or ‘common interests’¹¹⁸ and can relate to, for example, the environment, the global economy, international human rights and international peace and security. In a narrow sense, community interests are understood as fundamental values that are a matter of concern to the international community as a whole. This study understands community or common interests in a broad sense, which means that they encompass not only universal fundamental values but also interests shared by smaller groups of states.¹¹⁹

2.1.2 The rise of multilateral treaties

For a long time, the conclusion of bilateral treaties was the main method of international lawmaking. A treaty was viewed primarily as ‘a contract between two unfettered subjects according to their own will’¹²⁰, and bilateral treaties primarily served to safeguard the individual interests of the two states involved.¹²¹ Even the 1648 Peace of Westphalia, which did in fact involve a plurality of states, consisted of three separate bilateral treaties.¹²²

The conclusion of multilateral treaties is a relatively new phenomenon. The 1815 Vienna Congress is ‘commonly considered as the first multilateral treaty in the history of international law,’¹²³ but a more systemic move towards multilateralism in the negotiation and conclusion of international treaties was made only at the end of World War I.¹²⁴ In this context, a reference to international law’s move away from bilateralism signifies that the negotiation and conclusion of international treaties is no longer an exclusively bilateral matter; their form can be both bilateral and multilateral.

The rise of multilateral treaties is often linked to the increasing awareness of common or community interests discussed above. Multilateral treaties have been called ‘workhorses of community interests’,¹²⁵ and the account favoured by mainstream international legal scholarship is that multilateral treaties are better

¹¹⁷ See e.g. Simma (n 3); Giorgio Gaja, ‘The Protection of General Interests in International Law’ (2013) 364 *Recueil des Cours* 9; Wolfgang Benedek and others (eds), *The Common Interest in International Law* (Intersentia 2014).

¹¹⁸ Benedek and others (n 2) 1. ‘The concept of “common interest” suggests that more is at stake in international law than the individual self-interests of states.’

¹¹⁹ Feichtner (n 3) paras. 3-4; Christian Tams, ‘Individual States as Guardians of Community Interests’, *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011) 380.

¹²⁰ Pierre-Marie Dupuy, ‘A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility’ [2002] *EJIL* 1053, 1054.

¹²¹ Simma (n 3) 322.

¹²² Nollkaemper, ‘Unilateralism/Multilateralism’ (n 113) 13; Simma (n 3) 323.

¹²³ Nollkaemper, ‘Unilateralism/Multilateralism’ (n 113) 17.

¹²⁴ Nollkaemper, ‘Unilateralism/Multilateralism’ (n 113) 14.

¹²⁵ Simma (n 3) 322.

equipped to solve global problems than bilateral treaties are.¹²⁶ So not only are multilateral treaties often instinctively associated with common interests; but the protection and achievement of common interests is also instinctively associated with multilateral law making.¹²⁷

However, there is no necessary link between common interests and multilateral treaties. There are various examples of multilateral treaties that exclusively aim to safeguard more classical individual states interests (or that aim to safeguard both individual and common interests). In this respect, one may think of the Vienna Convention on Diplomatic Relations¹²⁸ or the General Agreement on Tariffs and Trade.¹²⁹ Moreover, common interests need not necessarily be pursued through multilateral treaties, but may very well be pursued through bilateral treaties.¹³⁰ In this respect, one may think of the Strategic Arms Reduction Treaty between Russia and the United States.¹³¹

2.1.3 The emergence of multilateral legal relations

In classical international law, legal relations were deemed to exist between pairs of states only.¹³² This view is no longer correct. As is illustrated throughout this chapter, the possibility of multilateral legal relations existing between more than two states and/or IOs has been affirmed in the law of treaties and the law of international responsibility.

Both the increased focus on the protection of common interests in international law and the rise of multilateral lawmaking processes have contributed to the move beyond a bilateral view of legal relations in international law. First, the focus on common interests has contributed to the awareness that an exclusively bilateralist approach is not sufficient for the solution of problems that are shared across borders.¹³³ In legal doctrine, *erga omnes (partes)* obligations (which, as is further clarified in §2.4 below, form part of multilateral legal relations with a plurality of right-holders) are often associated with the protection of common interests.¹³⁴

¹²⁶ Gabriella Blum, 'Bilateralism, Multilateralism and the Architecture of International Law' (2008) 49 Harvard International Law Journal 323, 325.

¹²⁷ Blum (n 126) 327. She observes that multilateral treaties are instinctively (but often wrongly) associated with 'higher politics' such as security, human rights and the environment.

¹²⁸ Vienna Convention on Diplomatic Relations (1961) 500 UNTS 95.

¹²⁹ General Agreement on Tariffs and Trade (1994) 1867 UNTS 187.

¹³⁰ Blum (n 126) 349, 358–359.

¹³¹ Treaty between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms (2010) S. Treaty Doc. No. 111-5.

¹³² Simma (n 3) 229; Dupuy (n 120) 1053.

¹³³ Sachariew (n 106) 273.

¹³⁴ See e.g. Benedek and others (n 2) 3; Tams, 'Individual States as Guardians of Community Interests' (n 119); Villalpando (n 3) 400; Feichtner (n 3) 43–44; Simma (n 3) 285.

Second, the increase in multilateral treaties has provided for the *possibility* of multilateral legal relations. Because a bilateral treaty is a treaty between two parties, it can only give rise to bilateral legal relations between those two parties. However, a multilateral treaty has three or more parties, which suggests that the legal relations involved need not be exclusively bilateral.¹³⁵ It thus seems fair to state that the increase of treaties with a more than two parties has at the very least opened up the door to the possibility of a multilateral legal relations arising from international treaties.

At the same time, it must be emphasized that common interests, multilateral treaties and multilateral legal relations do not *necessarily* coincide. Rules that aim to protect and achieve common interests can very well give rise to bilateral legal relations. The same is true for multilateral treaties, which can very well give rise to bilateral legal relations.¹³⁶ As put colloquially by Crawford, 'the "delivery vehicle" (the norm) may be multilateral, but the ensuing relationship - the "cargo" delivered by the norm - may be bilateral'.¹³⁷

For example, the obligation to provide innocent passage through one's territorial waters arises from a provision in a multilateral treaty, but the obligation does not give rise to a multilateral legal relation.¹³⁸ Rather, the obligation gives rise to bilateral legal relations that can be 'duplicated several or many times by reason of the fact that [the obligation has its] source in a multilateral treaty'.¹³⁹ The same can be said for the obligation of a receiving state to protect the diplomatic premises of other (sending) states on its territory.¹⁴⁰

Moreover, reservations to multilateral treaties can create bilateral legal relations, as they modify the main treaty in the mutual relationship(s) between the reserving party and the contracting party or parties that accept its reservation.¹⁴¹ In this respect, it has been noted that 'the interplay of reservations, objections and

¹³⁵ But this does not entail that multilateral treaties cannot give rise to bilateral legal relations. See Crawford, 'Chance, Order, Change: The Course of International Law' (n 111) 187–188. ('We might see multilateral treaties (...) as simply a more efficient way of generating bilateral relations.')

¹³⁶ Jan Klabbers, 'The Community Interest in the Law of Treaties: Ambivalent Conceptions' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011) 769.

¹³⁷ James Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 *Recueil des Cours* 325, 343.

¹³⁸ Crawford, 'Multilateral Rights and Obligations in International Law' (n 137) 343–344.

¹³⁹ Crawford, 'Multilateral Rights and Obligations in International Law' (n 137) 346.

¹⁴⁰ Article 22(2) Vienna Convention on Diplomatic Relations (1961) 500 UNTS 95 (n 128). This is further discussed in §2.2.3 below.

¹⁴¹ Thomas Giegerich, 'Reservations to Multilateral Treaties', *Max Planck Encyclopedia of Public International Law [MPEPIL]* (2010) para 2 <www.mpepil.com>.

acceptances may again unbundle and re-“bilateralize” even a truly multilateral undertaking.¹⁴²

Hence, the bilateral or multilateral character of a legal relation does not automatically follow from the type of interest protected by a rule or from the bilateral or multilateral character of a treaty. As is further clarified in the next section, the distinction between bilateral and multilateral legal relations relates to the *number of legal persons* that are a party to the legal relation in question.

2.2 The distinction between bilateral and multilateral legal relations

One may find various references to bilateral and multilateral legal relations in international legal literature¹⁴³ (or to obligations that 'transcend the sphere of bilateral relations'¹⁴⁴). Yet, it is rarely discussed what it is that distinguishes a legal relation that is bilateral from a legal relation that is multilateral or, for that matter, what it means to speak of legal relations in international law. Considering this chapter's focus on the move beyond a bilateral view of legal relations in the international law of obligations, a clear understanding of what it means to speak of legal relations in general and bilateral and multilateral legal relations in particular is essential.

This section starts by setting out the present study's understanding of legal relations on the basis of Hohfeld's analysis of legal relations (§2.2.1). Essentially, Hohfeld specifies that each legal relation consists of two correlative legal positions or, in other words, each legal relation consists of two sides. A right-duty relation consists of an obligation on one side and a correlative right on the other.

Hohfeld's work provides the basis for the understanding of the distinction between bilateral and multilateral legal relations throughout this thesis. At first sight, relying on Hohfeld in this context can seem counterintuitive. In international legal scholarship, the idea of a correlation between obligations and rights has been associated with an exclusively bilateral view of legal relations that leaves no room for

¹⁴² Simma (n 3) 330.

¹⁴³ See e.g. Villalpando (n 3) 400; Crawford, 'Multilateral Rights and Obligations in International Law' (n 137); James Crawford, 'Third Report on State Responsibility' (2000) A/CN.4/507 39, para 90; Pauwelyn (n 10); Linos-Alexander Sicilianos, 'The Relationship Between Reprisals and Denunciation or Suspension of a Treaty' (1993) 4 EJIL 341; Linos-Alexander Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' [2002] EJIL 1127; Sachariew (n 106); Dupuy (n 120); Simma (n 3); Willem Riphagen, 'Fourth Report on State Responsibility' (1983) A/CN.4/366 and Add.1 & Add.1/Corr.1 23, para 122.

¹⁴⁴ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 126, para 7; Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005) 49.

multilateral legal relations.¹⁴⁵ This section argues that the correlation between obligations and right is a general feature of international law (§2.2.2), and that the assumption of some international legal scholars that Hohfeld's analysis leaves no room for multilateral legal relations is unjustified. Hohfeld's work simply shows that any legal relation consists of two sides (e.g. one obligation and one right), but this does not automatically entail that all such legal relations are bilateral.

Building upon the premise that each legal relation in international law consists of an obligation on one end and a correlative right on the other hand, the section continues to distinguish between bilateral and multilateral legal relations in international law (§2.2.3). It argues that the distinction between bilateral and multilateral legal relations does not depend on the number of *sides* in a legal relation (which is always two). Rather, what distinguishes a bilateral legal relation from a multilateral one is *the number of legal persons* that are a party to that legal relation. In a bilateral legal relation, only one duty-bearer holds the obligation and only one right-holder holds the right, whereas in a multilateral legal relation the obligation is held by *multiple* duty-bearers or the right is held by *multiple* right-holders (or both). This indicates that there are two perspectives from which to approach the distinction between bilateral and multilateral relations: the perspective of the right-holder(s) in a legal relation and the perspective of the duty-bearer(s) in a legal relation.

2.1.1 Hohfeld's analysis of legal relations

Hohfeld's analysis of legal relations is based on the understanding that each legal relation consists of two legal positions (or two sides) that stand in a correlative relation to one another. Thus, any right-duty relation consists of two legal positions: an obligation on the one side and a right on the other side. A legal obligation (or duty) is defined as 'that which one ought or ought not to do'.¹⁴⁶ An obligation always has a right as its correlative, which in turn is defined as a right (or claim) to the performance of a correlative obligation.

There are innumerable examples of right-duty relations in international law. One may think, for example, of the obligation to protect another state's diplomatic premises and the corresponding right to have those diplomatic premises protected; an obligation to reduce one's CO2 emissions by a certain percentage and the corresponding right that those CO2 emissions are reduced by that percentage; and the obligation not to torture and the corresponding right not to be tortured. By accepting the correlation between rights and obligations, one essentially accepts that

¹⁴⁵ See §2.2.2 below.

¹⁴⁶ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* by Wesley Newcomb Hohfeld (Walter Wheeler Cook ed, Yale University Press 1920) 38.

whenever there is an obligation to do something or not to do something, there will be a corresponding right to have that obligation fulfilled.

Where the main focus of this chapter is on right-duty relations, it should be mentioned that one of the main aims of Hohfeld's analysis was to illustrate that not all legal relations amount to right-duty relations.¹⁴⁷ Hohfeld had grown frustrated by legal scholars and practitioners referring to a variety of legal position as a 'right', while that legal position in fact did not consist of a right to the performance of a correlative obligation.¹⁴⁸ His analysis identifies eight legal positions in total, which can be grouped together into four pairs of correlatives. Each pair of correlatives, in turn, forms a different type of legal relation.¹⁴⁹ In addition to a right-duty relation, a legal position can be part of a privilege-no-right relation, a power-liability relation or an immunity-disability relation. Such a diversity of legal positions can also be identified in international law.

First, a 'privilege' (also referred to as a liberty)¹⁵⁰ is defined as the absence of an obligation to abstain from a certain conduct.¹⁵¹ A state can have the (legal) liberty to engage in a certain conduct because there is no obligation not to engage in that conduct, either because of the absence of a rule prohibiting it or because of the presence of a rule permitting it. The correlative of a privilege is not an obligation, but a so-called 'no-right'. This entails that when state A engages in a certain conduct that is not prohibited by international law it has the liberty to do so, and state B has a 'no-right' (or in other words, does not have a right) that state A does not engage in that conduct; even if the conduct in question results in damage for state B.¹⁵²

Second, a legal 'power' is defined as the capacity to bring about change in a legal relation. The correlative of a power is referred to as a 'liability', which is the potential of having one's legal relations changed by the correlative power.¹⁵³ A clear example is the power to take counter-measures. When state B breaches an obligation that it owes to state A, state A may be entitled to take countermeasures against state B. The taking of countermeasures consists of 'the non-performance for the time being of international obligations of the State taking the measures towards the responsible

¹⁴⁷ Hohfeld (n 146).

¹⁴⁸ Hohfeld (n 146) 36.

¹⁴⁹ Hohfeld (n 146) 36.

¹⁵⁰ Hohfeld uses the term privilege, but other scholars have argued that legal liberty is a more appropriate term. See e.g. Glanville Williams, 'The Concept of Legal Liberty' (1956) 56 *Columbia Law Review* 1129.

¹⁵¹ Hohfeld (n 146) 38–39.

¹⁵² Provided that the causing of damage is not of itself prohibited by an international obligation, in which case there would simply be an obligation of state A not to cause damage and a correlative right of state B that state A does not cause damage to it.

¹⁵³ Hohfeld (n 146) 50.

State',¹⁵⁴ which is often referred to as the 'right' to take counter-measures.¹⁵⁵ But in Hohfeldian terms, there is no actual 'right' involved. It is more appropriate to say that state A has a power to (temporarily) change a right-duty relationship between itself and state B by taking countermeasures,¹⁵⁶ and that state B is liable to (temporarily) have its legal relationship with state A changed.

Finally, an 'immunity' is defined as the freedom from the legal power or control of another with regard to a legal relation. The correlative of an immunity is a 'disability'.¹⁵⁷ A state with a disability does not have the power to change a legal relation of a state with an immunity. So if state A does not have the power to make changes to a bilateral treaty it has concluded with state B, it has a disability towards state B, and state B holds the corresponding immunity.

What all of these different types of legal relations have in common is that they consist of two sides that stand in a correlative relation to one another. It is submitted that this is a general feature of all legal relations in international law, regardless of whether those legal relations are bilateral or multilateral. Both bilateral and multilateral legal relations have two sides (an obligation on one end and a correlative right on the other); but what distinguishes a bilateral legal relation from a multilateral one is the number of legal persons that hold the respective legal positions. This argument is further developed in §2.2.3 below.

Hohfeld's analysis is not primarily concerned with the number of legal persons that hold an obligation or a right in a legal relation. Still, it is interesting to note that Hohfeld explicitly recognized that an obligation or a right in a legal relation can be held by multiple legal persons. When discussing a hypothetical case in which B, C and D each agree with A never to enter A's land, he first considered that this scenario gives rise to three separate right-duty relations: a legal relation between A and B, a legal relation between A and C, and a legal relation between A and D.¹⁵⁸ In the terminology adopted by this thesis each of these three legal relations can be qualified as a bilateral legal relation, because in each of these legal relations one legal person holds the obligation and one legal person holds the corresponding right.

However, Hohfeld argued that this would be different if B, C and D had 'bound themselves so as to create a so-called joint obligation' towards A, for example a joint

¹⁵⁴ Article 49(2) ASR. See International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16).

¹⁵⁵ Even the ILC speaks of the 'right' to take countermeasures, see International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 136, 139.

¹⁵⁶ Lindblom similarly separates rights from the power to enforce rights on the basis of Hohfeld's analysis, see Anna-Karin Lindblom, *Non-Governmental Organizations in International Law* (CUP 2005) 133.

¹⁵⁷ Hohfeld (n 146) 60.

¹⁵⁸ Hohfeld (n 146) 93.

duty of B, C and D that B should not enter upon A's land. In this case there would be 'a single right and a single (joint) duty' (the latter duty incumbent upon multiple duty-bearers).¹⁵⁹ Using the terminology of the present study, this right and correlative obligation are part of a multilateral legal relation, where the obligation that B should not enter upon A's land is held by multiple legal persons (B, C and D) and the corresponding right is held by one legal person (A).

In the context of the present study's conceptualization of shared obligations, it should be noted that what Hohfeld refers to as a 'joint duty' of B, C and D corresponds to only one of the two types of shared obligations identified in this thesis: indivisible shared obligations.¹⁶⁰

2.2.2 The correlation between obligations and rights in international law

The correlation between obligations and rights is fundamental to all legal systems,¹⁶¹ and the present study considers the correlation between obligations and rights to be a general feature of international law. In his second report on state responsibility, Ago deemed it 'perfectly legitimate in international law to regard the idea of a breach of an obligation as the exact equivalent of the idea of the impairment of the subjective rights of others.'¹⁶² He argued that this correlation 'admits of no exception; (...) there are certainly no obligations incumbent on a subject which are not matched by an international subjective right of another person or subject, or even (...) of the totality of the other subjects' of international law.¹⁶³ In its commentaries to the 1996 Draft Articles as adopted on first reading, the ILC expressly underscored the existence of a correlation between obligations and rights in international law,¹⁶⁴ relying implicitly on the work of Hohfeld.¹⁶⁵ This has been toned down somewhat in the ILC's commentaries to the final ASR, which articulate that '*some* have considered the correlation between obligations and rights as a general feature of international law'.¹⁶⁶

This statement implies that some *do not* consider this correlation to be a general feature of international law. Notably, Simma has firmly critiqued the idea of a

¹⁵⁹ Hohfeld (n 146) 93.

¹⁶⁰ For a thorough discussion of the distinction between divisible and indivisible shared obligations, see Chapter 4.

¹⁶¹ Hugh Thirlway, 'Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning' [2002] *Recueil des Cours* 294, 396.

¹⁶² Roberto Ago, 'Second Report on State Responsibility' (1970) A/CN.4/217 and Corr. 1 and Add. 1 192-193.

¹⁶³ Ago, 'Second Report on State Responsibility' (n 162) 192-193.

¹⁶⁴ International Law Commission, 'Draft Articles of Parts One, Two and Three Provisionally Adopted by the Commission on First Reading' (1996) A/CN.4/L/528/Add.2 10, 86.

¹⁶⁵ Crawford, 'Third Report on State Responsibility' (n 143) 37, para 84.

¹⁶⁶ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 35. (emphasis added).

correlation between obligations and rights in international law for embodying a 'rigidly traditionalist' and 'bilateral-minded' view of international law where obligations exist only 'at the level of relations between States individually.'¹⁶⁷ He argues that the 'theoretical understanding of the structure of international law according to which the law exhausts itself in correlative rights and obligations of its subjects' lies 'at the basis of a bilateralist view of international legal relationships'.¹⁶⁸

The assumption that appears to underlie Simma's critique is that by accepting the necessary correlation between obligations and rights one must automatically accept that international law consists only of bilateral right-duty relations, with one legal person that bears the obligation and one legal person that holds the corresponding right. But it is submitted that such an assumption is inaccurate. Hohfeld's analysis simply illustrates that a legal relation covers two ends of the same stick,¹⁶⁹ with each end embodying one legal position. In the case of a right-duty relation there will be an obligation on the one end and a correlative right on the other end. However, this does not necessarily entail that this legal relation is bilateral,¹⁷⁰ with one subject that bears the obligation and one subject that holds the corresponding right.¹⁷¹ Even Hohfeld explicitly acknowledged that it is possible for an obligation or a right in a legal relation to be held by multiple legal persons.¹⁷²

The assumption that the correlation between obligations and rights reduces all legal relations to bilateral legal relations between two subjects has also led some legal scholars to reject the correlation between obligations and rights in domestic public law. In the context of domestic public law, reducing all legal relations to bilateral legal relations has been considered to be inappropriate because public law gives rise to many obligations that do not correspond to a correlative right in one individual right-

¹⁶⁷ Simma (n 3) 230, 232.

¹⁶⁸ Simma (n 3) 231. See also Crawford, *State Responsibility: The General Part* (n 24) 490. In this book Crawford states that 'the outdated bilateral conception of relations between states' is captured in Ago's statement 'that there is always a correlation between a legal obligation on the one hand and a subjective right on the other.' This appears to be in contrast with the view expressed in Crawford, 'Multilateral Rights and Obligations in International Law' (n 137) 436-437. Here, Crawford observes that Hohfeld 'was certainly not seeking to reduce legal relations to the form classically understood as a bilateral right-duty relation of two States in international law. Any use of his analysis to achieve such a result is illegitimate'.

¹⁶⁹ Curtis Nyquist, 'Teaching Wesley Hohfeld's Theory of Legal Relations' [2002] *Journal of Legal Education* 238.

¹⁷⁰ Sachariew (n 106) 275. Ago also recognized that legal relationships exist not only between pairs of states, but that that an obligation incumbent upon a state can be matched by the right of several or even all states. Ago, 'Second Report on State Responsibility' (n 162) 192. See also Crawford, 'Multilateral Rights and Obligations in International Law' (n 137) 436-437. Here, Crawford observes that Hohfeld 'was certainly not seeking to reduce legal relations to the form classically understood as a bilateral right-duty relation of two States in international law. Any use of his analysis to achieve such a result is illegitimate'.

¹⁷¹ Tams similarly argues *against* the assumption that 'legal positions labelled "rights" were, by necessity, allocated to one subject, and enabled [that one subject] to enforce a duty against one other subject', see Tams, *Enforcing Obligations Erga Omnes in International Law* (n 144) 34.

¹⁷² See §2.2.1 above.

holder.¹⁷³ However, others have argued that even ‘public duties’ such as an individual’s obligation to pay taxes can fit into Hohfeld’s scheme because ‘any public duty is owed to a collectivity (the state, the nation, the community) which holds the correlative right.’¹⁷⁴

Incidentally, it should be noted that the legal relation encompassing an individual’s duty to pay taxes would still be a bilateral one if the collectivity that holds the correlative right were considered to be a separate legal entity with its own legal personality. The legal relation would then exist between a specific individual as the bearer of the obligation to pay taxes on the one hand, and the collectivity as the holder of the corresponding right on the other hand. However, if the collectivity does not have a legal personality of its own but rather consists a plurality of legal persons (such as all individuals that make up a community), the legal relation would be multilateral. When construed as such the legal relation would exist between a specific individual as the bearer of the obligation to pay taxes on the one hand, and the plurality of legal persons that make up the community as holders of the corresponding right on the other hand.

To summarize, when distinguishing between bilateral and multilateral legal relations in international law, the legal positions in a legal relation (a right and an obligation) and the legal persons that hold the respective legal positions (one or more right-holders and one or more duty-bearers) are to be viewed as distinct from one another. The fact that any right-duty legal relation can be broken down into only one obligation on one side and one correlative right on the other side does not preclude that the obligation may be owed by more than one duty-bearer, or that the right may be held by more than one right-holder. Thus, accepting the correlation between obligations and rights in international law does not preclude that there may be a plurality of duty-bearers of an obligation or a plurality of right-holders of a right, which is what would make a legal relation multilateral.

2.1.3 Analysis: distinguishing between bilateral and multilateral legal relations

The premise that all right-duty legal relations in international law consist of an obligation on one end and a correlative right on the other end provides the basis for the present study’s understanding of bilateral and multilateral legal relations in international law.

¹⁷³ See John Morss, ‘The Legal Relations of Collectives: Belated Insights from Hohfeld’ [2009] *Leiden Journal of International Law* 289, 293 footnote 22.

¹⁷⁴ Matthew H Kramer, NE Simmonds and Steiner Hillel, *A Debate Over Rights: Philosophical Enquiries* (OUP 2000) 59.

The difference between bilateral and multilateral legal relations does not relate to the number of legal positions in a legal relation, as each right-duty relation – whether bilateral or multilateral – has two legal positions: an obligation and a correlative right. What makes a legal relation bilateral or multilateral is the number of parties to that legal relation or, in other words, the number of legal persons that hold the respective legal positions in that legal relation.

A bilateral legal relation is a legal relation between two legal persons, and thus has only two parties.¹⁷⁵ Figure 2.1 below illustrates that a bilateral right-duty relation encompasses one obligation with one duty-bearer on the one end, and one correlative right with one right-holder on the other end.

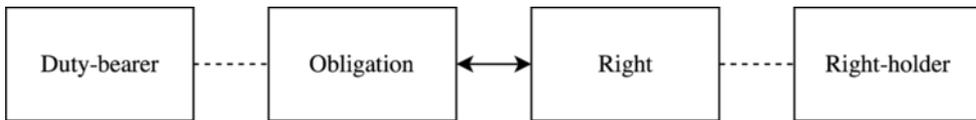


Figure 2.1: A bilateral legal relation

A multilateral legal relation also consists of an obligation on the one hand and a correlative right on the other end. However, a multilateral legal relation by definition involves *more than* two parties, which means that one (or both) of the legal positions in a legal relation is allocated to two or more subjects. Indeed, in an exception to the general silence of international legal scholars on what it means to speak of a multilateral legal relation Crawford considers that multilateral legal relations ‘involve rights or obligations that are held in common by a group or class of legal persons.’¹⁷⁶ A right-duty legal relation is multilateral if it involves one obligation that is held by multiple duty-bearers (see figure 2.2 on the next page); one right that is held by multiple right-holders (see figure 2.3 on the next page); or both.

¹⁷⁵ Crawford, ‘Multilateral Rights and Obligations in International Law’ (n 137) 335.

¹⁷⁶ Crawford, ‘Multilateral Rights and Obligations in International Law’ (n 137). Even though with this quote Crawford acknowledges that it can be both rights and obligations that are held in common by multiple legal persons, Crawford focuses only on *rights* that are held by multiple right-holders.

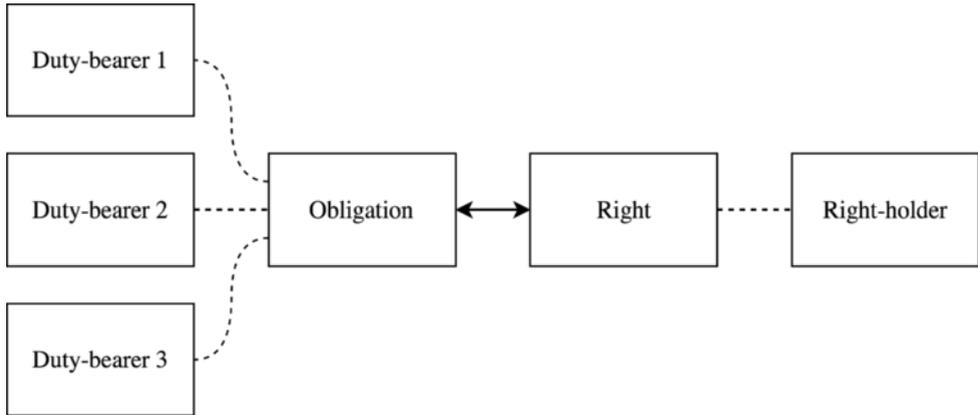


Figure 2.2: A multilateral legal relations with multiple duty-bearers

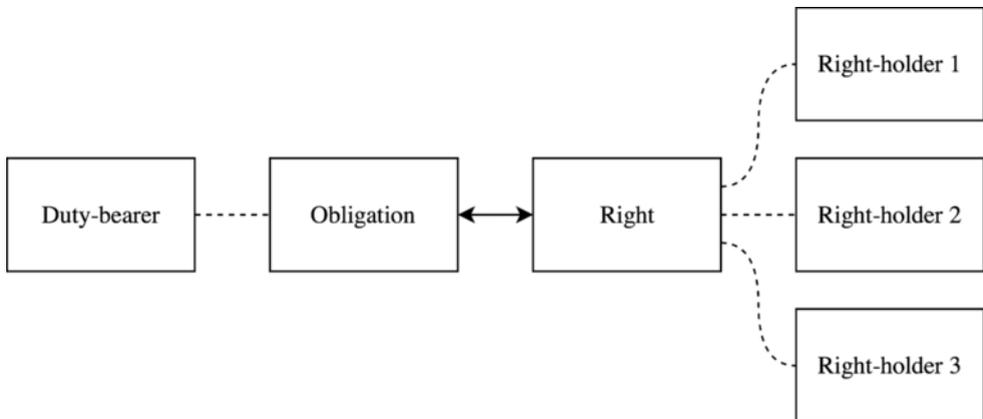


Figure 2.3: A multilateral legal relation with multiple right-holders

The distinction between bilateral and multilateral legal relations is particularly valuable when applied to international obligations that arise from a multilateral treaty or a rule of customary international law. As has been discussed in section 2.1 above, the fact that an obligation arises from a multilateral treaty does not automatically entail that the legal relations involved are multilateral. Several authors have pointed out the need to distinguish between an obligation in a multilateral treaty that gives rise to 'bundles' of bilateral legal relations¹⁷⁷ and an obligation in a

¹⁷⁷ Sachariew (n 106) 277; Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (n 143) 1133; Pauwelyn (n 10) 908; Christian Dominicé, 'The International Responsibility of States for Breaches of Multilateral Obligations' [1999] EJIL 353, 357; Tams, *Enforcing Obligations Erga Omnes in International Law* (n 144) 45; Tarcisio Gazzini, 'The Legal Nature of WTO Obligations and the Consequences of Their Violation' (2006) 17 EJIL 723, 724; International Law

multilateral treaty that 'transcend[s] the sphere of bilateral relations of the states parties',¹⁷⁸ which gives rise to legal relations that are 'genuinely multilateral in character'.¹⁷⁹

The distinction between an international obligation that gives rise to bilateral legal relations and an international obligation that gives rise to multilateral legal relations can be approached from two perspectives: the perspective of the right-holders and the perspective of the duty-bearers.

i. The perspective of the right-holders

A typical example of an obligation that gives rise to bundles of bilateral legal relations is the obligation of coastal states to provide innocent passage through its territorial waters, which is enshrined in article 17 of the United Nations Law of the Sea Convention (LOSC).¹⁸⁰ Each state party to the LOSC owes the obligation to provide innocent passage to each other state party *individually*. For example, state A owes the obligation to provide innocent passage through its territorial waters to state B. In this bilateral legal relation, one legal person bears the obligation (state A) and one legal person holds the corresponding right (state B).

In this scenario, state A is not only obliged to provide innocent passage to state B. State A also owes an obligation to provide innocent passage through its territorial waters to state C. State A's obligation to provide innocent passage to ships flying the flag of state C (and the corresponding right) is simply part of a different bilateral legal relation between state A and state C. The same can be said for the obligation to provide innocent passage that state A owes to state D or to state E. Article 17 LOSC gives rise to a great number of bilateral legal relations that can be 'duplicated several or many times by reason of the fact that [the obligation has its] source in a multilateral treaty'.¹⁸¹

These bilateral legal relations (and the obligations and rights that are part of these bilateral legal relations) are separate from one another.¹⁸² This has consequences for

Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 118.

¹⁷⁸ Tams, *Enforcing Obligations Erga Omnes in International Law* (n 144) 49; Pauwelyn (n 10) 917; International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 126, para 7.

¹⁷⁹ Crawford, 'Multilateral Rights and Obligations in International Law' (n 137) 346.

¹⁸⁰ United Nations Convention on the Law of the Sea (1982) 1833 UNTS 3.

¹⁸¹ Crawford, 'Multilateral Rights and Obligations in International Law' (n 137) 346.

¹⁸² In a similar vein Pauwelyn considers that when an obligation gives rise to a bundle of bilateral legal relations, those legal relations are *detachable* from one another, see Pauwelyn (n 10) 908. Gazzini speaks legal relations that can be isolated from one another, Gazzini (n 177) 724–725. Riphagen speaks of the 'separability' of such bilateral legal relations, Riphagen (n 143) 13, para 73. When discussing obligations

the (non-)performance of the obligation to provide innocent passage towards the right-holder of that obligation. In the legal relation between state A and state B, the obligation of state A represents a specific performance towards state B only. If state A fulfils the obligation by providing innocent passage to ships flying the flag of state B, it fulfils the obligation only towards state B. If state A fails to provide innocent passage to ships flying the flag of state B, this failure only infringes upon the right to innocent passage of state B. As such, this has no effect on the right to innocent passage through state A's territorial waters that is held by state C, which is part of a distinct bilateral legal relation between state A and state C.

Thus, even though state A owes the obligation to provide innocent passage to state B and to state C, the right of state B and the right of state C are part of separate (bilateral) legal relations. Each of these legal relations corresponds to figure 2.1 above.

An example of an obligation that gives rise to a multilateral legal relation where the corresponding right is held by multiple right-holders is the obligation of states parties to the Antarctic Treaty to refrain from asserting a new claim to territorial sovereignty in Antarctica.¹⁸³ Each state party owes this obligation to all other states parties simultaneously. Hence, state X's obligation to refrain from asserting a new claim to territorial sovereignty is part of a multilateral legal relation where the obligation is held by one legal person (state X) and the corresponding right is held by multiple legal persons (all other states parties to the Antarctic Treaty). This legal relation corresponds to figure 2.3 above.

The fact that state X's obligation is owed to all other states parties simultaneously has consequences for the (non-)performance of this obligation. The obligation of state X does not represent a specific performance towards another party, which means that it cannot be performed in relation to one other state only. Because *all* other states parties are holders of the right correlative to the obligation of state X, a breach of state X's obligation (in the form of a new claim to territorial sovereignty in Antarctica) necessarily infringes upon the right of all other parties simultaneously. Similarly, if state X fulfils the obligation it automatically fulfils the obligation towards all other states parties.

that arise from multilateral treaties, Riphagen notes that in most cases 'even if the content of the obligations imposed is uniform towards all other States parties, the relationships remain bilateral ones as between each pair or States parties, and the legal relationships between one pair is quite *separate* from the legal relationship between another pair' (emphasis added). See Riphagen, Willem, 'Sixth Report on State Responsibility' (1985) A/CN.4/389 and Corr.1 & Corr.2 7 para 14.

¹⁸³ Article IV(2) The Antarctic Treaty (1959) 402 UNTS 71.

As is further discussed in sections 2.3 and 2.4, various legal concepts in the law of treaties and the law of international responsibility recognize that some international obligations give rise to multilateral legal relations. However, these legal concepts approach multilateral legal relations solely from the perspective of the *right-holders* in a legal relation. This indicates that the international law of obligations solely addresses the potential problems raised by a plurality of right-holders, and does not focus on the potential problems raised by a plurality of duty-bearers.

ii. The perspective of the duty-bearers

A hypothetical example of an obligation that gives rise to a multilateral legal relation where the obligation is held by multiple duty-bearers is the obligation of multiple states to reduce their aggregate CO2 emissions with 40 per cent by 2030. In the terms of the present study, such an obligation constitutes an indivisible shared obligation.¹⁸⁴ This obligation does not give rise to multiple bilateral legal relations, but is part of one multilateral legal relation where the obligation is held by multiple duty-bearers (corresponding to figure 2.2 above).

In this multilateral legal relation, the obligation does not represent a specific performance that is owed by only one of the duty-bearers. Rather, it represents a performance that is owed by all duty-bearers together: the achievement of a 40 per cent reduction of aggregate emissions by 2030. The fact that one and the same performance is owed by multiple states together has consequences for the (non-)performance of the obligation by its bearers. The obligation cannot be fulfilled by one duty-bearer and breached by another duty-bearer. When a 40 per cent reduction of aggregate emissions is achieved by 2030, the obligation is automatically fulfilled by all duty-bearers, and when the 40 per cent reduction is not achieved by 2030 the obligation is necessarily breached by all duty-bearers.

It should be reiterated that the concept of shared obligation in this thesis approaches legal relations from the perspective of the *duty-bearers* in a legal relation. The concept of shared obligation covers two types of shared obligations. Divisible shared obligations give rise to *multiple* bilateral legal relations, and in each of these legal relations the obligation is held by only one duty-bearer. Each bearer of a divisible shared obligation only has to do its 'share' to be released from the obligation. Indivisible shared obligations give rise to one multilateral legal relation where the obligation is held by multiple duty-bearers, corresponding to figure 2.2 above. The bearers of an indivisible shared obligation are not merely bound to do their 'share', but rather are bound to jointly achieve a common goal. The distinction between these

¹⁸⁴ See Chapter 4, §4.1.1.

two types of shared obligations (and the nature of the legal relations involved) is further discussed in chapter 4.

This section has set out the present study's understanding of the distinction between bilateral and multilateral legal relations on the basis of Hohfeld's analysis of legal relations. With this understanding of bilateral and multilateral legal relations in mind, it becomes possible to examine the way in which the international law of obligations has addressed the problems raised by the move away from a bilateral conception of international legal relations. The next two sections focus on the legal concepts that have been developed in the law of treaties (section 2.3) and the law of international responsibility (section 2.4).

2.3 Multilateral legal relations and the law of treaties

This section examines the way in which the law of treaties has addressed the problems raised by the move beyond a bilateral view of legal relations. In light of the developments discussed in section 2.1, the law of treaties has moved away from the traditional idea that a treaty necessarily gives rise to bilateral legal relations between pairs of states only.¹⁸⁵ The move beyond a bilateral view of legal relations has never been a prominent theme in the codification of the law of treaties, but the 1969 and 1986 Vienna Conventions on the Law of Treaties (VCLT)¹⁸⁶ - the final products of the ILC's codification efforts - include a few provisions that (implicitly) recognize the existence of multilateral legal relations in international law address some of the problems raised by the move beyond a bilateral view of legal relations in the context of the law of treaties.¹⁸⁷

This section starts by examining the distinction between the categories of reciprocal, interdependent and integral obligations (§2.3.1), which has been developed by ILC Special Rapporteur Fitzmaurice with the purpose of determining which state or states are entitled to respond to a breach of a multilateral treaty. This categorization recognizes that some obligations in multilateral treaties are owed by each party to all other parties (rather than to each other party individually), and give rise to multilateral legal relations. Fitzmaurice's classification of obligations has left manifest traces in article 60 VCLT,¹⁸⁸ which regulates the entitlement to terminate or suspend a treaty in response to a material breach, and has influenced the ILC's approach to multilateral legal relations in its work on the law of international responsibility.

¹⁸⁵ Simma (n 3) 336.

¹⁸⁶ Unless explicitly stated otherwise, a reference to the VCLT refers to both the 1969 and the 1986 Convention: Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331 (n 39); Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986, not yet entered into force) 25 ILM 543 (n 39).

¹⁸⁷ Spinedi (n 106); Dupuy (n 120) 1054.

¹⁸⁸ Pauwelyn (n 10) 912.

Subsequently, this section examines the inclusion of the concept of peremptory norms (§2.3.2) in article 53 and 64 VCLT, which constitutes an acknowledgement of the fact that certain international obligations give rise to multilateral legal relations with a plurality of right-holders.

This section ends by analysing the approach to multilateral legal relations in the law of treaties (§2.3.3). On the basis of the legal concepts discussed in this section, it is concluded that the law of treaties has solely approached the possibility of and potential problems raised by multilateral legal relations from the perspective of the right-holders in a legal relation. This has arguably influenced the approach to multilateral legal relations in the law of international responsibility.

Before proceeding, it is important to note that the law of treaties has a relatively narrow focus when it comes to the (non-)performance of international obligations.¹⁸⁹ The breach of an international obligation falls within the ambit of the law of treaties only if it amounts to a 'material breach of treaty', which the VCLT defines as the repudiation of the treaty or a violation of a provision that is essential to the accomplishment of the object and purpose of the treaty.¹⁹⁰ This narrow focus stems from a decision made at an early stage in the codification of the law of treaties, when the ILC decided to focus on the treaty *instrument* rather than on the treaty *obligations*.¹⁹¹ Hence, the VCLT is concerned with the issue of non-performance of obligations only insofar as it has consequences for the continued validity or binding effect of a treaty.¹⁹² This is the case only if a breach of an international obligation amounts to a material breach of treaty, as a material breach can give rise to the entitlement to terminate or suspend the treaty.¹⁹³

2.3.1 Reciprocal, interdependent and integral obligations

The distinction between reciprocal, interdependent and integral obligations represents a shift away from an exclusively bilateral conception of legal relations in

¹⁸⁹ James Crawford and Simon Olleson, 'The Exception of Non-Performance: Links between the Law of Treaties and the Law of State Responsibility' (2000) 21 *Australian Yearbook of International Law* 55, 59. 'Indeed, it is not too much to say that the Vienna Convention focuses its attention on the conclusion, content and termination of treaties and ignores questions of performance', with the exception of article 26 (*pacta sunt servanda*) and article 60.

¹⁹⁰ Article 60(3) VCLT.

¹⁹¹ Shabtai Rosenne, *Breach of Treaty* (Grotius Publications Limited 1985); Shabtai Rosenne, 'Bilateralism and Community Interest in the Codified Law of Treaties', *Transnational law in a changing society: essays in honor of Philip C. Jessup* (Columbia University Press 1972) 205.

¹⁹² Fitzmaurice and Elias (n 90) 134.

¹⁹³ Crawford and Olleson (n 189) 59. In the *Gabčíkovo-Nagymaros Project* case, the ICJ considered that 'the Vienna Convention of 1969 on the Law of Treaties confines itself to defining - in a limitative manner - the conditions in which a treaty may lawfully be denounced or suspended'. *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, *Judgment*, 1997 ICJ Reports 7 38, para 47.

the law of treaties.¹⁹⁴ This classification of obligations can be traced back to the reports of Sir Gerald Fitzmaurice, who was the first ILC Special Rapporteur (SR) on the law of treaties to deal with the issue of termination or suspension of treaties in response to a 'fundamental breach'¹⁹⁵ of treaty.

SR Fitzmaurice's classification of obligations applies to international obligations that arise from multilateral treaties.¹⁹⁶ In his reports, Fitzmaurice argued that when it comes to a fundamental breach of a multilateral treaty, it is the *type of obligation*¹⁹⁷ that has been the subject of a fundamental breach that determines whether one or more states parties to the treaty are entitled to individually respond by refusing performance of their *own* treaty obligations.

This subsection examines the categories of reciprocal obligations (i), interdependent obligations (ii) and integral obligations (iii), and argues that SR Fitzmaurice's categorization of obligations in multilateral treaties represents a shift away from an exclusively bilateral conception of legal relations.¹⁹⁸ In this respect it should be noted that Fitzmaurice himself did not analyse his categories of obligations in terms of bilateral or multilateral legal relations. On the basis of the framework for distinguishing between bilateral and multilateral legal relations developed in this chapter, this subsection maintains that reciprocal obligations give rise to bilateral legal relations, whereas interdependent and integral obligations give rise to multilateral legal relations with a plurality of right-holders.

Moreover, this subsection shows that the distinction between reciprocal, interdependent and integral obligations has left manifest traces in article 60 VCLT,¹⁹⁹

¹⁹⁴ Spinedi (n 106) 1104.

¹⁹⁵ The concept of 'material breach' was later introduced by Special Rapporteur Waldock as a replacement of the concept of 'fundamental breach', see Humphrey Waldock, 'Second Report on the Law of Treaties' (1963) A/CN.4/156 and Add.1-3 76.

¹⁹⁶ 'The regulation of reactions to the breach of *bilateral* treaties was considered as unproblematic by both the ILC and the Vienna Conference'. Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer-Verlag 2012) 1034, para 40.

¹⁹⁷ By distinguishing between different types of obligations that can be fundamentally breached, Fitzmaurice focuses more on treaty *obligations* than on the treaty *instrument*, see Rosenne, *Breach of Treaty* (n 191) 87. See also Julian Arato, 'Accounting for Difference in Treaty Interpretation Over Time' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 219. 'Rather than sweeping generalized types of treaties, Fitzmaurice took a more fine-grained approach—reorienting the focus towards the nature of particular treaty norms. He distinguished between norms establishing reciprocal obligations, reflecting mere exchanges of rights and duties between parties (akin to Lauterpacht's 'contractual treaties'), and those treaty norms incorporating more absolute obligations (akin to instruments of public law). Within the latter set, Fitzmaurice identified two types: those truly absolute integral obligations and interdependent obligations, representing a kind of hybrid between the integral and the reciprocal types.'

¹⁹⁸ Spinedi (n 106) 1104.

¹⁹⁹ Christian Tams, 'Regulating Treaty Breaches (February 16, 2016)' Available at SSRN: <http://ssrn.com/abstract=2733325> or <http://dx.doi.org/10.2139/ssrn.2733325>; Bruno Simma and Christian Tams, 'Article 60' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties*

which addresses the entitlement of states and IOs to respond to a material breach of a treaty by suspension or termination. Hereby, the VCLT (implicitly) affirms the existence of multilateral legal relations, and recognizes that this may have consequences for the (non-)performance of obligations; more specifically, for the circle of states and/or IOs entitled to respond to a material breach of treaty.

Finally, it is important to note that the impact of SR Fitzmaurice's categorization of obligations is not limited to article 60 VCLT. Fitzmaurice's classification has been 'applied to all types of legal relations, irrespective of their source, and is generally accepted as workable and analytically sound.'²⁰⁰ As is further considered in section 2.4 below, these categories have influenced the classification of obligations in the law of international responsibility.

i. Reciprocal obligations

'Obligations of the reciprocal type' consist of 'a mutual and reciprocal interchange of benefits or concessions as between the parties.'²⁰¹ Classic examples of reciprocal obligations include obligations that arise from treaties on diplomatic or consular law or extradition treaties.²⁰² According to SR Fitzmaurice, a fundamental breach of a multilateral treaty that involves a reciprocal obligation entitles each of the other parties to refuse performance of reciprocal obligations, but only in their relations with the defaulting party.

Reciprocal obligations that arise from a multilateral treaty give rise to *bilateral* legal relations,²⁰³ as they are owed by each state party individually to each other state party individually.²⁰⁴ For example, each state party to the Vienna Convention on Diplomatic Relations (VCDR) individually owes an obligation to protect diplomatic premises on its territory to each other state party to the VCDR individually. This obligation gives rise to a bilateral legal relation between state A and state B, a

(OUP 2011) 1365; Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2008) 736; Fitzmaurice and Elias (n 90) 152; Tams, *Enforcing Obligations Erga Omnes in International Law* (n 144) 53; Pauwelyn (n 10) 911.

²⁰⁰ Tams, *Enforcing Obligations Erga Omnes in International Law* (n 144) 54. See e.g. Tams, *Enforcing Obligations Erga Omnes in International Law* (n 144) 54, fn.22-23; Sachariew (n 106) 273; Crawford, 'Third Report on State Responsibility' (n 143) 40, para 91; Fitzmaurice and Elias (n 90) 123; Arato (n 197) 208. Azaria relies on this classification of obligations to determine the nature of transit obligations via pipelines, which 'may be bilateral/bilateralisable, interdependent or integral', see Danae Azaria, *Treaties on Transit of Energy via Pipelines and Countermeasures* (OUP 2015) 104.

²⁰¹ Sir G Fitzmaurice, 'Second Report on the Law of Treaties' (1957) A/CN.4/107 30. In his third report SR Fitzmaurice speaks of 'multilateral treaties of the reciprocating type, with rights and obligations for each involving specific treatment at the hands of and towards each of the others individually, Sir G Fitzmaurice, 'Third Report on the Law of Treaties' (1958) A/CN.4/115 and Corr.1 27.

²⁰² Tams, *Enforcing Obligations Erga Omnes in International Law* (n 144) 55.

²⁰³ Tams, *Enforcing Obligations Erga Omnes in International Law* (n 144); Simma and Tams (n 199) 1365.

²⁰⁴ Fitzmaurice and Elias (n 90) 148.

bilateral legal relation between state A and state C, a bilateral legal relation between state A and state D, and so on.²⁰⁵

The category of reciprocal obligations is reflected in article 60(2)(b) VCLT,²⁰⁶ which provides that a state party to a multilateral treaty is entitled to suspend the operation of the treaty between itself and the defaulting party if it is 'specially affected' by a material breach. In order to be specially affected, a party's position should be distinguishable from that of other parties that 'merely' have a general interest in the observance of the treaty.²⁰⁷ When a material breach of a multilateral treaty concerns a bilateral legal relation there is always a specially affected party,²⁰⁸ namely, the party to whom the obligation was owed in case of a breach,²⁰⁹ such as sending state X whose diplomatic representative was not afforded sufficient protection by receiving state Y.

ii. Interdependent obligations

'Obligations of the interdependent type' are 'of such a kind that, by reason of the character of the treaty, their performance by any party is necessarily dependent on an equal and corresponding performance by all the other parties.'²¹⁰ Examples of interdependent obligations include those arising from treaties on disarmament where 'the obligation of each party to disarm, or not to exceed a certain level of armaments, or not to manufacture or possess certain types of weapons, is necessarily dependent on a corresponding performance of the same thing by all the other parties.'²¹¹ According to SR Fitzmaurice, a fundamental breach involving an interdependent obligation entitles all other parties to refuse performance of that interdependent obligation in response.²¹²

Interdependent obligations 'cannot be reduced to reciprocal exchanges between pairs of States,'²¹³ but 'must be performed by every party vis-à-vis every other

²⁰⁵ See Villiger (n 199) 745, para 19. The Vienna Convention on Diplomatic Relations regulates 'in multilateral form what are essentially bilateral relations between the parties.'

²⁰⁶ Fitzmaurice and Elias (n 90) 152; Simma and Tams (n 199) 1365. However, the legal consequences of a material breach described in this provision slightly differ from the legal consequences of a fundamental breach of a reciprocal obligation as described by Fitzmaurice. Article 60(2)(b) entitles only those that have been 'specially affected' to respond with suspension, whereas Fitzmaurice advocates that a breach of a reciprocal obligation should entitle *all other parties* to respond.

²⁰⁷ Simma and Tams (n 199) 1364, para 35; Villiger (n 199) 745, para 19.

²⁰⁸ Sicilianos, 'The Relationship Between Reprisals and Denunciation or Suspension of a Treaty' (n 143) 346.

²⁰⁹ Simma and Tams (n 199) 1365, para 36.

²¹⁰ Fitzmaurice, 'Second Report on the Law of Treaties' (n 201) 30–31; Fitzmaurice and Elias (n 90) 148.

²¹¹ Fitzmaurice, 'Second Report on the Law of Treaties' (n 201) 54.

²¹² Fitzmaurice, 'Second Report on the Law of Treaties' (n 201) 31.

²¹³ Tams, *Enforcing Obligations Erga Omnes in International Law* (n 144) 55–56.

party.²¹⁴ An interdependent obligation gives rise to multilateral legal relations where one duty-bearer holds the obligation and multiple right-holders hold the corresponding right. Taking the example of a treaty on disarmament, the obligation of state party A to disarm is owed to all of the other parties to the treaty, which means that all of the other parties hold the corresponding right that state A will disarm. If state A fulfils its obligation by successfully disarming, it fulfils the obligation towards all other states parties simultaneously; and if state A breaches its obligation by failing to disarm, it infringes upon the corresponding right that is held by all other states parties to the treaty.²¹⁵

The category of interdependent obligations is reflected in article 60(2)(b) VCLT,²¹⁶ which provides that each of the other parties to a multilateral treaty is entitled to suspend the operation of the treaty in whole or in part 'if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty'. In such a case, a material breach goes beyond bilateral legal relations²¹⁷ because the (material) breach by one party (e.g. by failing to disarm as required by a disarmament treaty) necessarily constitutes a breach towards all other parties.²¹⁸

iii. Integral obligations

SR Fitzmaurice's third category consists of obligations that require an 'absolute' or 'integral' performance. Such obligations arise from 'law-making treaties (...), system or régime creating treaties (...) or treaties involving undertakings to conform to certain standards and conditions, or (...) any other treaty where the juridical force of the obligation is inherent, and not dependent on a corresponding performance by the other parties to the treaty'.²¹⁹ 'Examples include obligations arising from human rights treaties, maritime conventions setting standards for safety at sea and treaties 'of the social or humanitarian kind, the principal object of which is the benefit of individuals.'²²⁰

²¹⁴ Simma and Tams (n 199) 1365, para 38.

²¹⁵ Simma and Tams similarly observe that in the case of interdependent obligations, 'one party's non-compliance would affect all other parties to the treaty.' Bruno Simma and Christian Tams, 'Reacting Against Treaty Breaches' in Duncan Hollis (ed), *Reacting against Treaty Breaches* (OUP 2012) 592.

²¹⁶ Simma and Tams (n 199) 1365; Fitzmaurice and Elias (n 90) 152; Tams, *Enforcing Obligations Erga Omnes in International Law* (n 144) 61; Crawford and Olleson (n 189) 60.

²¹⁷ Villiger (n 199) 745, para 21.

²¹⁸ Simma and Tams (n 199) 1365, para 38.

²¹⁹ Fitzmaurice, 'Second Report on the Law of Treaties' (n 201) 31.

²²⁰ Sir G Fitzmaurice, 'Fourth Report on the Law of Treaties' (1959) A/CN.4/120 46 (see footnote 12).

Much like interdependent obligations, integral obligations cannot be reduced to reciprocal legal relations between pairs of states.²²¹ An integral obligation is not owed to one party in particular;²²² rather, 'all states bound by it have the same interest in seeing the obligation observed'.²²³ SR Fitzmaurice even qualified integral obligations as 'obligations towards all the world'.²²⁴ It follows that an integral obligation gives rise to multilateral legal relations, as each state party bound to the obligation owes that obligation to all the other parties to the treaty, and the corresponding right is held by multiple right-holders.

SR Fitzmaurice considered that when states parties are bound to an integral obligation, 'neither juridically, nor from the practical point of view, is the obligation of any party dependent on a corresponding performance by the others'.²²⁵ Because of this, he argued that a fundamental breach involving an integral obligation can *never* entitle any of the other parties to the treaty to refuse performance of their own integral obligations.

At least part of what was envisaged by SR Fitzmaurice's category of integral obligations is covered by article 60(5) VCLT,²²⁶ which stipulates that suspension (or termination) is not allowed under any circumstance in case of a material breach involving 'provisions relating to the protection of the human person contained in treaties of a humanitarian character'. This includes treaties on humanitarian law and, according to some, human rights treaties.²²⁷

The above discussion of reciprocal, interdependent and integral obligations indicates that SR Fitzmaurice's classification of obligations recognizes that certain types of obligations are owed to all states parties simultaneously (rather than to each other party individually), which constitutes a shift away from an exclusively bilateral conception of legal relations in the law of treaties. This classification has left manifest traces in article 60 VCLT, and the VCLT hereby (implicitly) recognize that some obligations in multilateral treaties give rise to multilateral legal relations and that this can have consequences for (non-)performance.

²²¹ Malgosia Fitzmaurice and Elias qualify both interdependent and integral obligations as 'non-reciprocal types' of obligations. Fitzmaurice and Elias (n 90) 147. Tams notes that the performance of both 'absolute' (or integral) and 'interdependent' obligations 'cannot be reduced to reciprocal exchanges between pairs of States.' Tams, *Enforcing Obligations Erga Omnes in International Law* (n 144) 56.

²²² Tams, *Enforcing Obligations Erga Omnes in International Law* (n 144) 56; Pauwelyn (n 10) 911.

²²³ Tams, *Enforcing Obligations Erga Omnes in International Law* (n 144) 56.

²²⁴ Fitzmaurice, 'Second Report on the Law of Treaties' (n 201) 54, para 126.

²²⁵ Fitzmaurice, 'Second Report on the Law of Treaties' (n 201) 54.

²²⁶ Simma and Tams (n 199) 1369, para 48; Fitzmaurice and Elias (n 90) 152; Pauwelyn (n 10) 913.

²²⁷ Villiger (n 199) 747, 24 (footnote 78); Dörr and Schmalenbach (n 196) 1047, NaN-86; Simma and Tams (n 199) 1367-1368, NaN-46.

2.3.2 Peremptory norms

Another concept that represents a shift away from a strict bilateral conception of legal relations in the law of treaties is the concept of *jus cogens* or peremptory norms.²²⁸ Article 53 VCLT defines a peremptory norm as ‘a norm accepted and recognised by the international community of States as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’ This means that the power to modify a peremptory norm rests on ‘the international community of States’, and it can only be exercised when that community of states²²⁹ accepts and recognises the subsequent norm as a norm from which no derogation is permitted; states cannot do so bilaterally.

The VCLT does not address the potential implications of the peremptory nature of certain norms for the (non-)performance of obligations. Indeed, the notion of peremptory norms is not reflected in the regime of responses against treaty breaches discussed in subsection 2.3.1 above.²³⁰ Rather, articles 53 and 64 VCLT address the invalidity of treaties that conflict with peremptory norms of international law, providing, respectively, that ‘a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of international law’, and ‘[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.’

Nevertheless, the VCLT’S recognition of peremptory norms is relevant for present purposes. Peremptory norms reflect and safeguard what are often said to be the most important interests of the international community, and give rise to obligations that are owed to the international community as a whole.²³¹ Indeed, the mainstream position in legal literature is that there is at the very least some overlap between the notion of peremptory norms and *erga omnes* obligations that are owed to the international community as a whole.²³² As is further explained in section 2.4 below,²³³

²²⁸ Spinedi (n 106) 1101.

²²⁹ Simma considers that acceptance and recognition by ‘the international community of states’ does not mean that each and every state must accept and recognize a norm as a peremptory one, with the consequence that one state objecting frustrates the formation or modification of peremptory norms. Rather, the norm should be recognized as peremptory by ‘a large majority reflecting the “essential components” of this community.’ See Simma (n 3) 290–291.

²³⁰ Simma and Tams (n 199) 592.

²³¹ Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2008) 67–68.

²³² Erika de Wet, ‘Jus Cogens and Obligations Erga Omnes’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 555; Gaja (n 117) 55; Paolo Picone, ‘The Distinction between Jus Cogens and Obligations Erga Omnes’ in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 411; Simma (n 3) 300. Tams explains that there is a general consensus that there is some overlap between the concepts of jus cogens and obligations erga omnes, but ‘views expressed range from mere overlap, to partial identity (all peremptory norms imposing obligations *erga omnes*), or complete identity.’ See Tams, *Enforcing Obligations Erga Omnes in International Law* (n 57) 146. In its

obligations *erga omnes* give rise to multilateral legal relations in which the corresponding right is held by a plurality of right-holders. Hence, the inclusion of the notion of peremptory norms in the VCLT constitutes an acknowledgement of the fact that certain international obligations give rise to multilateral legal relations where the corresponding right is held by multiple right-holders.

2.3.3 The approach to multilateral legal relations in the law of treaties

The above confirms that the law of treaties has moved away from the traditional idea that an international treaty gives rise to bilateral legal relations only.²³⁴ The concepts of interdependent obligations, integral obligations and peremptory norms recognize that some treaty obligations cannot be reduced to bundles of bilateral legal relations between pairs of states or IOs. However, the approach to multilateral legal relations in the law of treaties is rather one-sided, since it focuses solely on the possibility of and potential problems raised by obligations that are owed to a plurality of right-holders.

The categories of interdependent and integral obligations developed by SR Fitzmaurice convey that certain obligations in multilateral treaties are owed to all states parties simultaneously, rather than to any state party in particular. Such obligations give rise to multilateral legal relations where the correlative right is held by multiple right-holders. In the above-mentioned example of the disarmament treaty, each of the parties to the treaty individually owes the obligation to disarm to all other parties together. This (interdependent) obligation is part of a multilateral legal relation where the corresponding right is held by a plurality of right-holders (see figure 2.4 on the next page).

commentaries to the ASR, the ILC notes that 'whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them.' International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 111, para 7.

²³³ See §2.4.2.ii below.

²³⁴ Simma (n 3) 336.

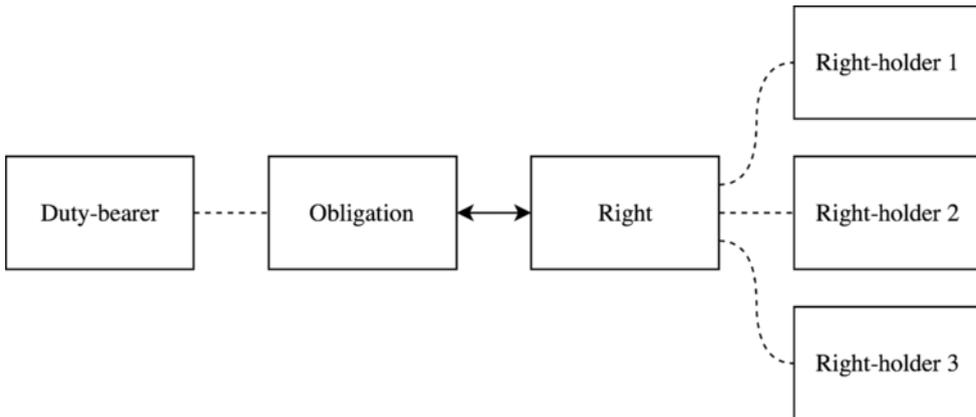


Figure 2.4: An interdependent or integral obligation

Influenced by SR Fitzmaurice's classification, article 60 VCLT (implicitly) recognizes that some obligations are owed to all other parties to the treaty simultaneously, and that this has implications for the (non-)performance of treaty obligations; more specifically, for the number of states and/or IOs that are affected by and entitled to respond to a material breach of a multilateral treaty by suspending that treaty.

Moreover, the VCLT's inclusion of the notion of peremptory norms (implicitly) affirms that certain international obligations give rise to multilateral legal relations where the corresponding right is held by multiple right-holders.

The legal concepts discussed in this section contribute to a better understanding of the (non-)performance of international obligations that are owed *to* multiple states and/or IOs by recognizing that multiple states and/or IOs can have a right or legal interest when it comes to the performance of these types of international obligations. They are useful tools in determining the consequences of non-performance (though limited to material breach of treaty). However, the approach to multilateral legal relations in the law of treaties does not consider the possibility of and potential problems raised by international obligations that are owed by a plurality of *duty-bearers*.

Granted, the law of treaties has a relatively narrow focus when it comes to the (non-)performance of international obligations, which might justify its one-sided approach to multilateral legal relations. The VCLT is concerned with the issue of (non-)performance of obligations only insofar as it has consequences for the continued validity or binding effect of a treaty.²³⁵ In the *Gabčíkovo -Nagymaros Project* case, the

²³⁵ Crawford and Olleson (n 189) 59.

ICJ considered that the 1969 VCLT 'confines itself to defining - in a limitative manner - the conditions in which a treaty may lawfully be denounced or suspended.'²³⁶

Here lies an important difference between the law of treaties and the law of international responsibility.²³⁷ The (non-)performance of international obligations is central to the law of international responsibility. Indeed, the law of international responsibility deals with the legal consequences that flow from the commission of an internationally wrongful act, which consists of the non-performance (or breach) of *any* international obligation by a state or IO, regardless of the gravity of the breach or the nature or source of the obligation.²³⁸

This suggests that the existence of and potential problems raised by multilateral legal relations with a plurality of duty-bearers might more properly fall within the ambit of the law of international responsibility, which is all about the (non-)performance of international obligations. However, the approach to multilateral legal relations in the law of treaties has arguably shaped the way of thinking about multilateral legal relations in the law of international responsibility. The next section finds that the approach to multilateral legal relations in the law of international responsibility similarly focuses only on international obligations that are owed *to* multiple states and/or IOs, which give rise to multilateral legal relations with a plurality of right-holders.

2.4 Multilateral legal relations and the law of international responsibility

This section examines the way in which the law of international responsibility has addressed the problems raised by the move beyond a bilateral view of legal relations. For a long time, the law of international responsibility was viewed primarily through a bilateral lens. International responsibility was deemed to arise when one state breached an obligation that it individually owed to one other state, and the ensuing responsibility relations would always arise solely between a single responsible state and a single injured state. But with the growing acceptance of a category of obligations whose breach can be qualified as a wrongful act that is 'so grave and so injurious, not only to one State but to all States, that a State committing them would be would be automatically held responsible to all States',²³⁹ the abandonment of a

²³⁶ *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 1997 ICJ Reports 7 (n 193).

²³⁷ Joe Verhoeven, 'The Law of Responsibility and the Law of Treaties' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010); Fitzmaurice and Elias (n 90) 134; Rosenne, *Breach of Treaty* (n 191) 24.

²³⁸ Article 12 ASR and article 10(1) ARIO. See also *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 1997 ICJ Reports 7 (n 193). Here, the ICJ considered that '[i]t is moreover well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved, whatever the nature of the obligation it has failed to respect' (emphasis added).

²³⁹ Spinedi (n 106) 1113.

strictly bilateral conception of legal relations came to be one of the main themes in the ILC's work on international responsibility.

This section starts with a brief discussion of the first step away from an exclusively bilateral view of legal relations in the ILC's work on international responsibility, which was taken with the introduction of the distinction between wrongful acts that qualify as international delicts and wrongful acts that qualify as international crimes (§2.4.1). Though the distinction between delicts and crimes has disappeared from the law of international responsibility, it has formed the basis for the idea that an international obligation can be owed to multiple states simultaneously, and that this may have legal consequences in the law of international responsibility.

Subsequently, this section examines legal concepts in the law of international responsibility that recognize and aim to address the problems raised by the move beyond a bilateral view of legal relations.

First, the distinction between bilateral, multilateral and *erga omnes (partes)* obligations (§2.4.2), has been incorporated into the ASR and ARIO for the purpose of determining which state(s) and/or IOs are entitled to respond to an internationally wrongful act (and the forms in which they can do so). This categorization of obligations recognizes that some international obligations are owed to a group of states and/or IOs. Such obligations give rise to multilateral legal relations where the corresponding right is held by multiple right-holders, with the main consequence that multiple states and/or IOs may be entitled to respond to an internationally wrongful act.

Second, the notion of serious breaches of obligations under peremptory norms (§2.4.3) is another recognition of multilateral legal relations in the law of international responsibility, considering that obligations that arise from peremptory norms are owed to the international community as a whole.

Finally, this section analyses the approach to multilateral legal relations in the law of international responsibility (§2.4.4). Arguably influenced by the approach to multilateral legal relations in the law of treaties, the law of international responsibility solely focuses on the possibility of and potential problems raised by a plurality of right-holders; not a plurality of duty-bearers.

2.4.1 Crimes and delicts: the first step away from an exclusively bilateral view of legal relations

The ILC's earliest codification efforts examined the rules on international responsibility from an exclusively bilateral perspective. This is not surprising if one

takes into consideration that the ILC's first Special Rapporteur García Amador focused solely on state responsibility as a result of injuries caused to the person or property of aliens on its territory.²⁴⁰ From this perspective it is not entirely unreasonable to construe (most of) the legal relations involved as purely bilateral.²⁴¹ García Amador's final 'draft on international responsibility' revolved around international obligations whose breach would result in injury to aliens, such as the denial of justice,²⁴² the deprivation of liberty²⁴³ and negligence in the performance of the duty of protection.²⁴⁴ These obligations are owed by each state individually to each alien in its territory individually, and each obligation is part of a bilateral right-duty relation.

But in 1963 (soon to be Special Rapporteur) Ago suggested to abandon this restricted approach to international responsibility. As Chairman of the Sub-Committee on State Responsibility he advocated for a focus not on the 'rules of substance laying down international rights and duties of states', such as the obligations of states with regard to the treatment of aliens, but rather on 'the aspects and consequences of the violation, by states, of the obligations deriving from these rules.'²⁴⁵ The subsequent report of the Sub-Committee on State Responsibility repeated Ago's proposal,²⁴⁶ and eventually the ILC determined that its work would focus on 'the definitions of the general rules governing the international responsibility of the State.'²⁴⁷ As a result of this decision, the breach of *any* international obligation could be a source of international responsibility;²⁴⁸ including an increasing number of obligations that do not necessarily give rise to bilateral legal relations.

²⁴⁰ García-Amador, 'Report on International Responsibility' (1956) A/CN.4/96; FV García-Amador, 'Sixth Report on International Responsibility' (1961) A/CN.4/134 and Add.1.

²⁴¹ Spinedi (n 106) 1108. However, it should not necessarily be excluded that multilateral legal relations may have a role to play even within this narrow perspective on international responsibility. Ago observed that the focus on the consequences of the breach of international obligations with respect to the treatment of foreigners may be 'a matter offering perhaps less opportunity than others of singling out exceptionally important obligations some breaches of which could have very serious consequences for the international community as a whole.' Nevertheless, 'here, too, internationally wrongful acts of that category can occur'. See Roberto Ago, 'Fifth Report on State Responsibility' (1976) A/CN.4/291 and Add.1 and 2 and Corr.1 30, para 94.

²⁴² Article 3 of García-Amador's 1961 Draft Articles, see García-Amador, 'Sixth Report on International Responsibility' (n 240) 46.

²⁴³ Article 4 of García-Amador's 1961 Draft Articles, see García-Amador, 'Sixth Report on International Responsibility' (n 240) 47.

²⁴⁴ Article 7 of García-Amador's 1961 Draft Articles, see García-Amador, 'Sixth Report on International Responsibility' (n 240) 47.

²⁴⁵ Roberto Ago, 'First Report on State Responsibility' (1969) A/CN.4/217 and Corr. 1 and Add. 1 127 para 6.

²⁴⁶ 'Report by Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility (Approved by the Sub-Committee)' (1963) A/CN.4/152 227-228, NaN-5.

²⁴⁷ 'Report of the International Law Commission on the Work of Its Fifteenth Session' (1963) A/CN.4/163 224, para 52.

²⁴⁸ Ago, 'First Report on State Responsibility' (n 245) 127 para 6. He considers responsibility as 'the situation resulting from a State's non-fulfilment of an international legal obligation, regardless of the nature of that obligation and the matter to which it relates.'

Ago's suggestion has provided the basis for what is known today as the distinction between primary and secondary rules. Primary rules 'define the content of international obligations, the breach of which gives rise to responsibility',²⁴⁹ but are not the focus of the law of international responsibility. Rather, the law of international responsibility focuses on secondary rules, which are concerned with 'the general conditions under international law for the State [or IO] to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom'.²⁵⁰

The ILC's adoption of the distinction between primary and secondary rules does not mean that the final ASR and ARIO contain no references to categories of obligations. It *does* mean that the ILC has included only those classifications or typologies of international obligations that it believes would have 'direct consequences within the framework of the secondary rules of States responsibility'.²⁵¹

As Special Rapporteur, Ago argued that it might still be relevant to distinguish between 'various kinds of obligations placed on States in international law'.²⁵² He was of the opinion that different kinds of obligations might give rise to different kinds of legal consequences in case of a breach.²⁵³ First, he distinguished between obligations whose breach qualifies as a delict and obligations whose breach qualifies as a crime.²⁵⁴ Second, he distinguished between obligations of result and obligations of conduct.²⁵⁵ However, considering that the latter distinction has had no role to play in the move beyond a bilateral view of legal relations it is not discussed in the present chapter.

In his 1976 report, Ago suggested to distinguish between the breach of 'ordinary' obligations – which he qualified as an 'international delict' – and the breach of obligations whose respect is of fundamental importance to the international community as a whole – which he qualified as an 'international crime'.²⁵⁶ 'Ordinary' obligations whose breach result in an international delict give rise to bilateral right-

²⁴⁹ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 31.

²⁵⁰ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 31.

²⁵¹ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 54.

²⁵² Ago, 'Second Report on State Responsibility' (n 162) 178, para 7.

²⁵³ Ago, 'Second Report on State Responsibility' (n 162) 178, para 7.

²⁵⁴ Ago, 'Fifth Report on State Responsibility' (n 241).

²⁵⁵ Roberto Ago, 'Sixth Report on State Responsibility' (1977) A/CN.4/302 and Add. 1, 2 & 3.

²⁵⁶ Ago, 'Fifth Report on State Responsibility' (n 241) 26, para 80.

duty relations,²⁵⁷ whereas obligations whose respect is of fundamental importance to the international community as a whole cannot be reduced to bilateral legal relations.

Ago argued that this distinction is important because the breach of each type of obligation corresponds to a different regime of international responsibility,²⁵⁸ and thus gives rise to different legal consequences. This view was gaining an increasing amount of support in legal scholarship at the time, particularly after the VCLT's express acknowledgement of peremptory norms²⁵⁹ and the ICJ's notorious reference to the essential distinction between 'the obligations of a State towards the international community as a whole [obligations *erga omnes*], and those arising vis-à-vis another State in the field of diplomatic protection' in the *Barcelona Traction* case.²⁶⁰

In 1976 the ILC followed Ago's suggestion and adopted article 19 in the first part of its Draft Articles on State Responsibility,²⁶¹ which distinguishes between international crimes and delicts as different kinds of wrongful acts that result from the breach of different kinds of obligations.

It was Ago's successor, Special Rapporteur Riphagen, who thoroughly discussed the different legal consequences that may arise as a result of different kinds of internationally wrongful acts. Riphagen contended that the distinction between crimes and delicts can have consequences for 1) the state or states entitled to respond to an internationally wrongful act by obtaining reparation or taking countermeasures²⁶² and 2) new international obligations for third states.²⁶³ Riphagen's suggestions eventually found their way into the 1996 Draft Articles as adopted on first reading.²⁶⁴

²⁵⁷ See e.g. Sicilianos, 'The Relationship Between Reprisals and Denunciation or Suspension of a Treaty' (n 143) 346. 'Delicts create, as a rule, bilateral relations'.

²⁵⁸ Ago, 'Fifth Report on State Responsibility' (n 241) 26, para 80. In para 90 Ago argues that the ICJ has implicitly recognized the need for the distinction between crimes and delicts in the *Barcelona Traction* case.

²⁵⁹ See §2.3.2 above.

²⁶⁰ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) Judgment, 1970 ICJ reports* 32.

²⁶¹ International Law Commission, 'Report on the Work of Its Twenty-Eight Session' (1976) A/31/10 95–96.

²⁶² See Riphagen's proposed article 5 of part 2 of the draft articles, Riphagen, Willem (n 182) 5–6. In his commentaries to this provision Riphagen considered that the determination of the state or states entitled to respond to an internationally wrongful act 'cannot be made independently of the origin and content of the obligation breached (the "primary rule"); indeed, that obligation is an obligation towards another State, or States, or towards the international community of States as a whole, i.e. towards all other States {*erga omnes*}'. See Riphagen, Willem (n 182) 6.

²⁶³ See Riphagen's proposed article 14 of part 2 of the draft articles, Riphagen, Willem (n 182) 13.

²⁶⁴ International Law Commission, 'Draft Articles of Parts One, Two and Three Provisionally Adopted by the Commission on First Reading' (n 164). Article 40 of the 1996 Draft Articles focuses on the identification of injured state(s) and recognizes that, in certain circumstances, an international obligation is owed to

The notion of an international crime did not make it into the final 2001 Articles on State Responsibility, as it was removed on second reading. Nevertheless, the ILC's discussion on the distinction between international crimes and international delicts constitutes the first major step away from an exclusively bilateral view of legal relations in the ILC's state responsibility project.²⁶⁵ In considering the notion of an international crime, the ILC acknowledged the existence of international obligations that are owed to multiple states simultaneously, which thus give rise to multilateral legal relations.

As is illustrated throughout the remainder of this section, the removal of the notion of an international crime from the state responsibility project did not prompt the ILC to abandon the idea that an international obligation can be owed to multiple states simultaneously, and that this may have legal consequences in the law of international responsibility. This idea is still reflected in the final ASR and ARIO. First, the ASR and ARIO rely on the distinction between bilateral, multilateral and *erga omnes (partes)* obligations for the purpose of determining which state(s) and/or IO's are entitled to respond to a wrongful act (§2.4.2). Second, the ASR and ARIO single out serious breaches of obligations under peremptory norms, which give rise to new international obligations for third states (§2.4.3).

2.4.2 Bilateral, multilateral and *erga omnes (partes)* obligations

The distinction between bilateral, multilateral and *erga omnes (partes)* obligations was introduced into the ILC's work on international responsibility by Special Rapporteur Crawford, the ILC's final Special Rapporteur on state responsibility. Crawford submitted that the provisions on state crimes in the 1996 Draft Articles 'detracted from the more important task of defining more systematically the consequences of different categories of obligations (...) that [are] generally recognized, including obligations *erga omnes*.'²⁶⁶ In order to systematically determine which state or states are entitled to respond to an internationally wrongful act, he distinguished between 'bilateral obligations', which are owed individually to another state, and 'multilateral obligations', which are owed to a group of states or even to the

multiple states, with the consequence that multiple states are injured and are entitled to respond to a wrongful act by obtaining reparation or by taking countermeasures. Article 40(3) provides that if an internationally wrongful act constitutes an international crime all other states are injured states. Moreover, article 53 of the 1996 Draft Articles provides that an international crime, unlike an international delict, gives rise to new international obligations for third states, such as the obligation 'not to recognize as lawful the situation created by the crime'

²⁶⁵ Crawford, 'Multilateral Rights and Obligations in International Law' (n 137) 455. Crawford states that 'in considering State crimes, the very assumption of bilateralism is challenged.'

²⁶⁶ 'Report of the International Law Commission on the Work of Its Fiftieth Session' (1998) A/53/10 66, para 251.

international community as a whole.²⁶⁷ This distinction draws from SR Fitzmaurice's classification of multilateral treaty obligations and article 60 VCLT.²⁶⁸

This subsection discusses the categories of bilateral obligations (i) and multilateral obligations (ii), of which obligations *erga omnes (partes)* are considered to be a subcategory. It shows that both the ASR and ARIO have explicitly incorporated this classification of obligations²⁶⁹ in order to determine which state(s) and/or IO(s) are entitled to respond to an internationally wrongful act (and the forms in which they can do so). By relying on this classification of obligations, the ASR and ARIO affirm that certain international obligations give rise to multilateral legal relations, and that this has consequences in the law of international responsibility.

i. Bilateral obligations

Bilateral obligations are 'obligations to which there are only two parties',²⁷⁰ and are owed individually to a particular state (or IO).²⁷¹ Crawford underscored that the term 'individually' should not obscure the possibility that state A may at the same time owe an obligation with similar normative content to one or many other states.²⁷² For example, a receiving state may owe 'identical bilateral obligations' to a large number of sending states,²⁷³ but it owes these obligations to each sending state individually. The mere fact that state A owes an obligation with similar normative content to state B and state C, or even to every other state, does not make that obligation (or the legal relations involved) multilateral.²⁷⁴

Bilateral obligations give rise to bilateral legal relations between one duty-bearer and one right-holder. Indeed, the obligation to protect the diplomatic premises of a mission give rise to bundles of bilateral legal relations between the states parties to the Vienna Convention on the Diplomatic Relations,²⁷⁵ which each represent a performance towards one other state individually. State A's obligation to protect the

²⁶⁷ See Crawford, 'Third Report on State Responsibility' (n 143) 8, 44; Crawford, 'Multilateral Rights and Obligations in International Law' (n 137) 344.

²⁶⁸ Crawford, 'Third Report on State Responsibility' (n 143) 40, 47, 49–50; Fitzmaurice and Elias (n 90) 147; Dupuy (n 120) 1059.

²⁶⁹ Articles 42 and 48 ASR and 43 and 49 ARIO explicitly refer to obligations that are 'owed to another state [or IO] individually' and obligations that are 'owed to a group of states [(or IOs)]' or 'owed to the international community as a whole'. There are no explicit references to the terms bilateral obligations or multilateral obligations in the provisions of the ASR and ARIO. However, the commentaries to the ASR do contain several references to bilateral and multilateral obligations, see International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 35, 55, 69, 118.

²⁷⁰ Crawford, 'Third Report on State Responsibility' (n 143) 44, para 99.

²⁷¹ Crawford, 'Third Report on State Responsibility' (n 143) 44, para 103.

²⁷² Crawford, 'Third Report on State Responsibility' (n 143) 44, para 103.

²⁷³ Crawford, 'Third Report on State Responsibility' (n 143) 44, para 103.

²⁷⁴ Crawford, 'Multilateral Rights and Obligations in International Law' (n 137) 343–344.

²⁷⁵ Crawford, 'Third Report on State Responsibility' (n 143) 44, para 100.

diplomatic premises of a mission that has established a diplomatic mission on its territory is generally performed or breached towards one sending state individually. If state A takes measures to protect the diplomatic premises of state B it fulfils its obligation towards state B, and if state A fails to take measures to protect the diplomatic premises of state C it infringes upon the corresponding right of state C. Bilateral obligations resemble the category of reciprocal obligations identified by SR Fitzmaurice.²⁷⁶

Crawford considered that in case of a breach of a bilateral obligation, only the particular state to which the obligation was owed is injured by its breach. As an injured state, that state is entitled to respond to the internationally wrongful act by invoking responsibility or by taking countermeasures.²⁷⁷ This is reflected in articles 42 ASR and 43 ARIO, which address the entitlement to invoke responsibility by an injured state or IO. The definition of 'injured state' in these provisions has been closely modelled after article 60 VCLT.²⁷⁸ Articles 42(a) ASR and 43(a) ARIO stipulate that a state or IO is qualified as an injured state or IO if the obligation breached is owed to that state or IO individually. Thus, the individual right-holder of a bilateral obligation is always injured by the breach of a bilateral obligation.²⁷⁹ As an injured state or IO it is entitled to 'resort to all means of redress contemplated by the articles',²⁸⁰ which means that it can invoke responsibility and take countermeasures.²⁸¹

ii. Multilateral and erga omnes (partes) obligations

Multilateral obligations are broadly defined as obligations that are 'owed not individually to a particular State, but to a collective, a group of States, or even to the international community as a whole.'²⁸² A multilateral obligation cannot be reduced to bundles of bilateral legal relations. Rather, it gives rise to multilateral legal relations, where the right corresponding to the obligation is held by multiple right-holders. It follows that such an obligation cannot be performed or breached in

²⁷⁶ See §2.3.1.i above.

²⁷⁷ Crawford, 'Third Report on State Responsibility' (n 143) 45, para 102.

²⁷⁸ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 117, para 4.

²⁷⁹ The commentaries to the ASR clarify that a state 'must have an individual right to the performance of an obligation', International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 117, para 5.

²⁸⁰ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 117, para 3.

²⁸¹ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 117, para 3.

²⁸² Crawford, 'Third Report on State Responsibility' (n 143) 46. For a further discussion of multilateral obligations see e.g. Pauwelyn (n 10); Dupuy (n 120); Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (n 143); Dominicé (n 177).

relation to only one right-holder²⁸³ but only in relation to all right-holders simultaneously. For this reason, multilateral obligations have been described as legally 'indivisible'.²⁸⁴

An example of a multilateral obligation is the obligation of states parties not to emit excess CFCs into the atmosphere.²⁸⁵ Each state party owes this obligation to all other states parties simultaneously (rather than to any state party in particular), which are all right-holders of the right corresponding to the obligation not to emit excess CFCs into the atmosphere. When this obligation is fulfilled by a state party it is fulfilled towards all right-holders simultaneously, and when it is breached it this infringes upon the corresponding right of all right-holders.²⁸⁶

Crawford considered that in case of a breach of a multilateral obligation, all states to which the obligation is owed are entitled to respond to that breach. However, he argued that the forms in which those states are entitled to respond should be differentiated.²⁸⁷ For this purpose, Crawford distinguished between some further types or subcategories of multilateral obligations: obligations *erga omnes*, obligations *erga omnes partes* and integral (or, using more accurate terminology, interdependent) obligations.²⁸⁸

These subcategories of multilateral obligations are reflected in articles 42 and 48 ASR and articles 43 and 49 ARIO. Depending on the type of multilateral obligation breached,²⁸⁹ the ASR and ARIO provide that each of the states and/or IOs to which a multilateral obligation is owed is entitled to respond either as an injured state or IO, or as a state or IO *other than* an injured state or IO.²⁹⁰ All states or IOs other than an

²⁸³ Tams, *Enforcing Obligations Erga Omnes in International Law* (n 144) 49–50.

²⁸⁴ The indivisible structure of performance of multilateral obligations is further discussed in Chapter 4, §4.1.1.

²⁸⁵ Crawford, 'Third Report on State Responsibility' (n 143) 48, para 108.

²⁸⁶ This does not automatically entail that all right-holders are affected in the same way or suffer the same kind of injury. One or more right-holders might suffer material injury whereas others suffer 'merely' legal injury. See Stern, 'A Plea For "Reconstruction" of International Responsibility Based on the Notion of Legal Injury' (n 76).

²⁸⁷ Crawford, 'Third Report on State Responsibility' (n 143) 49, para 110. 'Just because there is a common group of states legally entitled to invoke responsibility, the forms in which individual states can do so may have to be differentiated.'

²⁸⁸ Crawford, 'Third Report on State Responsibility' (n 143) 46.

²⁸⁹ However, it should be noted that if one of the states and/or IOs to which the multilateral obligation is owed is 'specially affected' in the sense of article 42(b)(i) ASR and article 43(b)(i) ARIO, that state or IO is entitled to respond as an injured state or IO, regardless of the type of multilateral obligation.

²⁹⁰ For a convincing critique of the notion of 'a state other than an injured state' see Stern, 'A Plea For "Reconstruction" of International Responsibility Based on the Notion of Legal Injury' (n 76) 96. Stern states that '[i]f a State is the beneficiary of an obligation that has been breached, it is hard to see how one could consider that it is not an injured State.' At 102 she argues for a reunification of the concept of injured state by including states that have suffered legal injury, and distinguishing between different types of injury: 'there would be one concept, that of injured State, which may suffer different forms of injury (material, moral or legal).'

injured state or IO are entitled to respond to an internationally wrongful act, but unlike an injured state or IO they are not entitled to resort to all means of redress. They may only claim performance of the obligation of reparation 'in the interest of the injured State or of the beneficiaries of the obligation breached',²⁹¹ and the ILC has deliberately left the question whether such states or IOs are entitled to take countermeasures unresolved.²⁹²

Articles 48(1)(b) ASR and 49(3) ARIIO provide that if 'the obligation breached is owed to the international community as a whole', any state or IO is entitled to invoke responsibility as a state or IO *other than* an injured state or IO. This covers the first subcategory of multilateral obligations identified by Crawford: obligations *erga omnes*²⁹³, which are defined as obligations that are owed to the international community as a whole.²⁹⁴ Obligations *erga omnes* have been the subject of extensive academic debate ever since the ICJ's *obiter dictum* in the 1970 *Barcelona Traction* case.²⁹⁵ Some examples include the obligation not to commit genocide, the obligation to refrain from aggression²⁹⁶ and the obligation of a sponsoring State to take measures to preserve the environment of the high seas and the Area.²⁹⁷

Articles 48(1)(a) ASR and 49(1) ARIIO provide that if 'the obligation breached is owed to a group of States or international organizations (...) and is established for the protection of a collective interest of the group', any of the states or IOs to which the obligation is owed is entitled to invoke responsibility as a state or IO other than an injured state or IO. This covers the second subcategory of multilateral obligations identified by Crawford: obligations *erga omnes partes*. Such obligations are 'owed to all the parties to a particular regime',²⁹⁸ and all parties are recognized as having a common interest in their performance.²⁹⁹ Examples include obligations relating to biodiversity, global warming and obligations arising under a regional human rights

²⁹¹ Article 48(2)(b) ASR.

²⁹² Article 54 ASR and 57 ARIIO simply state that the articles 'do not prejudice' the right of any state or IO other than an injured state or IO to take countermeasures. In its commentaries to the ASR the ILC notes that 'such cases are controversial and the practice is embryonic.' International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 129, para 8. For a different view see Tams, *Enforcing Obligations Erga Omnes in International Law* (n 144) 311.

²⁹³ Some authors have linked the concept of *erga omnes* obligations to Fitzmaurice's category of integral obligations discussed in §2.3.1.iii above, see e.g. Pauwelyn (n 10) 924; Dupuy (n 120) 1072. However, this has been contested by others, see e.g. Fitzmaurice and Elias (n 90) 163.

²⁹⁴ Crawford, 'Third Report on State Responsibility' (n 143) 46, para 106.

²⁹⁵ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) Judgment*, 1970 ICJ reports 3 (n 260).

²⁹⁶ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) Judgment*, 1970 ICJ reports 3 (n 260).

²⁹⁷ 'Responsibilities and Obligations of States with Respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, P. 10' para 180.

²⁹⁸ Crawford, 'Third Report on State Responsibility' (n 143) 47, 106. See also page 41 para 92.

²⁹⁹ Crawford, 'Third Report on State Responsibility' (n 143) 41, para 92.

treaty.³⁰⁰ In *Belgium v. Senegal*, the ICJ considered that the obligation of each state party to the Convention against Torture to prosecute or extradite suspects of torture present on its territory is an obligation *erga omnes partes*.³⁰¹

Finally, articles 42(b)(ii) ASR and 43(b)(ii) ARIO provide that if an obligation is owed to a group of states or IOs and the breach of the obligation is 'of such a character as radically to change the position of all other States [or IOs] to which the obligation is owed with respect to the further performance of the obligation', all states and/or IOs to which the obligation is owed are entitled to respond as an injured state. For example, if a state party breaches article 4 of the Antarctic treaty by claiming sovereignty over an unclaimed area of Antarctica, all other states parties are injured states.³⁰² In its commentaries to the ASR the ILC notes this provision resembles article 60(2)(c) VCLT.³⁰³ This corresponds to the third type of multilateral obligations identified by Crawford, which he referred to as 'integral obligations'.³⁰⁴ While Crawford rightly attributed the origin of this notion to Sir Gerald Fitzmaurice,³⁰⁵ the terminology used is somewhat unfortunate as this type of obligation corresponds to what in Fitzmaurice's classification would be an interdependent obligation.³⁰⁶

By distinguishing between different types of obligations for the purpose of determining which states and/or IOs are entitled to respond to a wrongful act (and the forms in which they may do so), the ASR and ARIO affirm that certain international obligations give rise to multilateral legal relations, and that this has distinct consequences in the law of international responsibility.

2.4.3 Serious breaches of obligations under peremptory norms

Both the ASR and ARIO single out international responsibility that is entailed by the serious breach of an obligation arising under a peremptory norm of international law. The ILC's inclusion of the notion of serious breaches of obligations under peremptory norms in the ASR and ARIO is yet another expression of the move beyond a bilateral

³⁰⁰ Crawford, 'Third Report on State Responsibility' (n 143) 47, para 106(b).

³⁰¹ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment, 2012 ICJ Reports 422 449, para 68.

³⁰² International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 119, para 14.

³⁰³ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 119, NaN-14.

³⁰⁴ Crawford defined integral obligations as obligations whose breach 'necessarily affects the enjoyment of the rights or the performance of obligations of the other State parties' to a treaty, see Crawford, 'Third Report on State Responsibility' (n 143) 40. Moreover, he qualified 'integral obligations' as a sub-category of obligations *erga omnes partes*, Crawford, 'Third Report on State Responsibility' (n 143) 47, fn 195.

³⁰⁵ Crawford, 'Third Report on State Responsibility' (n 143) 40, fn. 175.

³⁰⁶ See §2.3.1.ii above. The commentaries to the ASR seem to use both terms interchangeably. Fitzmaurice and Elias observe that Crawford appears to assimilate "interdependent" and "integral" obligations, though the term "interdependent obligations" might be more appropriate. See Fitzmaurice and Elias (n 90) 162.

view of legal relations in the law of international responsibility. As has been discussed in §2.3.2 above, obligations arising from peremptory norms are 'owed to the international community as a whole' and can be qualified as obligations *erga omnes*,³⁰⁷ which give rise to multilateral legal relations where the corresponding right is held by a plurality of right-holders.

Articles 41 ASR and 42 ARIO provide that serious breaches of obligations under peremptory norms give rise to additional legal consequences that 'go beyond those ordinarily applying to internationally wrongful acts.'³⁰⁸ These provisions replace the aggravated regime of responsibility resulting from international crimes in the 1996 Draft Articles as adopted on first reading.³⁰⁹

Interestingly, the additional consequences do not arise for the state(s) or IO(s) responsible for the serious breach.³¹⁰ Rather, a serious breach of an obligation arising from a peremptory norm gives rise to new obligations for other states and IOs. States and IOs are obliged to 'cooperate to bring to an end through lawful means' any serious breach;³¹¹ they must abstain from recognising as lawful a situation created by a serious breach;³¹² and from rendering aid or assistance in maintaining that unlawful situation.³¹³

2.4.4 The approach to multilateral legal relations in the law of international responsibility

This section has demonstrated that the law of international responsibility is no longer viewed through an exclusively bilateral lens. The concepts of multilateral obligations, obligations *erga omnes (partes)* and serious breaches of obligations under peremptory norms have all been incorporated into the ASR and ARIO. These concepts recognize that certain international obligations are owed to a group of

³⁰⁷ See § 2.3.2 above.

³⁰⁸ Gaja (n 117) 124.

³⁰⁹ Eric Wyler, 'From "State Crime" to Responsibility for "Serious Breaches of Obligations under Peremptory Norms of General International Law"' (2002) 13 EJIL 1147.

³¹⁰ Christian Tams, 'Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State?' (2002) 13 EJIL 1161.

³¹¹ Article 41(1) ASR and article 42(1) ARIO. The ILC acknowledges that 'it may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law.' International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 16) 114, para 3. For a discussion of this obligation see Nina Jørgensen, 'The Obligation of Cooperation' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 695.

³¹² Article 41(2) ASR and article 42(2) ARIO. For a discussion of this obligation see Martin Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010).

³¹³ Article 41(2) ASR and article 42(2) ARIO. For a discussion of this obligation see Nina Jørgensen, 'The Obligation of Non-Assistance to the Responsible State' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010).

states and/or IOs or to the international community as a whole, and cannot be reduced to bundles of bilateral legal relations between pairs of states (or IOs). Consequently, it is no longer assumed that responsibility relations that arise in case of a breach necessarily arise between a single responsible state or IO and a single injured state or IO.

However, much like the approach to multilateral legal relations in the law of treaties, the law of international responsibility approaches multilateral legal relations solely from the perspective of the *right-holders* in a legal relation. The category of multilateral obligations, including its sub-categories of *erga omnes* obligations, *erga omnes partes* obligations and interdependent obligations, convey that certain international obligations are owed to a plurality of states and/or IOs. Such obligations give rise to multilateral legal relations where the correlative right is held by multiple right-holders. For example, Senegal owes the *erga omnes partes* obligation to prosecute or extradite Mr. Habré - a suspect of torture present on Senegalese territory - to all other states parties to the Convention against Torture.³¹⁴ This obligation is part of a multilateral legal relation where the corresponding right is held by multiple right-holders:

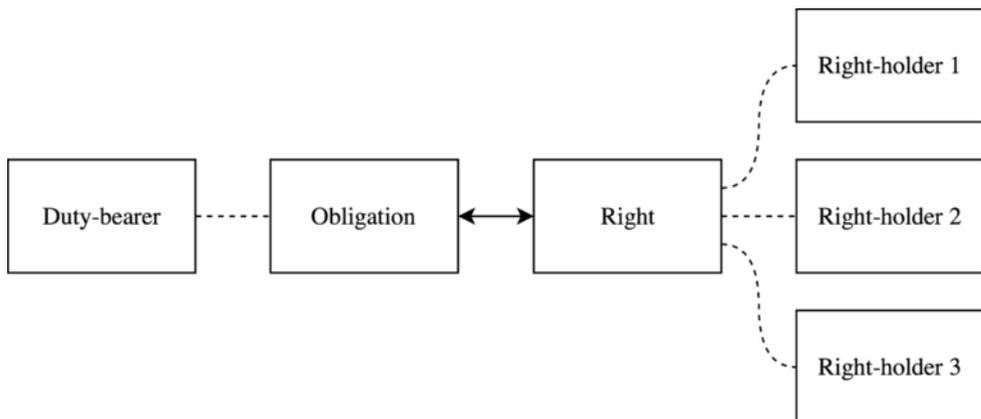


Figure 2.5: A multilateral obligation

Both the ASR and ARIO recognize that when an international obligation is owed to multiple states and/or IOs, all states and/or IOs that hold the corresponding right are entitled to respond to a breach of that obligation. The forms in which they may do so depends on whether the multilateral obligation in question is an obligation *erga omnes*, an obligation *erga omnes partes* or an interdependent obligation.

³¹⁴ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 2012 ICJ Reports 422 (n 301).

Moreover, the inclusion of the notion of a serious breach of an obligation arising under a peremptory norm in the ASR and ARIO recognizes that some obligations are owed to the international community as a whole, and that a serious breach of such obligations gives rise to additional legal consequences for third states.

All in all, the move beyond a bilateral view of legal relations has been a significant theme in the codification of the law of international responsibility, which is due to the fact that this development has implications for the (non-)performance of international obligations. Both the ASR and ARIO affirm that certain international obligations give rise to multilateral legal relations, and that this has distinct consequences in the law of international responsibility. Nevertheless, the approach to multilateral legal relations in the law of international responsibility has remained one-sided with its exclusive focus on the possibility of and potential implications of a plurality of right-holders, and simultaneous failure to consider the possibility of and potential implications of a plurality of duty-bearers.

Particularly in the field of international responsibility one may wonder whether this approach is satisfactory. If different legal consequences can arise depending on whether the obligation breached is owed to one right-holder or to multiple right-holder(s), should not the usefulness be considered of a distinction between situations where an obligation breached is owed *by* one or by multiple *duty-bearer(s)*?

2.5 Conclusions

This chapter has explored the way in which the international law of obligations has addressed the problems raised by the move beyond a bilateral view of legal relations. It has demonstrated that the international law of obligations has engaged with the idea that legal relations do not necessarily involve only one right-holder and one duty-bearer, and recognizes that this may have consequences for treaty and responsibility relations. However, both the law of treaties and the law of international responsibility approach multilateral legal relations solely from the perspective of the *right-holders* in legal relations. Categories of obligations that have developed in this context serve primarily to determine which state(s) or IO(s) are entitled to respond to an internationally wrongful act or a material breach of treaty in the case of non-performance.

This indicates that the international law of obligations has neglected to address the possibility of and potential consequences of a plurality of *duty-bearers*. This is quite remarkable, considering that in practice there are various situations in which multiple states and/or IOs are bound to an international obligation in the context of

cooperative activities and the pursuit of common goals.³¹⁵ Such situations can raise questions regarding the (non-)performance of international obligations by the bearers of those obligations: when is the obligation breached or fulfilled by which duty-bearer, and who can be held internationally responsible for what in case of a breach? These questions are particularly pertinent in the context of the law of international responsibility, which is concerned primarily with the (non-)performance of international obligations.

The present study's conceptualization of shared obligations aims to fill this gap and contribute to a better understanding of the (non-)performance of international obligations that are binding upon multiple states and/or IOs in the context of cooperative activities and the pursuance of common goals. It focuses on situations with a plurality of duty-bearers, not on situations with a plurality of right-holders.

Nonetheless, the categories of multilateral and *erga omnes (partes)* obligations discussed in this chapter serve as an important source of inspiration and analogy in the conceptualization of shared obligations. It has been already been noted that at its inception, the current project defined shared obligations as the exact mirror image of multilateral and *erga omnes (partes)* obligations. Because a multilateral or *erga omnes (partes)* obligation gives rise to a multilateral legal relation where the right is held by a plurality of right-holders, the concept of shared obligations was considered to cover only those obligations that give rise to a multilateral legal relation in which the obligation is held by multiple duty-bearers. At present, such obligations are defined as indivisible shared obligations. Now that the concept of shared obligations has been broadened to include both indivisible and divisible shared obligations, the categories of multilateral and *erga omnes (partes)* obligations serve primarily as a source of analogy for the category of indivisible shared obligations.

The next two chapters further develop the concept of shared obligations, thereby approaching the topic of plurality of parties from the perspective of the *duty-bearers* in legal relations. First, chapter 3 sets out the overarching concept of shared obligations, and does not focus on the distinction between divisible and indivisible shared obligations. This is the focus of chapter 4, which draws from the categories of multilateral and *erga omnes (partes)* obligations in its discussion of the distinction between two types of shared obligations: divisible and indivisible shared obligations.

³¹⁵ See the introduction to Chapter 1.