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The Law of Responsibility: A Response to Fragmentation?

Kristen E. Boon*

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I. INTRODUCTION

In its 2006 report on Fragmentation, the International Law Commission (“ILC”) noted that “[i]t is a well-known paradox of globalization that while it has led to increasing uniformization of social life around the world, it has also led to its increasing fragmentation—that is, to the emergence of specialized and relatively autonomous spheres of social action and structure.”¹ The ILC’s study has coincided with serious, multifaceted reflection on the state of the international system from many different academic quarters.² On the one hand, the proliferation of international institutions, courts, and tribunals—and the inconsistent doctrines they sometimes espouse—reflects the deepening complexity and relevance of the international legal system.³ On the other hand, the expansion of international bodies with law-making capacity has led to the production of conflicting norms.⁴ As Neil Walker writes, this, in turn, has prompted a desire for greater coherence:

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1. *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Rep. of the Study Grp. of the Int’l Law Comm’n., 58th sess., May 1-June 9, July 3-Aug. 11, 2006, ¶ 7, U.N. Doc. A/CN.4/L.682 [hereinafter *Fragmentation Report*].

2. See, e.g., Jeffrey L. Dunoff & Joel P. Trachtman, *A Functional Approach to International Constitutionalization*, in *RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE: A FUNCTIONAL APPROACH TO GLOBAL CONSTITUTIONALISM* 6 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009) (stating that the values and interests advanced by one regime may not correspond with those of another). See generally Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT’L L. 999 (Michelle Everson trans. 2004) (arguing that the creation of self-contained regimes and fragmentation is inextricably the result of the world’s pluralism and that functional networking, not implementation of an authoritative hierarchy, remains the norm of international law); see also generally Tullio Treves, *Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice*, 31 N.Y.U. J. INT’L L. & POL. 809 (1999).

3. *Fragmentation Report*, supra note 1, ¶ 8.

4. Dunoff & Trachtman, supra note 2, at 6.

[T]here [are] more areas of overlap and marginal contestation on the surface of legal relations, but . . . no single deep metaprinciple of authority—such as state sovereignty, with its structurally simple matrix of horizontal and vertical authority relations—to provide a dominant overall grid for the conduct of these marginal relations.⁵

The very notion of fragmentation, however, assumes that a pre-existing unity has been lost.⁶ In the context of human rights, this assumption is questionable for two reasons. First, despite the existence of influential and widely respected human rights treaties like the International Covenant on Civil and Political Rights (“ICCPR”), the European Convention on Human Rights, and the Inter-American Convention on Human Rights, there has never been a high degree of consensus about the core content of many international human rights norms.⁷ To be sure, these foundational agreements boast high ratification rates,⁸ and many provisions of the non-binding Universal Declaration of Human Rights are now considered to be customary international law.⁹ Nonetheless, serious disagreements remain with regard to the scope of some core norms, including religious rights, minority rights, the legality of the death penalty, and rights of expression.¹⁰ Economic and social rights are the subject of particular controversy because of their budgetary implications and the more expansive role they accord to governments.¹¹

5. Neil Walker, *Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders*, 6 INT’L J. CONST. L. 373, 386 (2008).

6. Vera Gowlland-Debbas, *Issues Arising from the Interplay Between Different Areas of International Law*, 63 CURRENT LEGAL PROBS. 597, 598-600 (2010).

7. ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 14, 33, 70, 85-86, 107 (2006) (arguing that the rights conferred by international treaties do not clearly delineate the substantive rights of the parties and general norms of international human rights); Malcolm D. Evans, *State Responsibility and the European Convention on Human Rights: Role and Realm*, in ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 139, 140-42 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004); François Gianviti, *Economic, Social, and Cultural Human Rights and the International Monetary Fund*, in NON-STATE ACTORS AND HUMAN RIGHTS 113, 120-22 (Philip Alston ed., 2005); August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, in NON-STATE ACTORS AND HUMAN RIGHTS 37, 39, 42, 72-73 (Philip Alston ed., 2005) (arguing that as the framework through which to evaluate international human rights is changing, the accepted norms which form part of the field are similarly changing); Bill Bowring, *Fragmentation, Lex Specialis and the Tensions in the Jurisprudence of the European Court of Human Rights*, 14 J. CONFLICT & SECURITY L. 485, 487 (2010) (arguing that the presupposition of unity within international law does not exist and any alleged fragmentation is in fact a structural move to meet the specialized and diverse needs of the field).

8. See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1940-41, 1992-93, 1999-2000 (2002) (arguing that treaty ratification rates do not guarantee compliance).

9. CLAPHAM, *supra* note 7, at 86; Gianviti, *supra* note 7, at 121; Reinisch, *supra* note 7, at 39; OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 337-38 (1991).

10. See HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 166, 192 (3rd ed. 1996).

11. See generally Kristen Boon, *The Role of Courts in Enforcing Economic and Social Rights*, 39 GEO. WASH. INT’L L. REV. 449, 452 (2007) (discussing the role of courts as agents of social transformation in new democracies and, by enforcing economic and social rights, as voices for the poor).

Even countries with deep human rights cultures can differ greatly in the scope of their guarantees.¹² For example, both Canada and the United States have strong and entrenched human rights protections, and yet there are profound differences between the approach to human rights north and south of the border. While most Canadians believe there is a right to health care and pensions, public debates in the United States demonstrate that there is far less support for such protections there.¹³ Similarly, group rights, such as the protection of French language rights in Quebec and Aboriginal rights to land, are widely practiced and respected in Canada.¹⁴ In fact, these group rights are so developed that Canada asked the Supreme Court to articulate standards under which secession of Quebec would be legal and legitimate.¹⁵ Group rights have never had this traction in the United States.

The second reason that fragmentation is inherent in the human rights context is that human rights is now a legitimate topic of inquiry in multiple fora. For example, human rights considerations are now regularly raised in the context of investment disputes,¹⁶ environmental challenges, and trade law cases.¹⁷ The linkages forged between human rights and other substantive areas mean that tribunals in different branches of the international judicial architecture may be faced with human rights claims or considerations.¹⁸ Although sometimes these conflicts can be addressed through interpretation or the rules of *lex specialis*,¹⁹ courts may render conflicting decisions or exclude applicable law. For example,

12. The ILC's study of the Fragmentation of International Law focused on conflicts between different regulations, courts, and specialized bodies of law, as causes of fragmentation. Cultural relativism may, nonetheless, be a source of fragmentation in its own right, particularly where regional human rights conventions or courts give institutional voice to cultural beliefs. *Fragmentation Report*, *supra* note 1, ¶¶ 200, 201, 216.

13. MICHAEL IGNATIEFF, *THE RIGHTS REVOLUTION* 7-8 (2000).

14. Leighton McDonald, *Can Collective and Individual Rights Coexist?*, 22 MELB. U. L. REV. 310, 311-12 (1998); see IGNATIEFF, *supra* note 13, at 8.

15. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 5 (Can.).

16. See generally HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Pierre-Marie Dupuy et al. eds., 2009) (discussing the role of human rights in investor-state arbitration and international economic adjudication).

17. See JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* 268-72 (2003) (reviewing cases of the Appellate Body where rules of general international law are used for the interpretation of WTO provisions).

18. See generally José E. Alvarez & David W. Leebbron, *Linkages*, 96 AM. J. INT'L L. 5, 5 (2002) (distinguishing between substantive and strategic linkages); see generally José E. Alvarez & Robert Howse, *From Politics to Technocracy—And Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94 (2002) (“[I]f free trade is recast in terms of ‘rights,’ it must obviously be integrated or balanced somehow with other human rights, explicitly entrenched in international legal instruments (something that Petersmann has willingly and explicitly admitted). Yet since these other rights are not substantively focused on trade, it is very unclear why the trading system itself or, more specifically, its juridical organs have the legitimacy to strike the balance (as opposed to the UN organs primarily seized of human rights questions), or indeed why it should not in the first instance be struck by democratic decision making within each polity.”).

19. Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331 (provides one such tool in that it requires the interpreter take into account “any relevant rules of international law applicable in the relations between the parties.”).

the ad hoc International Criminal Tribunals, established by the United Nations (“U.N.”) Security Council, did not contain clear guarantees on basic human rights like *nullum crimen sine lege*.²⁰ If a state complied with the tribunal, it risked being sanctioned by a human rights court for violating its human rights obligations, and incurring international responsibility as a result.²¹ Similarly, the U.N. Security Council’s 1267 Sanctions regime has been challenged in multiple fora on the basis of human rights,²² and some bodies, like the U.N. Human Rights Committee, have found countries in violation of the ICCPR for their implementation of this resolution.²³

Even if we acknowledge some disunity as our point of departure, however, there are some important overarching doctrines of law that are often overlooked. In particular, rules derived from the law of responsibility play a unifying role in human rights jurisprudence specifically, and provide coherence to international law generally. Because the law of responsibility, as ultimately developed by the ILC, is restricted to secondary rules, it does not contribute to the scope of key rights and freedoms.²⁴ Primary rules, which include the definition of fundamental rights and freedoms, are contained in other instruments like treaties.²⁵ The law of responsibility provides general secondary rules on attribution of conduct, excuses precluding wrongfulness, and remedies.²⁶ These residual rules apply across sub-fields of international law.²⁷

This Article explores how the rules of responsibility operate through human rights jurisprudence, and argues they are cross-cutting in scope and effect. The rules of responsibility are being picked up and applied across different courts,

20. See Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 123 (2008).

21. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 11, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

22. THOMAS BIERSTEKER & SUE ECKERT, ADDRESSING CHALLENGES TO TARGETED SANCTIONS: AN UPDATE TO THE “WATSON REPORT” 7-8 (2009), available at http://www.watsoninstitute.org/pub/2009_10_targeted_sanctions.pdf.

23. See, e.g., Human Rights Comm., Views in re: Nabil Sayadi and Patricia Vinck v. Belgium, Communication [Comm.] No. 1472/2006, ¶ 10.13-12, U.N. Doc. CCPR/C/94/D/1472/2006 (2008).

24. Evans, *supra* note 7, at 139-40, 160.

25. Primary rules refer to the law relating to the content and duration of substantive state obligations. In contrast, secondary rules refer to the legal consequences of failing to fulfill obligations established by primary rules. See JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 14-16 (2002); see also Eric David, *Primary and Secondary Rules*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 27 (James Crawford et al. eds., 2010); Reinisch, *supra* note 7, at 39-41; SCHACHTER, *supra* note 9, at 74-75; Daniel Bodansky & John R. Crook, *The ILC’s State Responsibility Articles: Introduction and Overview*, 96 AM. J. INT’L L. 773, 773 (2002).

26. David, *supra* note 25, at 27, 29; see also David D. Caron, *The Basis of Responsibility: Attribution and Other Transsubstantive Rules of State Responsibility*, in THE IRAN UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 110 (Richard B. Lillich & Daniel B. Magraw eds., 1998), available at http://works.bepress.com/david_caron/65.

27. André Nollkaemper, *Constitutionalization and the Unity of the Law of International Responsibility*, 16 IND. J. GLOBAL LEGAL STUD. 535, 537 (2009).

cultures, and bodies of law with a high degree of uniformity.²⁸ As a result, the law of responsibility can act as a uniting force in human rights, and beyond.²⁹ Furthermore, it performs some constitution-like functions.³⁰ By constitution-like, I mean the law of responsibility has regulating and limiting functions, and creates overarching, generally applicable rules. Moreover, the law of responsibility plays a central role in delimiting public and private spheres, and defining the state for the purposes of human rights guarantees. The Article concludes by evaluating whether unity and conformity are good things.

II. THE SCOPE OF THE LAW OF RESPONSIBILITY

The law of responsibility is a law of consequences.³¹ It addresses what happens when a state breaches an international obligation by act or omission.³² Under the law of responsibility, when an internationally wrongful act occurs, the injured state is entitled to seek redress and ask for reparations.³³ In some circumstances, a state can also take self-help countermeasures.³⁴ Today, the most important restatement of the law of responsibility is the ILC's widely respected Articles on the Responsibility of States,³⁵ which the U.N. General Assembly recommended to States in 2002.³⁶

28. Note, however, the disagreement between the ICJ and ICTY on the proper test for attributing responsibility to a state for the conduct of non-state actors. The ICJ has espoused an "effective control" test. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 I.C.J. 14, ¶ 116 (June 27). The ICTY has recommended an "overall control" test. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment of the Appeals Chamber, ¶¶ 122, 145 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999). Similarly, the court in *Behrami v. France and Saramati v. France*, App. Nos. 71412/01, 78166/01, 45 Eur. H.R. Rep. 85 (2007), has applied an overall control test, which has been followed by the ECHR in other cases.

29. See Nollkaemper, *supra* note 27, 535-36.

30. *Id.* at 545 (arguing that the law of responsibility has a constitutional role).

31. Roberto Ago, who was responsible for establishing the basic structure of the Articles, wrote: the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility . . . [I]t is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation [has] been violated and what should be the consequences [of] the violation.

1970 2 Y.B. Int'l L. Comm'n 306, ¶ 66(c), U.N. Doc. A/8010/Rev.1.

32. An internationally wrongful act is defined as an "action or omission" that is (i) attributable to the state or International Organization ("IO") under international law and that (ii) constitutes a breach of an international obligation (whether by treaty or by another source of law) of that IO. See *Report of the International Law Commission to the General Assembly*, 53rd Sess., U.N. GAOR Supp. No. 10, art. 2, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. Int'l L. Comm'n 20 [hereinafter Draft Articles of State Responsibility].

33. See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 184 (Apr. 11).

34. *Case Concerning Gab ikovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7, ¶ 83 (Sept. 25); see also Draft Articles of State Responsibility, *supra* note 32, at art. 22.

35. See generally Draft Articles of State Responsibility, *supra* note 32.

36. The U.N. General Assembly took note and recommended these Articles to States in 2002. The

The law of responsibility is relevant to human rights because when states violate human rights obligations, demands for remediation are based on the law of responsibility.

As Hector Gros Espiell explains:

the present international system for the protection of human rights, concurrent with, subsidiary or complementary to, the internal protection of human rights, is based on the responsibility of the States for the violation of their duty to respect these rights, and on the possibility, through the treaties in force, to impose and secure the conditions that ensure respect for human rights. International responsibility may arise from an action of any authority, official, agent or person who *de jure* or *de facto* is a member of the State machine, or from an omission, in any way and for whatever cause, of the State's duty to abide by and meet the conditions necessary for the effective and general, non discriminatory, respect of human rights.³⁷

It is important to note that individuals cannot invoke the law of responsibility directly.³⁸ The law of responsibility is based on a state-to-state system.³⁹ Thus, unlike treaty or customary obligations that engage the reciprocal obligations of states, human rights obligations have “the purpose of . . . guarantee[ing] the enjoyment of individual human beings of those rights and freedoms rather than to establish reciprocal relations between States.”⁴⁰ Nonetheless, the responsibility rules still have a direct effect on human rights.⁴¹ International wrongs are

International Law Commission (“ILC”) has also adopted Articles on the Responsibility of International Organizations; *see generally* Rep. of the Int’l Law Comm’n to the General Assembly, 63 Sess., Apr. 26–June 3, July 4–Aug. 12, 2011, U.N. Doc. A/CN.4/L.778 (2011); *see generally* Kristen E. Boon, *New Directions in Responsibility: Assessing the International Law Commission’s Draft Articles on the Responsibility of International Organizations*, 37 YALE J. INT’L L. ONLINE 1, 5-7 (2011), <http://www.yjil.org/online>.

37. Héctor Gros Espiell, *International Responsibility of the State and Individual Criminal Responsibility in the International Protection of Human Rights*, in INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 151, 152 (Maurizio Ragazzi ed., 2005).

38. Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, art. 42, U.N. Doc. A/RES/56/83 (2001) [hereinafter Articles of State Responsibility].

39. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 435 (7th ed. 2008). This limitation has been criticized as unreflective of the international system in the Twenty-First Century. Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT’L L. 798, 802, 815-16 (2002) (arguing that while international law has expanded to allow individuals and non-state entities to utilize the law of state responsibility under treaty and customary law, this is not recognized by the ILC articles, showing the articles are wholly incongruous with the advances made in international law).

40. “Other Treaties” Subject to the Consultative Jurisdiction of the Court (Article 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. ¶ 24 (Sept. 24, 1982), *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_01_ing1.pdf.

41. *See* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY INTERNATIONAL LAW 99 (1989) (human rights protect individuals from being injured by an action of the state or an action that can be attributed to the state).

committed by individuals, not abstract entities like states.⁴² Indeed, the ILC frequently references human rights in its Commentary,⁴³ and the whole field of diplomatic protection allows a state to sue on behalf of its nationals who have been injured by another state's conduct.⁴⁴ The subject matter of these claims is based on violations of individual rights, and thus the protection of individuals often fuels state responsibility.⁴⁵ Individuals are also protected indirectly through the ILC's approach to "injured states": the rules of invocation expand who can bring a claim for the violation of an *erga omnes* violation.⁴⁶

Attribution rules derived from the law of responsibility are particularly important to human rights jurisprudence.⁴⁷ Specifically, the rules on state responsibility address what organs or agents constitute the "state" for the purposes of human rights guarantees.⁴⁸ The 1988 Velasquez decision by the Inter-American Court of Human Rights ("IACHR") illustrates this point.⁴⁹ In 1981, Manfredo Velasquez was a university student in Honduras.⁵⁰ He was violently detained without a warrant by members of the National Office of Investigations.⁵¹ He was accused of political crimes, and then subjected to harsh interrogation and torture.⁵² The police and security forces denied he was being detained.⁵³ He subsequently disappeared.⁵⁴ His family alleged this constituted a violation of the right to life.⁵⁵ The question put to the court was whether these actions were imputable to the Armed Forces, and permitted by the Government of Honduras.⁵⁶ In other words, there were two legal issues: was the National Office of

42. See Philip Allott, *State Responsibility and the Unmaking of International Law*, 29 HARV. INT'L L.J. no. 1, 1988 at 1, 2.

43. Draft Articles of State Responsibility, *supra* note 32, at commentary to art. 14, para. 11, art. 15, para. 6 n.260, art. 20, para. 10, n.328, art. 30 para. 13, n.446.

44. See BROWNLIE, *supra* note 39, at 477-78; *Draft Articles on Diplomatic Protection*, art. 1, U.N. GAOR, 58th Sess., Supp. No. 10, paras. 22, 24, U.N. Doc. A/61/10 (2006).

45. See BROWNLIE, *supra* note 40, at 435; *Draft Articles on Diplomatic Protection*, *supra* note 45, at art. 1.

46. Weiss, *supra* note 39, at 798, 800-02, 809, 815-16. See *infra* Part III (for a discussion of "aggravated responsibility" regime); *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, New Application, 1970 I.C.J. 3 (Feb. 5) (endorsing and affirming states' responsibility towards their *erga omnes* obligations, which involve the basic rights of the human person, and accepting that genocide, slavery, torture, and racial discrimination are also *erga omnes* obligations).

47. See Boon, *supra* note 36, at 1.

48. *Id.* at 1-2.

49. *Velasquez-Rodriguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

50. *Id.* at para. 3.

51. *Id.*

52. *Id.*

53. *Id.* at paras. 3, 5, 147(d)(v).

54. *Id.* at para. 147(e)-(g).

55. *Id.* at para. 4, 157; *The Torture and Disappearance of Manfredo Velasquez: Reyes v. Lopez Grijalba*, CENTER FOR JUST. & ACCOUNTABILITY, <http://www.cja.org/article.php?id=467> (last visited Mar. 6, 2012).

56. *Velasquez-Rodriguez*, Inter-Am. Ct. H.R. (ser. C) No. 4 at para. 28(d), 158-60.

Investigations acting as an agent of the government, and was the government liable because it failed to prevent the abuses?⁵⁷

The IACHR structured its decision around the rules of state responsibility.⁵⁸ First, it found that whenever a “[s]tate organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention.”⁵⁹ In so doing, the court established that international responsibility may arise from an action of any authority, official, agent or person who is a member of the state machinery.⁶⁰ Next, the court affirmed that a state is responsible for acts of its agents undertaken in their official capacity, and for their omissions, even when those acts are outside the sphere of their authority.⁶¹ Thus, the court made a broad statement that human rights can be violated when states fail to act, or when agents act outside their scope of competence.⁶² Finally, the court found the state has a legal duty to prevent human rights violations by carrying out investigations, identifying those responsible, imposing appropriate punishments, and ensuring adequate compensation.⁶³

The Court noted it is “a ‘tenet of international law that the State is responsible for the acts and omissions of its agents acting in their official capacity, even when those agents act outside the scope of their authority.’”⁶⁴ The linkage between acts by agents of the State with the State apparatus expands avenues available to human rights courts to prosecute wrongful acts by States. The judgment in *Velasquez* places a “duty to guarantee” on States, requiring them to take active steps towards monitoring, regulating and policing their agents, ensuring that a violation of international rights will not go unpunished, and upholding the right to life by all of their citizens.⁶⁵ Both the European Court of Human Rights (“ECHR”) and the Human Rights Commission (“HRC”) have integrated this ruling into their jurisprudence.⁶⁶ The *Velasquez* decision

57. *Id.* at paras. 168-70.

58. *See id.* at paras. 168-69.

59. *Id.* at para. 169.

60. *See id.*

61. *Id.* at para. 170.

62. *Id.* at paras. 170-71, 174.

63. *Id.* at para. 174.

64. *Kawas-Fernández v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 196, ¶ 72 (Apr. 3, 2009) (citing *Velasquez-Rodriguez*, Inter-Am. Ct. H.R. (ser. C) No. 4 at para. 173).

65. *See id.* at paras. 74-76.

66. *See Anzualdo Castro v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 202, paras. 37-38 (Sept. 22, 2009); *Bevacqua v. Bulgaria*, App. No. 71127/01, HUDOC para. 53 (Dec. 9, 2008), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=71127/01&sessionId=88137103&skin=hudoc-en> (Eur. Ct. H.R.); U.N. Human Rights Comm., General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶¶ 8, 13, 16, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); *Hajrizi Dzemajil v. Yugoslavia*, Case No. 161/1999, U.N. Human Rights Comm., ¶¶ 8, 10, U.N. Doc. CAT/C/29/D/161/2000 (2002); *Jegatheeswara Sarma v. Sri Lanka*, Case No. 950/2000, U.N. Human Rights Comm., ¶ 8.5 U.N. Doc. CCPR/C/78/D/950/2000 (2003); *Kawas-Fernández*, Inter-Am. Ct. H.R. (ser.

illustrates that secondary rules on responsibility are being picked up and applied with a high degree of uniformity across different human rights courts.⁶⁷

III. AGGRAVATED RESPONSIBILITY REGIME

A second example of how the rules of responsibility affect the adjudication of human rights involves the “aggravated responsibility” regime in the state responsibility articles. Articles 40-2 and 48 provide that, in certain circumstances, not only injured states have the right to react, but the whole community of states can react.⁶⁸ These provisions draw on the concept of *erga omnes* obligations discussed in the Barcelona Traction case, by which “[e]very State, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfillment of certain essential obligations.”⁶⁹ Indeed, these articles were intended to reverse the ICJ’s Namibia decision, in which the Court determined that Ethiopia and Liberia did not have standing because they were not injured states.⁷⁰ The Articles on State and IO Responsibility therefore create a legal basis for non-injured states or international organizations to sue for violation of a human rights treaty.

The aggravated responsibility regime is important to human rights law for two reasons. First, a number of human rights protections, including the prohibition of genocide and self-determination of peoples, have *erga omnes* status, and the Articles call for the joint and coordinated action of all states to bring the breaches to an end.⁷¹ Here, the community of states may be called upon to implement principles of state responsibility by failing to recognize or provide

C) No. 196; *Opuz v. Turkey*, App. No. 33401/02, 50 Eur. H.R. Rep. 28, 716 (2009).

67. [T]he interpretation of human rights treaties has been shaped in notable ways by the general law of State responsibility . . . Human rights courts and tribunals regularly express their analyses in terms that draw on concepts and principles of State responsibility, and increasingly human rights activists are likewise using ideas recognized in the law of State responsibility to support their initiatives.

Susan Marks & Fiorentina Azizi, *Responsibility for Violations of Human rights Obligations: International Mechanism*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 725, 736 (James Crawford et al. eds., 2010).

68. Articles of State Responsibility, *supra* note 38, at art. 40-42, 48. If the Draft Articles on Responsibility of IOs are adopted, IOs too will be empowered to react. Int’l Law Comm’n, *Draft Articles on the Responsibility of International Organizations*, ch. III, U.N. Doc. A/66/10/Add.1 (2011), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf.

69. Draft Articles of State Responsibility, *supra* note 32, at art. 1, cmt. para. 4 (discussing Barcelona Traction Case, *supra* note 46, para. 33).

70. Arnold N. Pronto, “Human-Rightism” and the Development of General International Law, 20 *LEIDEN J. INT’L L.* 753, 755 n.1 (2007); Weiss, *supra* note 39, at 804.

71. Anne-Laure Vaurs-Chaumette, *The International Community as a Whole*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 1023-25 (James Crawford et al. eds., 2010). “State responsibility towards the international community translates into legal form the will to safeguard collective goods and values, including human rights, humanitarian law, self-determination of peoples, the prohibition of genocide, respect for international peace, and protection of the environment.” *Id.* at 1024-25.

assistance to countries that engage in massive human rights abuses.⁷² Consequently, the Articles of State Responsibility prioritize collective norms—such as peace and security—over acts which threaten the international community.⁷³ Therefore, the Articles sketch a rough normative ordering of international interests.⁷⁴ Moreover, the commentary on the Articles of State Responsibility discusses regional systems of human rights as collective obligations.⁷⁵ These obligations vest a “shared community interest”⁷⁶ in the international community as a whole and, at least in theory, give states a legal interest in the protection of *erga omnes* obligations. This creates an incentive for states to fulfill their human rights commitments.⁷⁷ States are accordingly required to diligently monitor the human rights of their citizens in order to avoid the consequences and penalties placed upon a violating state by the ILC’s laws on state responsibility.⁷⁸

72. For example, Security Council resolutions 216, 217, 232, 253, and 277 called for non-recognition of the situation in Rhodesia and South Africa caused by racial segregation. S.C. Res. 216, U.N. Doc. S/RES/216 (Nov. 12, 1965); S.C. Res. 217, U.N. Doc. S/RES/217 (Nov. 20, 1965); S.C. Res. 232, U.N. Doc. S/RES/232 (Dec. 16, 1966); S.C. Res. 253, U.N. Doc. S/RES/253 (May 29, 1968); S.C. Res. 277, U.N. Doc. S/RES/277 (Mar. 15, 1970).

73. Article 48 of the Articles of State Responsibility provides as follows:

Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

- (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
- (b) the obligation breached is owed to the international community as a whole.

Articles of State Responsibility, *supra* note 38, at art. 48. In the *Barcelona Traction* case, the ICJ acknowledged that there was a difference between the bilateralist norms—which were of concern only to the parties involved—and obligations *erga omnes*, which derive a universal stature by virtue of being a concern for the entire community. *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, ¶ 33 (Feb. 5) (there are “obligations of a State towards the international community as a whole . . . and . . . all States can be held to have a legal interest in their protection . . .”); *see also* CRAWFORD, *supra* note 25, at 332.

74. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331. Article 53 of the VCLT defines a peremptory norm of general international law as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted . . .” *Id.*

75. Draft Articles of State Responsibility, *supra* note 33, at 126 cmt. para. 7.

76. Evans, *supra* note 7, at 155.

77. DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 85-86 (2d ed. 2005) (arguing that the ILC’s expansion of the laws of State Responsibility in regard to human rights of *erga omnes* obligations has almost elevated the laws from secondary to primary norms of international law. However, in practice, since states rarely bring human rights complaints against other states due to the political, economic and social implications which result, the expansion is illusory at best.).

78. *See* Christian Tomuschat, *Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law*, in *STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS* 4 (Albrecht Randelzhofer & Christian Tomuschat eds., 1999).

IV. REMEDIES

The law of responsibility does not exist in a vacuum, and one important phenomenon is that human rights jurisprudence has shaped the subsequent development of some principles of responsibility. The field of remedies is particularly relevant in this regard. The provisions on remedies in the state responsibility articles are very general.⁷⁹ Human rights courts have tried to come up with more innovative solutions than simply calling for compensation, in part because many states cannot afford to pay out large monetary awards.⁸⁰ For example, human rights courts have required *effective* remedies tailored to the situation, and called for inquiries, public awareness via symbolic remedies, and the right to file a new appeal.⁸¹ Courts have also vacated judgments where there was no due process.⁸²

Remedies for human rights violations reflect an “aggregate sanctioning [of] goals of a community,” especially when the remedy is compensation.⁸³ The most important of such goals are: “. . . *correcting* the behavior . . . *rehabilitating* victims who have suffered the brunt of public order violations; and *reconstructing* in a larger social sense, to remove conditions that appear likely to generate” similar violations in the future.⁸⁴ In order to achieve such goals while providing adequate remedies for individuals, human rights courts have focused on “‘procedural’ reparation[s] where the] . . . wrongdoing State [has] to provide the individual with effective domestic remedies against the violation.”⁸⁵

V. CONSTITUTIONALISM AND THE LAW OF RESPONSIBILITY

The secondary, residual rules of responsibility provide important points of unity in the international legal system. The law of responsibility creates common canons, bridges sub-regimes, and is now starting to be applied to international organizations as well as states. Indeed, even when there are normative conflicts—between human rights and the environment or between intellectual

79. Articles of State Responsibility, *supra* note 38, at arts. 34-37 (calling, for example, for restitution, compensation, interest, and satisfaction).

80. W. Michael Reisman, *Compensation for Human Rights Violations: The Practice of the Past Decade in the Americas*, in STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS 65, 66-67 (Albrecht Randelzhofer & Christian Tomuschat eds., 1999).

81. Dominic McGoldrick, *State Responsibility and the International Covenant on Civil and Political Rights*, in ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 194-95 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004).

82. *See id.*

83. *See* Reisman, *supra* note 80, at 65.

84. *Id.*

85. Riccardo Pisillo-Mazzeschi, *International Obligations to Provide for Reparation Claims?*, in STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS 149, 150 (Albrecht Randelzhofer & Christian Tomuschat eds., 1999).

property and human rights—the law of responsibility can provide the glue to keep it all together. This is why the law of responsibility should be considered, not only as a counter-point to fragmentation, but as possessing some constitutional aspects.⁸⁶ While the law of responsibility does not create an international constitution in the sense of supplying a coherent set of normative commitments, it does offer some unifying functions. Specifically, the law of responsibility has a regulating and limiting role, and it creates overarching, generally applicable rules.⁸⁷ As Thomas Franck wrote, the “[o]bligation is perceived to be owed to a community of states as a necessary reciprocal incident of membership in the community.”⁸⁸ Moreover, like the State Action rule in U.S. Constitutional law, which determines what the state is for the purposes of the 14th Amendment, the Articles on attribution play an important role in determining what constitutes the state for the purposes of international responsibility.⁸⁹

There are two important limits to the unifying potential of the law of responsibility. First, Article 55 on *lex specialis* recognizes that states can make special provisions for the consequences of breaches.⁹⁰ Thus, sometimes treaties contain secondary rules that address the same subject matter as the law of responsibility. The ILC recognizes that when states have contracted around the residual rules of responsibility, the more specific and specially negotiated rules will take precedence.⁹¹ Thus, the first way in which the Articles on Responsibility may be limited is that states, and now IOs under the Articles on the Responsibility of IOs, can create their own rules in specific situations.⁹² This specialization will limit the application of residual rules, which some consider a threat to the coherence of international law.⁹³

86. Ian Brownlie, *State Responsibility and the International Court of Justice*, in ISSUES OF STATE RESPONSIBILITY BEFORE JUDICIAL INSTITUTIONS 12 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004) (“[State responsibility] is a motor or foundation subject, and thus has a quasi-constitutional role. State responsibility, after all, provides the foundation of the law of treaties and constitutes the most basic part of general international law.”).

87. See Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT’L L. 705, 753 (1988).

88. *Id.*

89. See, e.g., Frank I. Michelman, *The State Action Doctrine*, in GLOBAL PERSPECTIVES ON CONSTITUTIONAL LAW 228, 228-29 (Vikram David Amar & Mark V. Tushnet eds., 2010).

90. Draft Articles of State Responsibility, *supra* note 32, at art. 55; CRAWFORD, *supra* note 25, at 306-07 (indicating that the Articles operate in a residual way in situations of *lex specialis*, where the special legal provisions regarding breaches of a State are wholly inconsistent with those in the Articles of State Responsibility).

91. See *Fragmentation Report*, *supra* note 1, at para. 165. Trade agreements like the WTO fall into this category: these regimes contain their own secondary rules and would replace the default rules contained in the Articles on Responsibility. *Id.*

92. In the context of human rights, such an outcome appears unlikely because the ILC’s Articles of State Responsibility are already replete with references to the practice of human rights tribunals and the rules reflect many of the characteristics of human rights treaties. See generally Articles of State Responsibility, *supra* note 38.

93. See generally Ian Brownlie, *Problems Concerning the Unity of International Law*, in LE DROIT

A second limitation of the responsibility articles is apparent in the drafting process itself. The Articles of State Responsibility, produced by the ILC, do not represent all of the law on state responsibility, but only a reductionist version of that law. The ILC spent fifty-two laborious years in their formulation, and many issues were compromised on or eliminated altogether.⁹⁴ The controversial nature of the project has become more pronounced in the ILC's recent efforts to develop rules of responsibility for IOs.⁹⁵ The second limitation of the rules of responsibility stems from the inherent controversy surrounding their scope, content and form, which continues to percolate in the way courts and jurists invoke and apply the rules.⁹⁶

These two limitations lead to an important question: is unity desirable? On the one hand, uniformity reduces uncertainty about the state of the law and, hence, is more efficient.⁹⁷ Uniformity may also engender support for human rights law by demonstrating the universal values at stake.⁹⁸ On the other hand, global legal pluralism reminds us that various legal systems can coexist, and that diversity in the human rights regime may be desirable in its own right.⁹⁹ After all, the goal of human rights law is to protect the individual, not the state,¹⁰⁰ and where courts have allowed it to diverge from the general international law, it has often been because of this specific "object and purpose."¹⁰¹ From this perspective, overarching principles derived from the law of responsibility may never provide the flexibility needed to achieve the goals of the human rights regime.¹⁰² Thus, fragmentation could be a sign of the vitality and maturation of the international legal system, which will ultimately strengthen adherence to human rights.

INTERNATIONAL À L'HEURE DE SA CODIFICATION: ETUDES EN L'HONNEUR DE ROBERTO AGO 153, 156 (Dott. A. Giuffrè ed., 1987).

94. Allott, *supra* note 42, at 1-2.

95. McGoldrick, *supra* note 81, at 167.

96. *Id.* at 165-66 (arguing that the responsibility rules are being misused by the human rights regime as primary instead of secondary rules).

97. Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1190 (2007).

98. *See id.* at 1190.

99. *Id.* at 1158-59, 1190 (noting that historically, colonialism resulted in legal pluralism when the colonizing state's legal system was layered onto the existing indigenous legal system; these multiple systems can interact and "can at times create openings for contestation, resistance, and creative adaptation.").

100. MERON, *supra* note 41, at 99.

101. *See Fragmentation Report*, *supra* note 1, at para. 150 (discussing human rights as a special regime); *see also* Robert McCorquodale, *Impact on State Responsibility*, in *THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW 239-40* (Menno T. Kamminga & Martin Scheinin eds., 2009).

102. Chantal Thomas, *Convergences and Divergences in International Legal Norms on Migrant Labor*, 32 COMP. LAB. L. & POL'Y J. 405, 435 (2011).

