

# Revisiting the Humanisation of International Law: Limits and Potential

## Obligations *Erga Omnes*, Hierarchy of Rules and the Principle of Due Diligence as the Basis for Further Humanisation

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### Abstract

The article critically evaluates the theory of the humanisation of international law. First, it argues that despite human rights having impact on (other areas of) international law, this trend has in the past been somewhat inflated. A number of examples are given where human rights have been tested against other objectives pursued by international law, with humanisation revealing its limits and actual dimensions. The second argument consists in identifying and highlighting obligations *erga omnes* (*partes*) and the principle of due diligence as two 'systemic' tools, that are central to the humanisation of international law. Both these tools form part of modern positive law, but may also make a positive contribution towards the direction of deeper humanisation in international law, having the potential, *inter alia*, to limit state will, establish occasional material normative hierarchy consisting in conditional priority in the fulfilment of human rights, give a communitarian tone to international law and invite states to be pro-active in the collective protection of their common interests and values. In its conclusions, the article offers a plausible explanation about the paradox it identifies of the limits of the humanisation on the one hand, and its potential for further development on the other. For, it is inherent in international law that the line separating the law from deontology is thin. The process of humanisation needs to be balanced with the other objectives of international law as well as reconciled with the decentralised and sovereignist origins of the pluralistic international legal system.

**Keywords:** humanisation, constitutionalism, legal positivism, human rights, *erga omnes*, due diligence, positive obligations, normative hierarchy, proportionality

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## 1. Introduction

This article seeks to critically evaluate the idea of the humanisation of international law. During the last two decades, eminent scholars from both sides of the Atlantic have argued that international law is undergoing a profound transformation owing to the impact that human rights have on general international law and its special regimes.<sup>1</sup> Although not all scholars agree as to the extent of that impact, there seems to be a consensus that, indeed, human rights are a source of change in international law.

1. B. Simma was one of the first to study the interaction between general international law and human rights in his course at the Academy of European Law at the EUI. B. Simma, *International Human Rights and General International Law: A Comparative Analysis, The Protection of Human Rights in Europe*, 1993, IV/2, 153-236, Collected courses of the Academy of European Law. Judge B. Simma devoted his general course at the Hague Academy in 2009 to 'The Impact of Human Rights on International Law'. This is also the case of Judge T. Meron, who published an extended version of his general course in the Hague Academy in 2003: T. Meron, 'The Humanization of International Law' (2006); as well as of Judge A.A. Cançado Trindade, who discussed this very same question as part of his own general course in The Hague: A.A. Cançado Trindade, 'International Law for Humankind: Towards a New Jus Gentium' (2010) For a collection of essays on the topic, see: M.T. Kamminga and M. Scheinin (eds.), *The Impact of Human Rights Law on General International Law* (2009). See also the very comprehensive overview by M.T. Kamminga, 'Humanisation of International Law', in I. Boerefijn and J.E. Goldschmidt (eds.), *Changing Perceptions of Sovereignty and Human Rights. Essays in Honour of Cees Flinterman* (2008), at 29-40. Recently, the Judge at the ECtHR, L.A. Sicilianos, treated the same topic, in Greek. *The Human Dimension of International Law. Interactions Between General International Law and Human Rights* (2010). Characteristic of the 'trend' in scholarship is also the number of papers discussing the way human rights are affecting other areas of international law. Just to give a few examples: P. Dupuy, E. Petersmann & F. Francioni (eds.), *Human Rights in International Investment Law* (2009); U. Kriebaum (ed.), 'Aligning Human Rights and Investment Protection', *Transnational Dispute Management*, special issue, (2013); B. Simma, 'Foreign Investment Arbitration: a Place for Human Rights?' 60 *International and Comparative Law Quarterly* 573 (2011); A.A. Cançado Trindade, 'The Humanization of Consular Law: The Impact of Advisory Opinion No. 16 (1999) of the Inter-American Court of Human Rights on International Case-law and Practice', 6 *Chinese Journal of International Law*, at 1-16 (2007); Z. Drnas de Clément, 'The Humanisation of International Courts', in B. Vukas and T.M. Šošić (eds.), *International Law: New Actors, New Concepts*, Continuing Dilemmas: Liber Amicorum Božidar Bakotić (2010), at 397-408.

The article, in the theory of the humanisation of international law, observes a narrative purporting to depict 'the law as it is', that is, to identify the ways positive international law *is* changing because of human rights, to capture the evolution that its humanisation has generated and, mainly, to illustrate the influence the latter has on the international legal order. In that sense, the theory of humanisation can be seen as contiguous or, to a certain extent, complementary to the other relevant 'big' theory, namely, the constitutionalisation of international law.<sup>2</sup>

That second theory defends the idea of the existence of a number of foundational international norms, which provide the basis for an empirically observable trend leading to the constitutionalisation of the international order. Although no consensus exists as to what these 'cosmopolitan' norms are, since they vary from imperative norms to the UN Charter or to the constitutionalisation of some of the special regimes of international law, such as WTO law or the European Convention on Human Rights (ECHR) system, the constitutionalist paradigm differs from the theory of humanisation (*inter alia*) in that it does not only understand these constitutional features as positive law.<sup>3</sup> They also provide the basis for the expansion (through various means, including interpretation) of the constitutional model into new areas, with a view to boosting certain normative ideals, such as democracy. The international 'constitution' cannot be but informal. By the means of an (somewhat exaggerated)<sup>4</sup> analogy, it borrows its name from national constitutionalism. The symbolism is evident. Yet, be they different, the two levels of constitutionalism are not entirely disconnected. The same forces of globalisation that challenge domestic constitutions (if not sovereignty as such) generate (the need for, that is, a demand for) constitutionalisation at the global, highly pluralistic level, where new varieties of 'centrifugal' power are actually exercised. Yet, constitutionalism appears to be aware of the fact that it is called to operate – at both the positive and the teleology-driven normative levels –

within a decentralised system that mainly relies on the consent of its 'actors'.

Other than the object of the humanisation of international, human rights are one of the 'ingredients' of the constitutionalisation of international law. These theories are two separate but adjoining ways to see 'modern' international law, to explain the prevailing trends, as well as to understand the dynamism and the forces of change within it. Be they distinctive, they cover a common territory, sharing the following two key elements: the idea of the emergence at the international level of an increasingly tangible core, that is, a '*noyau dur*', as well as the erosion of sovereignty because of the informal quasi-verticalisation of the system, which, because of its voluntarist origins and the rule of sovereign equality, has traditionally been conceived as – and has indeed been – merely horizontal. As such, the constitutionalisation of international law, even if crossing the idea of humanisation, will not focus on it exclusively. However, much of what can be said about humanisation can also encompass the idea of constitutionalisation, at least to the extent of their shared characteristics.

This brief comparative overview aims to highlight the commonalities of the two theories. The article concerns the common space they share; yet, it chooses to focus on the humanisation of international law, as this theory offers a more tangible basis. The empirical observation of the ways – some of which are examined in the main part of this study – human rights interact with other regimes of international law and operate within general international law, often affecting the systemic premises of its order, render the argument about the tangibility of the humanisation of international law more comprehensible. The analysis that follows does not purport to measure the impact of the humanisation (an intellectual exercise that would require the use of quantitative methods), but to critically assess some of its outcomes. In that respect, the article will undertake a twofold task.

*First*, it will endeavour to demonstrate that the effect of the humanisation of international law has been in the past somehow overestimated. In a number of instances the idea of an abundantly humanised international legal order, that has drastically changed (if one wants to remain neutral), or improved, because of/thanks to human rights, has been overstated, if not misconstrued. The humanisation of international law is gradually revealing its limits and actual dimensions.

However, the message contained in this article is not only critical of the account of the humanisation of international law. The *second* path the article follows is more positive and constructive. It is argued that, despite its recent shortcomings, the humanisation of international law contains in its very essence a 'core', that is, a systemic *acquis*, essentially consisting of two 'groundwork' tools, namely obligations *erga omnes* (*partes*, if the obligation stems from a treaty) and the principle of due diligence, which are both the *reality* of modern positive international law, as well as a *potential* for further humanisation – within the confines, of course, of a pluralistic legal order that remains state-centric as well as

2. Among other, see the recent books by J.L. Dunoff and J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (2009); J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law* (2009); B. Fassbender, *The United Nations Charter as the Constitution of the International Community* (2009), as well as G. de Búrca and J.H.H. Weiler (eds.), *The Worlds of European Constitutionalism* (2011). See also, Chapter 8, entitled 'Does the Constitutionalization of International Law Still Have a Chance?', in J. Habermas (C. Cronin ed. & tr.), *The Divided West* (2006), at 115-193. For a brief assessment of the constitutionalization of international law, see A. Peters, 'Are We Moving Towards Constitutionalization of the World Community', in A. Cassese (ed.), *Realizing Utopia. The Future of International Law* (2012), at 118-135, as well as E. De Wet, 'The Constitutionalization of Public International Law', in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (2012), at 1209-1230.
3. With the exception of the functional approach to constitutionalism, which observes the phenomenon in neutral terms, only focusing on the function of the "constitutional" rules.
4. See the critical observations in that respect by Nicholas Tsagourias: 'Introduction – Constitutionalism: a theoretical roadmap', in N. Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives* (2007), especially at 4-5.

constructed on the basis of sovereignty and state will as the primary, but *not* exclusive,<sup>5</sup> foundation of the normative force of its rules.

The article will evaluate humanisation along the lines of the twofold argument outlined above. The second section will undertake a critical assessment of the limits of (and the misconceptions about) the humanisation of international law. The third section will discuss what in the eyes of the study constitutes the twofold systemic *acquis* of the humanisation of international law, that is, obligations *erga omnes* and due diligence. In that respect, the article will distinguish between what is the *lex lata* of that *acquis*, and what, to date, can only be seen as a basis, that is to say, merely a potential, for further humanisation – should this very process continue to evolve and to impact on the systemic traits of such an idiosyncratic legal order, as the international one. The fourth and final section of the article will conclude by suggesting a plausible explanation about the paradox identified in the article of the limits of the humanisation on the one hand, and its potential on the other.

## 2. The Humanisation of International Law Revealing Its Limits: From Utopia, Back to Apology<sup>6</sup>

The first path taken by the article aims to discuss in a critical mode the theory of humanisation and to point to a number of recent instances where this has proven to be more ambitious than it could truly afford. The idea here is that, even if human rights have a certain impact on (other areas of) international law, this trend has been inflated. If this is true, then we must admit that, to a certain degree, A. Pellet was right to accuse some of his colleagues of confusing their desires – that is, their ideology – with the law, or in different terms the *lex ferenda* with the *lex lata*.<sup>7</sup> Indeed, this has been proven to be the case in a number of areas of law, such as immunities, diplomatic protection and, of course, invalid reservations. With their relatively recent practice, the International Law Commission (ILC), as well as a number of international judicial *fora*, exercised *authority* and

refused to validate the alleged humanisation of the named areas of international law.

### 2.1. Empirical Observation: Humanisation Reaching a Limit

The limited scope of the article does not allow for an in-depth analysis of the examples given above. As far as reservations to treaties are concerned, suffice it to remind that the conclusion the European Court of Human Rights (ECtHR) reached in *Loizidou* opened an animated debate on the effect of invalid reservations.<sup>8</sup> The court examined in the merits the case before it, although the respondent state's reservation regarding its competence was found to be invalid on the grounds of its incompatibility with the ECHR's 'special' object and purpose.<sup>9</sup> Thus, in the realm of the humanisation of international law, the reserving state should remain bound by the treaty without the benefit of its invalid reservation. In the aftermath of *Loizidou*, the President of the International Court of Justice (ICJ) accused the court of Strasbourg of fragmenting international law.<sup>10</sup> This has opened yet another debate, this time about the so-called fragmentation of international law because of, *inter alia*, the 'specialty' of human rights. The ILC examined in detail the question of reservations and has finally suggested that, in essence, there is no reason to depart from the '*règle d'or*' of international voluntarism. The emphasis is put on state will.<sup>11</sup> Under provision 4.5.3(4) of the ILC Guidelines

[i]f a treaty monitoring body expresses the view that a reservation is invalid and the reserving State or international organisation intends not to be bound by the treaty without the benefit of the reservation, it should express its intention to that effect within a period of twelve months from the date at which the treaty monitoring body made its assessment.<sup>12</sup>

5. On international voluntarism and the opposing schools of thought arguing that state will is not the (exclusive) source of the binding force of international law, see E. Jouanet, 'A Century of French International Law Scholarship', 61 *Maine Law Review* 83 (2009) (especially the theory of sociological objectivism, pp. 95 *et seq.*).
6. Referring to the homonymous work by Koskeniemi: M. Koskeniemi, *From Apology to Utopia. The Structure of the International Legal Argument* (2005).
7. A. Pellet, '"Human Rightism" and International Law', 10 *Italian Yearbook of International Law* 3 (2000), especially 5. For a similar critique against constitutionalism this time, see J. Kammerhofer, 'Constitutionalism and the Myth of Practical Reason: Kelsenian Responses to Methodological Problems', 23 *Leiden Journal of International Law* 723 (2010).

8. For a collection of essays on the issue of reservations to human rights treaties, see I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime. Conflict, Harmony or Reconciliation* (2004). See also R. Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent', 96 *American Journal of International Law* 531 (2002); as well as R. Moloney, 'Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent', 5 *Melbourne Journal of International Law* 155 (2004).
9. *Loizidou v. Turkey* (1995) 20 E.H.R.R. 99, paras 70 *et seq.* especially para. 93.
10. See the speech by the former President of the International Court of Justice, Judge Gilbert Guillaume, 'The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order.' Speech to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000. Available at <[www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1](http://www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1)> (last visited on 3 October 2012). See also the critique made by another former President of the ICJ: R.Y. Jennings 'The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers', in *Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution* 9 *ASIL Bulletin*, at 5-6 (1995).
11. See *Report of the International Law Commission, Sixty-third Session* (2011) A/66/10/Add.1 at 534-535, para. 26 accusing the ECtHR of "constructing state will".
12. *Guide to Practice on Reservations to Treaties*, adopted by the ILC at its Sixty-third Session in 2011 A/66/10, para. 75.



By the same token, the idea that the right to access to justice should prevail over the ‘all time classic’ laws of state immunities, so that human rights are effectively protected and the individual is given the necessary means to directly claim her/his rights and, thereby, make states remedy the wrong they have caused to her/him, has recently been rejected by both the ICJ and the ECtHR – that is, the very same court that has been accused in *Loizidou* of judicial activism in the name of human rights specialty. According to the ECtHR, it is proportionate to derogate from (that is, in that particular instance, to create an exception to) the right to access to justice in order to give room to a rule promoting ‘comity and good relations between States through the respect of another State’s sovereignty’.<sup>13</sup> The wrongs<sup>14</sup> access to justice sought to remedy in these particular cases were of great material importance, sometimes even translating into a very special and, thus, exceptional type of rules, namely *jus cogens*. However, in the absence of normative conflict<sup>15</sup> between *jus cogens*, on the one hand, and state immunities, on the other, the latter should prevail over the ideals pursued by human rights protection.

Yet, sovereign immunities are not the only case where the humanisation of international law has been undermined. The same trend of counter-humanisation also characterises the other pathway international law makes available for the (indirect, this time) protection of the rights of the individual at the international level, namely diplomatic protection. The dynamic vision defended by the ILC, calling for a codification that would also embrace the progressive development of diplomatic protection, has crashed into the wall of international reality. One needs only to compare the suggestion made by the second Special Rapporteur, J. Dugard, that states should be obliged to resort to diplomatic protection in case of *jus cogens* violations,<sup>16</sup> with the final version of the ILC project. Ideas such as the one mentioned here have either entirely disappeared or been downgraded to a spineless form of recommendation, inviting states to ‘[g]ive due consideration to the possibility of exercising

diplomatic protection, especially when a significant injury has occurred’.<sup>17</sup>

What these instances all have in common is that the humanisation of international law has proven to have limits. The perception of an order giving *unconditional* priority to human rights, which have, according to that view, led to the drastic erosion of the classical foundations of voluntarist sovereignism and have utterly displaced bilateralism to the benefit of community interests<sup>18</sup> (still?) belongs in all these instances to the world of the normative ‘ought’. Humanisation is gradually revealing its real dimensions. ‘Alas’, despite the well-intentioned nature of its humanistic cause, international law is resisting the change the ‘*droitdeslhommes*’ claim it to have undergone or call it to undergo.

## 2.2. Empirical Observation: The Side-effects of ‘Humanisation’

At the same time, one can diagnose another symptom of legal shortsightedness, owed (among other reasons) to the uncritical acceptance of the narrative about the deep impact human rights – allegedly – have on international law. What distinguishes that case from the previous ones is that, indeed, human rights have been successful in conflating international law with the (in that particular instance) by-products of their ‘special’ regime. However, far from humanising international law, these by-products threaten to negatively affect the broader system, as well as human rights protection at the global level. The example that may be given in that respect is the criterion of effective control as a condition for holding a state responsible for extraterritorial wrongfulness directly attributable to it.<sup>19</sup> The reasons why this criterion is seen by the author of the article as groundless in terms of positive international law cannot be explained within the limited confines of this article. Suffice it to underline that the ECtHR – that established the standard with its case law – has explained that the standard’s purpose is to preserve the regional scope of the ECHR and to safeguard the so-called *espace juridique* of the European system of first generation human rights protection.<sup>20</sup> In that particular context, effective control is nothing other than an artificial barrier in defence of regionalism. This is what ‘allows’ the ECtHR to depart

13. *Al-Adsani v. United Kingdom*, (2002) 34 E.H.R.R. 11, paras 54-56. See also the ‘clone’ cases of *Fogarty v. The United Kingdom*, (2002) 34 E.H.R.R. 12, paras 35-36; and *McElhinney v. Ireland* (2002) 34 E.H.R.R. 13 paras 36-37, as well as, among other cases, *Kalogeropoulou and others v. Greece and Germany* (ECtHR) (Admissibility) 59021/00, 12 December 2002.

14. Such as torture, or serious war crimes.

15. *Jurisdictional Immunities of the State*. (*Germany v. Italy*, Greece intervening), ICJ Judgment of 3 February 2012 <[www.icj-cij.org/doctet/files/143/16883.pdf](http://www.icj-cij.org/doctet/files/143/16883.pdf)>, paras 93 *et seq.* The literature on that question is particularly rich. Among others, see the analysis by D. Akande and S. Shah, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’, 21 *European Journal of International Law* 815, especially at 832 *et seq.* (2010). See also, L.A. Sicilianos, ‘The Human Face of International Law. Interactions Between General International Law and Human Rights: An Overview’, 32 *Human Rights Law Journal* 1, at 3-4 (2012).

16. *First Report on Diplomatic Protection* by Mr. John R. Dugard, Special Rapporteur. ILC, Fifty-second Session, 2000. A/CN. 4/506, Art. 4, pp. 27 *et seq.*, paras 75 *et seq.*

17. *Draft Articles on Diplomatic Protection*, adopted by the ILC in its Sixty-first Session. *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), Art. 19(4).

18. Referring to the homonymous course by B. Simma before the Hague Academy: B. Simma, ‘From Bilateralism to Community Interests’, 250 *RCADI* 217 (1997).

19. *Ilașcu and others v. Moldova and Russia*, (2005) 40 E.H.R.R. 46, para. 311, stating that ‘[t]he exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention’.

20. *Banković and others v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom*, (2007) 44 E.H.R.R. SE5, para. 80.

from the ILC norms on state responsibility<sup>21</sup> and, in essence, establish an extra condition, namely the criterion of effective control, for holding responsible the states that directly violate international human rights law outside their borders. This is a barrier that has been created by a regional court of human rights as a means to territorially limit human rights protection on the basis of jurisdiction. It goes without saying that, in the absence of regionalism, the standard's *raison d'être* ceases to subsist. However, we observe that this very standard has been uncritically adopted by *fora* that were never designed to be regional. Thus, it has been – erroneously, in the author's opinion – adopted by the ICJ,<sup>22</sup> as well as by the UN Human Rights Committee.<sup>23</sup> It may be an irony, but *Loizidou*, for which Strasbourg has been (as already explained) accused of fragmenting the unity of international law, constructed a standard, the criterion of effective control, which has contributed both to the unity, as well as to the 'anti-humanisation' of international law.

### 3. The Systemic 'Core' of the Humanisation of International Law

The second path taken by the article aims to offer a more positive account of the theory of humanisation. Be it somehow inflated, the named theory constitutes at the same time a 'reality' of international law – and this, according to the article, is mainly for two reasons.

The first is quite evident. Because of human rights, the individual is now included in all textbooks of international law as a – passive,<sup>24</sup> at least – subject of international law who is, under certain conditions, entitled to protection. International law is, literally, 'humanised' as it now contains a mature set of substantive rules, as well as an institutional apparatus, both regional and universal, for the safeguard of human rights. A paradigm shift

is said to exist, consisting in the gradual abandonment of the classic conception of state sovereignty and "the incorporation of humanitarian concerns [...] as a crucial element in the justification of state action".<sup>25</sup> Admittedly, the normative framework is not equally developed with respect to all subjects (if one wants to stick to the jargon of positivism) of international law. The individual, or, more generally, the private actor, are offered more protection at the international level, than they have obligations and responsibility.<sup>26</sup> Nevertheless, legal personality depends upon the needs of the society,<sup>27</sup> and it is these very 'needs' that led to the emergence of international criminal law or to the – still immature – law of soft human rights 'obligations' of multinational corporations,<sup>28</sup> to give two characteristic examples. The road is still under construction and the idea of humanisation is an ongoing process.

Yet, all of this is well known. It is the second dimension of the reality of the humanisation of international law that the article wishes to emphasise. Thus, the argument is that human rights have made a positive contribution to the development of two invaluable 'systemic tools', which both constitute at the same time a *reality* in the international legal order, and a *potential* for further change in the direction of the humanisation. Both these tools extend well beyond human rights. Yet, in human rights they found fertile ground for application. This is what links them to human rights as a reality of positive international law, as well as what makes them a basis, that is, an opportunity for further humanisation.

As already explained in the introduction, as a reality, these two tools constitute an *acquis*, forming part of modern positive international law. As a potential/possibility, the article argues that, although these systemic tools remain underexplored (and to a certain degree understudied), they do offer a number of opportunities that could radically change the face of international law, as we know it. However, as such, they only constitute a *lex ferenda*. They are open to evolution and they are susceptible to and depend on the practice and the (ideology-stemming) will of those (including the international judge) who have the power to shape and change international law.

#### 3.1 The Erga-Omnisation of International Law

##### 3.1.1 Lex Lata

As far as the first systemic 'apparatus' is concerned, this is closely linked to the development of human rights,

21. *Articles on the Responsibility of States for Internationally Wrongful Acts*, adopted by the ILC on 10 August 2001: *Report of the International Law Commission, Fifty-third Session, A/56/10*, Chapter IV, Art. 2, providing that the two elements of wrongfulness are the breach of a rule by a state and attribution of that conduct to the state.

22. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 226, para. 109. The ICJ referred to the HRC to hold that, because Israel exercises effective control, its jurisdiction extends to the occupied territories as well (para. 110 regarding civil and political rights, para. 112 regarding social and economic rights). See also *Case Concerning Armed Activities on the Territory of the Congo, (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, 168, para. 179, and paras 167 and 169, reflecting a tendency to link responsibility for directly attributable to the respondent state conduct with the control exercised by its organs acting as occupying power.

23. UN Human Rights Committee (HRC), *General Comment no. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 10.

24. See for instance J. Verhoeven, 'Droit International Public' (2000), at 295 *et seq.*

25. R. Teitel, *Humanity's law* (2011) at 9 and 35 *et seq.*

26. In that respect, see: A. Clapham, *Human Rights Obligations of Non-State Actors* (2006).

27. According to the famous passage of the ICJ advisory opinion: *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, p. 174, at 178.

28. Among others see *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie. Human Rights Council Seventeenth session. A/HRC/17/31; as well as the UN Global Compact <[www.unglobalcompact.org](http://www.unglobalcompact.org)> (last visited on 5 October 2012).

although it does not only apply with regard to rules aiming to protect the human being and its fundamental rights. Obligations *erga omnes* (*partes*) are transforming an otherwise bilateral(isable) international legal order, which has traditionally been based on reciprocity<sup>29</sup> and individualism, into something much more close to the idea of a community, wherein all states are entitled – *but not obliged* – to protect what constitutes interests and values that are common to everyone. They have entered positive international law in a rather unexpected way, through a revolutionary *obiter dictum* by the ICJ;<sup>30</sup> yet, *erga omnes* came to stay. They found their place in the law of international responsibility and, as a result, all states, even if not directly<sup>31</sup> affected by wrongfulness, are entitled to react against it and invoke the responsibility of the offender.<sup>32</sup> This is how a system moves beyond reciprocity and merely synallagmatic relationships<sup>33</sup> and recognises the legitimate interest, translated into a proper legal right, that each and every state has to be actively engaged in the protection of collective interests. A traditionally sovereignist legal order based upon the premises of reciprocity and self-protection<sup>34</sup> allows its community to protect its shared interests and values in a collective way. This is the reality of obligations *erga omnes* – or this is *erga omnes* as a reality of positive international law.

### 3.1.2 *Lex Ferenda*

However, it is the potential this special type of international obligations has that mainly interests this article. The argument here is that obligations *erga omnes* may have far-reaching implications, allowing for change in a number of areas of international law. They are opening the way to further objectivisation and do have the potential to fertilise the legal order with a series of innovative elements that affect the very essence of its systemic structure. The derivatives of that change vary. To name but a few of them, these would concern several domains of general international law, such as the infor-

mal hierarchy (of rules), jurisdiction, the obligation to execute and to comply with international judgments, etc.

Once again, the limited scope of the article does not favour depth in the analysis. One would need a monograph to introduce in detail the idea of the *erga-omnes*isation of international law, but the bottom line of the argument could be summarised in the following way. The first step of the syllogism would be to recognise the link between the material importance of certain rules and the named class of obligations. Although the formal hierarchy (of sources) is foreign to international law,<sup>35</sup> this does not mean that some rules are not created for – that is, their *ratio legis*, their purpose or *raison d'être* is – the protection of certain interests and ideals that are thought to be of higher value,<sup>36</sup> that is, more important<sup>37</sup> than other ones. This leads to a first set of conclusions.

First, ideology is indeed of pertinence. It may be that legal positivism prefers it to be hidden behind the veil of the formal method that generates the rule, but, indeed, what always feeds the rule is its underlying material. This refers to the commonplace distinction between formal and material sources in law making. Thus, outside state interests (and the *will* to protect them),<sup>38</sup> the material source of international law may also be – for some rules – the idea of social values (and the *necessity* to protect them).<sup>39</sup>

Second, the 'box' within which rules that seek to protect values, such as human rights, or common interests, like the protection of the environment, are placed is not irrelevant to the characteristics and the architecture of the system within which those rules were born, as well as aimed to produce effects. International law is decentralised. For it to maintain that very nature, but also be able to accommodate areas such as the protection of human rights, cultural heritage or the environment, it needed to create a special type of rules that would enable each and every member of the community to be (if they wish) involved in the protection of these, common to all, values and interests. The reason *erga omnes* rules are receiving that special treatment within international law is of course their material content. However, the protection of their material content needed to be reconciled with (the preservation of) decentralisation. The outcome of that combination is a category of obligations owed *erga omnes* that recognise each and every state's faculty to actively protect the values that are common to

29. On reciprocity see the very pertinent contribution by A. Paulus, 'Whether Universal Values can Prevail over Bilateralism and Reciprocity', in Cassese (ed.) *supra* n. 2, at 91 *et seq.*

30. *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* Second Phase, Judgment, ICJ Reports 1970, p. 3 at 32, para. 34.

31. The ILC opts for the term not injured states. (ILC *Articles on the Responsibility of States* *supra* n. 21 at 116). The terms non-directly affected, indirectly affected and not injured state, are used in the paper interchangeably.

32. ILC *Articles on the Responsibility of States*, Art. 48. See also the critical remarks by P.M. Dupuy on Art. 48. 'The Deficiencies of the Law of State Responsibility Relating to Breaches of "Obligations Owed to the International Community as a Whole": Suggestions for Avoiding the Obsolescence of Aggravated Responsibility' in Cassese, *supra* n. 2 at 210.

33. See the brief but apt comments by Judge Simma on the occasion of the *exceptio non adimpleti contractus* in his separate opinion in *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece)*, ICJ Judgment of 5 December 2011 <[www.icj-cij.org/docket/files/142/16827.pdf](http://www.icj-cij.org/docket/files/142/16827.pdf)>, paras 10 *et seq.*

34. On the concept of self-protection or self-help, V. Tzevelekos 'Vers la reconnaissance d'un droit étatique à l'autoprotection? Entre le droit et la politique', 2 *Revue Générale de Droit International Public* 295 (2008).

35. D. Shelton, 'International Law and 'Relative Normativity'', in M.D. Evans (ed.), *International Law*, 3rd ed., at 142-143.

36. Cf. the critical comments by J. d'Aspremont, calling scholarship to put emphasis on common interests, rather than to values. J. d'Aspremont, 'The Foundations of the International Legal Order', 18 *Finnish Yearbook of International Law* 219 (2007).

37. C. Tams, 'Enforcing Obligations Erga Omnes in International Law' (2005), at 136 *et seq.* See also A. Orakhelashvili, 'Peremptory Norms in International Law' (2006) at 49: who discusses the links between morality and *jus cogens* norms.

38. Referring to the voluntarist view of international legal positivism.

39. Referring to the sociological objectivist view of international legal positivism.



them. Thereby, all states within the decentralised order have their share in the protection.

Third, *erga omnes* is contributing a communitarian tone in a society of individual sovereigns. Non-directly affected states are not (re)acting to the breach of an *erga omnes* obligation with an aim to protect individual interests that are exclusive to them, but interests and values that are common to their ensemble, that is, to the international community as a whole. This is how *erga omnes* is making possible the passage from a society of individuals into an – always decentralised – community of ‘stakeholders’. And this is how reciprocity cedes its place to collective enforcement. In that respect, *erga omnes* could be metaphorically understood as a special ‘capsule’ within which the system is placing only those rules that are of significant material importance. This very ‘capsule’ acts in the same time as a ‘vehicle’, introducing – through the ‘backdoor’ – the idea of community within a decentralised order of sovereign individuals. What will be the content of that ‘capsule’, that is to say what are the rules that will be given the special effect of *erga omnes*, is a question that goes beyond the article’s scope. Questions such as what shapes trans-societal consensus, what is societal consensus, if this is universal or not, how can this be evidenced in a decentralised order and which are the philosophical foundations of the material content of these special rules escape the article, if not legal positivism as such. In simple words, and, although one cannot overlook the fact that *erga omnes* are closely linked to human rights, for the article, it is not the content of the ‘capsule’ that counts, but the ‘capsule’ as such. It is the systemic tool that has been designed to encapsulate what, in the eyes of the society (of a given society, at a given time), is seen as important and worthy to be protected by each and every state acting in the name of all. With no regard to the specific content of the ‘capsule’, everything classified as *erga omnes* bears a special weight, which, in less fragmented and more integrated societies, is called public order. In essence, – let us admit it – *erga omnes* is a tool vesting with special legal effect rules of public order and, as such, it is acting, in *Hartian* terms as an implicit *rule of recognition*.<sup>40</sup> As a society, we recognise that some values and interests are more important and, for that reason, we mark them as a distinctive category of rules. This is the reason why these rules are given special legal effects. The specialty, finally, of that effect depends on the characteristics of the system – which in the case of international law happens to be decentralised.

This has two main consequences (*i.e.* community reaction to wrongfulness and limitation of individual state will) that are closely linked to the examples that were given earlier and which also explain why the article sees obligations *erga omnes* as an opportunity for profound, structural humanisation of the international legal system.

- The Community’s Reaction to Wrongfulness: Universal Jurisdiction

The idea of a community of interests for the protection of public order rules gives all states the right to react to wrongfulness – through lawful means, of course, and within the limits set by the law. This is well established in the framework of secondary obligations, giving, for instance, the right to any state to resort to countermeasures against the state that breaks an *erga omnes* obligation,<sup>41</sup> or a *locus standi* to bring that state to justice.<sup>42</sup> This is the *lex lata* of *erga omnes*; as such, it provides a sufficient, albeit indirect, nexus between the state and international wrongfulness. However, that very same rationale may be also used to argue that the concept of obligations *erga omnes* and the indirect links they set between wrongfulness and third states (*i.e.* non-injured states) may justify the exercise of universal jurisdiction<sup>43</sup> by the domestic judicial authorities of any state in the world – under the same terms and for the same reasons that any state is allowed to invoke the international responsibility of the subject that breaks an obligation it owes *erga omnes*. In other words, it could be argued that the breach of an obligation *erga omnes* justifies the exercise of universal jurisdiction – even when that form of jurisdiction is not explicitly authorised by an international treaty.<sup>44</sup>

In universal jurisdiction, the state exercises criminal or even civil<sup>45</sup> jurisdiction, that is, it brings under its sovereignty by rendering its judiciary competent to adjudicate a case that is under no circumstances (territorially, personally or under the protective principle) linked to its own order. The tools stem from the domestic legal system, but there is equally a strong international element. The exercise of jurisdiction in that context may be seen as a unilateral<sup>46</sup> (re)action to a breach of interna-

41. Art. 54, ILC *Articles on the Responsibility of States*.

42. *Case Concerning East Timor, (Portugal v. Australia)* Judgment, ICJ Reports 1995, 90, especially para. 29.

43. For an overview, among others, see R. O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’, 2 *Journal of International Criminal Justice* 735 (2004). For a comparative analysis of the various national policies/practices on the topic see L. Reydam, ‘Universal Jurisdiction’, *International and Municipal Legal Perspectives* (2003).

44. See for instance the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 1465 UNTS 85, Art. 5(2), as well as the recent ICJ judgment in *Questions Relating to the Obligation to Prosecute or Extradite. (Belgium v. Senegal)* ICJ, Judgment of 20 July 2012 <[www.icj-cij.org/docket/files/144/17064.pdf](http://www.icj-cij.org/docket/files/144/17064.pdf)> and *Ould Dah v. France* (ECtHR, Admissibility) 13113/03, 17 March 2009; discussing the French criminal law on universal jurisdiction, empowering the French judiciary to ‘try the perpetrator of an offence regardless of his or her nationality or that of the victim and the place of the offence, subject to two conditions: the perpetrator must be on French territory and must be tried in application of certain international conventions’.

45. Among others, see the interesting analysis by D.F. Donovan and A. Roberts, ‘The Emerging Recognition of Universal Civil Jurisdiction’, 100 *American Journal of International Law* 142 (2006).

46. For the distinction between unilateral universal jurisdiction and multilateral, based on international agreements, see J. d’Aspremont, ‘Multilateral Versus Unilateral Exercises of Universal Criminal Jurisdiction’, 43 *Israel Law Review* 301, at 305 *et seq.* (2011). See also in the same pages the critical comments by that author on the constitutional bias that, in his view, characterises the debate about the exercise of jurisdiction at the international level.

tional law by a third subject who is not linked to (that is to say, who is not directly affecting, nor injuring) the reacting state. That state transforms its own judiciary into a universal, 'world' *forum* that acts, not in order to protect that state's individual interests, but the interests (and the values) of the international society. Yet, this is exactly what *erga omnes* do as well. They authorise every state to unilaterally react against the breach of an obligation owed *erga omnes*. Thereby, states seek to unilaterally (and in the name of the society) protect interests and values (translated into a special type of rules) that are common to the society. Both counter-measures (to give the most characteristic example of reaction against the breach of an *erga omnes* rule) and universal jurisdiction constitute a form of unilateral reaction to wrongfulness. In both cases there is no direct link connecting wrongfulness with the reacting state. The analogy is noticeable. If what authorises a non-injured state to react to wrongfulness is the *erga omnes* quality of the norm, with the latter being a condition for the former, then why not to recognise that very same condition as the basis of universal jurisdiction as well? The logic and the *raison d'être* of *erga omnes* as a distinctive class of rules may authorise/permit a state to react – by exercising jurisdiction – to the breach of a rule that concerns/affects everyone, including itself as a non-(directly) injured state.<sup>47</sup> In that sense, the condition for universal jurisdiction to be permissible would be that the rule at issue has an *erga omnes* character.

However, legitimate counterarguments exist. The analogy is far from perfect, as, in the former case, the reaction is occurring at the international level and concerns the relationship between two states, whereas in the case of universal jurisdiction the offender is by definition a subject that would not be covered by immunity (especially not another state) as the offender will have to be placed under the jurisdiction (that is, under the sovereignty) of another state – a fact that may infringe the sovereignty of the other involved states, and primarily of the state of nationality. Second, it is debatable<sup>48</sup> whether obligations *erga omnes* are binding for non-state actors.<sup>49</sup> Finally, the question of universal jurisdiction – both its

legality, as well as its extent –<sup>50</sup> is far from settled in international law.

Nonetheless, it is for all these reasons that universal jurisdiction is mentioned here merely as an opportunity offered by the 'tool' of obligations *erga omnes* for further humanisation of international law. In other words, *erga omnes* only establish the nexus between the non-injured state and the wrongful conduct, that is, they provide a justification in favour of universal jurisdiction. Whether that form of jurisdiction is or will ever be allowed in international law is, once again, a question that falls outside this article and which definitely escapes the authority of its author, who is neither a judge, nor a state official, whose practice could count as state practice.

- Limiting the Will of the State *Uti Singuli*

The second consequence of the concept of obligations *erga omnes* is even more challenging. If, for the reasons that have been already explained, this category of rules is destined to allow the community of states to protect what is of material importance to them (referring back to the idea of a public order), then, the interests and values of the community should be able to limit the will of the state *uti singuli*. After all, this is the meaning of a public order, to restrict individual will. In international law, this is the case of that limited number of absolute, imperative, peremptory, intransgressible or whatever these may be called obligations *erga omnes* that are also known as *jus cogens*<sup>51</sup> – which is (especially as far as treaty law is concerned) the *lex lata* of international law. But, once again, one may wonder if there is no room for further development, as well as whether, in a system such as the international one, nullity of conflicting rules and prohibition of exceptions, limitations or derogations (that is, the effect of *jus cogens*) are the only means for a public order to limit the sovereign will of individual states?

In that respect, the article can give two examples of the far-reaching and still underexplored consequences that obligations *erga omnes* may have for international law. The first is the question of state will in the execution of and compliance with international judgments; the second is the hierarchy of rules and, in a sense, it is a *pre-requisite* for the former.

- Execution of and Compliance with International Judgments

As far as the first issue is concerned, it would be interesting to give the example of a famous problem in logic, namely the Protagoras' Paradox of the Court. A young pupil in ancient Greece, Euathlus, wanted to study with

47. For a more detailed presentation of the argument in the context of the Alien Tort Claims Act, see V. Tzevelekos, 'In Search of Alternative Solutions: Can the State of Origin Be Held Internationally Responsible for Investors' Human Rights Abuses Which Are Not Attributable to It?', 35 *Brooklyn Journal of International Law* 155, at 208 *et seq.* (2010).

48. See, however, the *Institut de droit international* Resolution on *Obligations Erga Omnes in International Law* (27 August 2005), suggesting that 'certain obligations bind all subjects of international law for the purposes of maintaining the fundamental values of the international community'.

49. However, these obligations are binding for the state, which, under due diligence, has an obligation to protect them through positive measures. See *infra* the arguments presented in the paper on the effect of due diligence and its interaction with obligations *erga omnes*.

50. See for instance the separate opinion of the former president of the ICJ, Judge Guillaume, concluding that universal jurisdiction exists against piracy. Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v. Belgium*), ICJ Reports 2002, 3, separate opinion of Judge Guillaume at 37-38; as well the separate opinion of Judge Koroma in the same case adding genocide and slave trade to the list of crimes subject to universal jurisdiction. *Ibid.* at 61-62.

51. See the thorough analysis of M. Byers, 'Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules', 66 *Nordic Journal of International Law* 211 (1997).



Protagoras and become an ‘attorney’. However, the student could not afford the fees the famous sophist was charging. The agreement they reached was that he would only pay Protagoras for his instruction after he had won his first case. Time passed and Euathlus was neither paying his tutor nor practicing law. Protagoras decided to claim the amount Euathlus owed him and brought the case to court. Should Protagoras win the case, the student would be obliged to compensate him on the basis of the judgment. If the opposite scenario were to come true and Euathlus won the case, Protagoras would still be paid on the basis of their original contract. As it is easy to guess, the student’s views were exactly the opposite, concluding that, either way, he should be exempted from the obligation to pay.

The Protagoras’ Paradox of the Court introduces in the most genuine way the dilemma between ‘private’ state will and the *autorité de la chose jugée*. If one wishes to emphasise sovereignty, then the agreement between two states should suffice to allow them to depart from the judgment of a court. How may obligations *erga omnes* be relevant in that respect? If one agrees that, because of their material weight, these rules (and not only *jus cogens*) might (under the *conditions* that are explained below) limit state will, then the agreement of the parties to the dispute should *not* be of the power to permit them to circumvent their secondary obligations – and especially those that relate to the ceasing of the illicit conduct<sup>52</sup> and the adoption of measures of compliance aimed to guarantee non-repetition,<sup>53</sup> aiming to the so-called substantive element of the compliance with an international judgment.<sup>54</sup> The concept of public order does not allow a dispute to be ‘privatised’. This is indeed the spirit of the ECHR when it sets conditions for the friendly settlement of human rights disputes,<sup>55</sup> limiting thereby the will of the parties and subordinating it to the authority of its court – and this may be seen as an example as to how the idea presented here may translate into *lex lata*. Yet, there is still plenty of space for evolution, whereas the argument presented here depends on the condition that, indeed, obligations *erga omnes* may limit state will. This is what the next paragraph discusses, arguing that obligations *erga omnes* develop a ‘special’ type of *material* supremacy, which translates into a *conditional*, occasional priority in fulfilment.

52. Art. 30(a) ILC *Articles on the Responsibility of States*.

53. Art. 30(b), ILC *Articles on the Responsibility of States*.

54. In the context for instance of the ECHR, see Art. 46(1) ECHR and the old, but always pertinent article by G. Cohen-Jonathan, ‘Quelques considérations sur l’autorité des arrêts de la Cour européenne des Droits de l’Homme’, *Liber amicorum Marc-André Eissen* (1995) at 49-50.

55. Which must be done ‘on the basis of respect for human rights as defined in the Convention’. Art. 39(1) ECHR. See also O. de Schutter, ‘Le règlement amiable dans la Convention européenne des droits de l’homme: entre théorie de la fonction de juger et théorie de la négociation’, in *Les droits de l’homme au seuil du troisième millénaire. Mélanges en hommage à Pierre Lambert* (2000) at 238-239.

## • Hierarchy of Rules

Turning now to the question of hierarchy of rules, what needs first to be underlined is that, although only very few obligations *erga omnes* are *jus cogens* and, therefore, in their vast majority *erga omnes* form part of *jus dispositivum*, they distinguish, however, themselves from bilateral or bilateralisable synallagmatic obligations in that they are integral.<sup>56</sup> This explains why they are ‘immune’ to reciprocity and, more generally, why they constitute an extraordinary type of *jus dispositivum*, which is given special effects. Leaving the territory of *do ut des* and entering the world of “legitimate community interest[s]”<sup>57</sup> entails consequences. The will of individual states ought to be – somehow – limited against what is an international public order, no matter whether this translates into *jus cogens* or, simply, *erga omnes*.<sup>58</sup>

It is not within the intentions of the article to repeat an argument that this author has already presented elsewhere.<sup>59</sup> In its general outline, the idea is simple. Yet, before briefly presenting it, it is necessary to recognise that the argument suggested here is far from established in international law,<sup>60</sup> as well as that it definitely goes against the thesis defended by the ILC, which only distinguishes rules *erga omnes* because of their procedural scope and consequences,<sup>61</sup> that is, the faculty of every state to react to wrongfulness.

Against that background, it is argued here that obligations *erga omnes* do develop a certain type of *sui generis*

56. For a comprehensive overview of the Fitzmauricean classification of obligations, see J. Pauwelyn, ‘A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature’, 14 *European Journal of International Law* 911 (2003). The ILC on the other hand makes a distinction between integral and inter-dependent obligations. Draft *articles on Responsibility of States for Internationally Wrongful Acts*, with commentaries *supra* n. 21, pp. 117-118. See also L.A. Sicilianos, ‘The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility’, 13 *European Journal of International Law* 1127, at 1134 *et seq* (2002), as well as, by the same author, ‘L’influence des droits de l’homme sur la structure du droit international. La hiérarchisation de l’ordre juridique international’, 116 *Revue Générale de Droit International Public* 5 (2012).

57. UNHRC, *General Comment No. 31* *supra* n. 23, para. 2.

58. A thesis that goes against the voluntarist approach defended by Prosper Weil, who was seeing in obligations *erga omnes* and, of course, in *jus cogens* a threat for classic international law. P. Weil, ‘Towards Relative Normativity in International Law’, 77 *American Journal of International Law* 413 (1983).

59. V. Tzevelekos, ‘The Use of Art. 31(3)(c) of the VCLT in the Case-law of the ECtHR: an Effective Anti-Fragmentation Tool or a Selective Loop-hole for the Reinforcement of the Teleology of Human Rights? Between Evolution and Systemic Integration’, 31 *Michigan Journal of International Law* 621, at 641 *et seq* (2010).

60. On the variety of doctrinal approaches on hierarchy in international law, see J.H.H. Weiler and A.L. Paulus, ‘The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?’ 8 *European Journal of International Law* 545, especially at 558 *et seq*. (1997).

61. *Fragmentation of International Law: Difficulties Arising from The Diversification and Expansion of International Law*. Report of the Study Group of the International Law Commission, finalised by Martti Koskeniemi. ILC Fifty-eighth session. A/CN. 4/L.682, para. 408. See also J. Vidmar ‘Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System’, in E. De Wet and J. Vidmar (eds.), *Hierarchy in International Law. The Place of Human Rights*, at 23-25 (2012).

material hierarchy,<sup>62</sup> which is of course closely linked, and indeed derived from their material importance,<sup>63</sup> that is to say, from the fact that they have been set to protect important societal values (human rights) or common interests (environmental protection) that, inevitably, affect everyone's life within the community. However, the effect of that type of normative supremacy described here has nothing to do with the force of *jus cogens*. It consists of a simple (yet effective and, indeed, essential) *priority* in the fulfilment of the obligation, on the basis and under the *conditions* set by the widespread<sup>64</sup> use, in the 'age of balancing',<sup>65</sup> principle of proportionality, which only operates on an *ad hoc* basis, that is, within the context, or in the light of the particular circumstances of each separate case.

*Jus cogens* is a 'guillotine' clause. Inherently<sup>66</sup> conflicting rules are deprived of any effect, that is, of any normative force. *Erga omnes* treat conflicting norms in a more 'gentle' way. Unlike *jus cogens*, they are susceptible to limitations. Yet, for these limitations to be permitted, they must satisfy the exigencies of proportionality. As explained, this tool only operates on an *ad hoc* basis. Far from giving standardised, pre-established or automatic results, its outcomes, that is, the assessment of the legality of a limitation/derogation (for the purposes, in that instance, of compliance with a conflicting international obligation), depend on the particular circumstances of the case. In that sense, proportionality is a tool for the establishment (also) of *ad hoc*, *i.e.*, occasional priorities in fulfilment, which only apply within the particular context of a given case.

This is, besides, what the ECtHR did when, very recently, it applied proportionality in the context of the famous *Nada* case, whereby, the court required the defendant state to limit the effect of a Chapter VII UN SC Resolution that was imposing sanctions against the applicant, to the extent that this was necessary for the

applicant's rights under the ECHR to be protected.<sup>67</sup> The reference the court makes to harmonisation<sup>68</sup> is in reality a euphemism, that is, a less 'aggressive' way to explain that, given the particular facts of the case, it was *necessary* to limit the effect of the UN SC resolution. This is another way to imply that priority ought to be given in the fulfilment of the (*erga omnes partes*) rule at issue of the ECHR over a conflicting obligation stemming from the UN Charter and its Article 103. The key tool here is proportionality. If another similar case ever occurs, proportionality will again be of usefulness, as a means to assess from the beginning the facts of the new case.

Actually, this is the same intellectual process we all do in any situation of conflict of obligations/aims. Setting the sort of priority described here is not the prerogative of the international judge. Although only the latter has the authority to declare the legality of the outcome of that intellectual process, in reality, state agents are intuitively doing the same thing in the 'everyday life' of international law. Think for instance of the banal example of a diplomatic bag passing through border control in an airport. State officials know that they are 'under no circumstances' allowed to inspect the bag. What if they listened to a baby inside that bag crying? Maybe they do not conceive it in these terms, but in reality they are facing something more than a moral dilemma, as, in the context of the case, there is also an apparent conflict of legal obligations. The first obligation requires them to protect the baby's life, under the positive effect given to the human right to life. The second obligation calls them to abstain from opening the bag. Each rule has its own *ratio* and they both pursue a legitimate aim. The first has been established to allow co-existence and co-operation, and to facilitate the diplomatic relationship between nations. The second's *telos* is the protection of human life.

Proportionality in that example may work either way, that is, with respect to the limitation of each one of the two rules. In the first case, it would be applied as a means to assess the legality of the opening of the bag to save the baby's life. The criterion would be necessity, *i.e.* whether opening the bag is necessary for saving that life. In the opposite scenario, proportionality would test the legality of the limitation of the baby's right to life, in order to comply with the rule on the inviolability of diplomatic bags. Either way, the function of proportionality remains unchanged. Both roads would lead to a common result on the basis of one single key concept: necessity.

Necessity here operates at a dual level. The more technical dimension of it consists in assessing the legality of a limitation on the basis of what would be necessary in

62. B. Simma, 'Universality of International Law from the Perspective of a Practitioner', 20 *European Journal of International Law* 265, at 272 *et seq.* (2009).

63. See D. Shelton, 'Normative Hierarchy in International Law', 100 *American Journal of International Law* 318 (2006); M. Ragazzi, *The Concept of International Obligations Erga Omnes* (1997); and E. de Wet, 'The International Constitutional Order', 55 *International and Comparative Law Quarterly* 51, at 57 (2006), *et seq.* Contra A. Pellet, 'Conclusions', in C. Tomuschat and J. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order*, at 418 (2006); I.D. Seiderman, *Hierarchy in International Law: The Human Rights Dimension*, at 125 (2001).

64. On the spread of proportionality and the various reasons why it is nowadays so commonly applied in a big number of legal systems, see A. Stone Sweet and Jud Matthews, 'Proportionality Balancing and Global Constitutionalism', 47 *Columbia Journal of Transnational Law* 74 *et seq.*, and M. Cohen-Eliya and I. Porat, 'Proportionality and the Culture of Justification', 59 *American Journal of Comparative Law* 464 *et seq.* (2011).

65. T.A. Aleinikoff, 'Constitutional Law in the Age of Balancing', 96 *Yale Law Journal* 943 (1987).

66. Concerning the typology of normative conflicts, see J. Pauwelyn, 'Conflict of Norms in Public International Law', in *How WTO Law Relates to other Rules of International Law*, at 176 (2003).

67. *Nada v. Switzerland* (ECtHR, Judgment) 10593/08, 12 September 2012, paras 181 *et seq.*, especially paras 196-198. See also the critical comments by Judge Malinverni, who, in his concurring opinion (especially paras 11 *et seq.*) is directly raising the question of hierarchy of rules in case of conflict between UN-stemming obligations and human rights.

68. *Ibid.*, para. 197.

order to achieve a goal. The question asked here is what is the level of limitation a right should suffer in the light of the circumstances of the case. In the case of the right to life, proportionality would test what kind of positive conduct, such as opening the bag, would be necessary to protect the baby's life. If the same test were conducted with regard to the inviolability of the diplomatic bag, the question would be whether, to protect the diplomatic relationship between the two states involved in the scenario, it would be necessary *not* to take the positive measures at issue, such as opening the bag. The sign changes from positive to negative, but the 'math' is the same. The outcome of the equation depends on the particular facts of the case, as well as on whether it is possible to harmonise the two obligations. For instance, it would make a big difference if a scanning machine were available, enabling to inspect the bag with minimal interference to the inviolability of the diplomatic bag. This is the *procedural* aspect of necessity in proportionality.<sup>69</sup> It enables balancing means with ends.<sup>70</sup>

Yet, it is the second and more *substantive* dimension of necessity that mainly interests this article. The limitation (the legality of which is tested through proportionality) is a means to an end. Means and ends cannot be truly disconnected. Opening the bag is a means to rescue a life. At stake is a value that is common to the international community as a whole, and this is why the obligation is integral and owed *erga omnes*. Abstaining from opening the bag is a means for the protection of cooperation at the inter-state level. As such, this aim is primarily linked to the individual interests of a pair of states – and this is what makes the obligation bilateralisable. The role of necessity in that second level is to examine whether these two goals (the object and purpose of each rule) are worthy enough on the basis of their material content and importance to justify a (necessary or in different legal systems reasonable) limitation to the conflicting goal/obligation. The particular circumstances of the case remain of importance. In the example discussed here, the criterion would be the consequences (starting from a simple degradation of bilateral relationship, and extending to acts of self-help) that the opening of the bag would have in the relationship of the two countries, or, in the opposite scenario, the consequences for the baby's life and health. In both cases, the task of proportionality would be the same. It would be used to juxtapose two legitimate aims, to weigh their material importance in the light of the facts of the case and, if harmonisation was proven to be of limited effec-

tiveness, to finally give priority to one of the two goals and respective rules by authorising or prohibiting a limitation.<sup>71</sup>

Unlike *jus cogens*, in the case of conflict with *erga omnes* obligations both rules remain in force. Yet, in the light of the facts of the case, only one can be given priority. Outside facts, the key here is the value, the weight and the material importance of the aims/rules at stake. The argument the article wishes to contribute is that, *overall*,<sup>72</sup> in most situations of conflict, the test of proportionality will make the rules *erga omnes* prevail over the synallagmatic rules that have been designed to protect individual state interests. The reason is simple. *In abstracto*, protecting a life is more important than diplomatic correspondence. This is, after all, why that obligation is owed *erga omnes*. *In concreto*, proportionality will provide for the necessary adjustments, in the light of the particular facts of each case.

The conclusion that can be reached is that, indeed, *erga omnes* do not develop 'hard' supremacy of the kind of *jus cogens*. However, they do prevail over conflicting obligations in that, under conditions, priority is given to their effect. The way one will express this idea depends on whether s/he sees the glass half full or half empty. From a more traditional perspective that would emphasise sovereignty, states shall be free to create and apply any rule they want, unless if they disproportionately infringe the societal values obligations *erga omnes* protect. This is how the *Lotus* court would express that idea. If, on the other hand, the emphasis is put on public order and the community of interests, then states shall *not* be allowed to do so, unless they satisfy proportionality. Yet, in both cases, the bottom line is common. Despite the voluntarist origins of the international system, the concept of a community of interests does not leave the will of states unaffected. This is how international law may protect the fundamental values/common interests of its society, which, of course, extend well beyond *jus cogens*. The type and the effect of the supremacy are different, but the logic, the function and the purpose are common in both *erga omnes* and *jus cogens*. This is, besides, what distinguishes obligations *erga omnes* from the rest of *jus dispositivum*.

69. Among other authors, T. Hickman, 'Proportionality: Comparative Law Lessons', *Judicial Review* 38 *et seq.* (2007). On the three distinctive 'sub-principles' (suitability, necessity and proportionality *stricto sensu*) that apply within the framework of the overall test of proportionality and their origins in the German constitutional tradition, see R. Alexy, 'Constitutional Rights, Balancing, and Rationality', 16 *Ratio Juris* 135 (2003).

70. On the function of proportionality as a balancing 'mechanism' on the basis of the test of necessity, among many other authors, see A. Barak, 'Proportional Effect: The Israeli Experience', 57 *University of Toronto Law Journal* 369 (2011) and of the same author, 'Proportionality and Principled Balancing', 4 *Law and Ethics of Human Rights* 3 (2010).

71. See J. Waldron ['Fake Incommensurability: A Response to Professor Schauer', 45 *Hastings Law Journal* (1993-1994) 817 *et seq.*], who argues that when conflicting values can be brought into relation with one another, the balancing process enables the establishment of priorities.

72. Yet, everything depends on the particular circumstances of the case. See for instance the examples given earlier with regard to the clash between access to justice and sovereign immunities. Yet, if the facts of the case were different, the outcome of proportionality would have been equally different. It makes a significant difference for instance to request that immunity is raised in order to obtain a pecuniary compensation for heinous international crimes, which, however, took place decades ago and to apply the test of proportionality in order to assess whether an imminent danger to the life or an ongoing grave violation of human rights may justify raising immunity.



## 3.2 Due Diligence: The State as 'Good Samaritan'

### 3.2.1. *Lex Lata*

The second 'tool' pre-dates human rights. The famous principle of due diligence<sup>73</sup> has formed part of international law for several decades now as a generic matrix that alters the scope of international obligations. One does not need to go back to *Alabama* or to *Island of Palmas*. The principle has been recognised by the ICJ on numerous occasions – at the beginning indirectly<sup>74</sup> and, more recently, in a very outspoken way, confirming its customary foundations in positive international law.<sup>75</sup> Due diligence is a general principle that applies well beyond human rights. However, it matured within the field of human rights or, more accurately, when human rights were embodied within it, thanks to the case law, mainly of the Inter-American and the European courts of human rights, giving an indirect-horizontal (positive) effect to the rights safeguarded by their respective conventional frameworks. As far as the interrelationship between due diligence and human rights is concerned, the I-ACHR has recognised that,

in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the state. However, this does not define all the circumstances in which a state is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the state might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.<sup>76</sup>

For due diligence to obtain full and concrete content it needs to be applied with regard to a specific international rule, such as human rights. The principle expands the effect and scope of application of the rule within which it is embodied to the extent that the state is not only

expected to abstain from breaking that rule by actions or omissions that are directly attributable to it, but also to 'fight' (*i.e.* prevent, punish, etc.) a breach of the law that is either attributable to a third subject or owing to a general situation that cannot be personified, such as social or natural phenomena.

Due diligence is quasi-absent from the aforementioned ILC norms.<sup>77</sup> The difference between so-called objective responsibility, stemming from the fact that the state is directly causing the wrongful result attributable to it, and responsibility because of the failure of the state to demonstrate diligence, that is, to 'fight' the wrongful conduct of another person/situation causing the wrongful result, is that the former requires states to guarantee certain results. On the contrary, for the state to escape responsibility for lack of diligence, it needs to demonstrate that it did everything that was possible to fight wrongfulness. To comply with diligence, states need to suitably use the pertinent means at their disposal.<sup>78</sup> By definition, due diligence generates obligations of means,<sup>79</sup> that is, a concept that is directly linked to the old idea of responsibility because of 'state fault'<sup>80</sup> – requiring a subjective appreciation of the available means, their suitability and the necessity to make good use of them in order to reach the goals of due diligence.

### 3.2.2 *Lex Ferenda*

The potential of due diligence is indeed great, as we are only now starting to understand how this principle can find application in a wide range of areas of international law. Due diligence not merely requires the state to passively abstain from breaking the law, but also to actively strive to guarantee (to the best of its ability) that the other subjects of the society (especially those under its jurisdiction) be prohibited and prevented from breaking the law as well. Yet, the article wishes to point to two different directions, which are both relevant to the idea of the humanisation of international law and to the potential offered in that respect by due diligence.

73. On due diligence, see R. Pisillo Mazzeschi, 'Due Diligence' e responsabilità internazionale degli Stati (1989), as well as, by the same author, 'The Due Diligence Rule and the Nature of the International Responsibility of States', 35 *German Yearbook of International Law* 9 (1992). See also R.P. Barnidge, 'The Due Diligence Principle under International Law', 8 *International Community Law Review* 81 (2006).
74. *The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)* Judgment of 9 April 1949 ICJ Reports 1949, 4 at 22; *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion. ICJ Reports 1996, 226 at para. 29, *Legal Consequences of the Construction of a Wall (supra n. 22)* at para. 141, ICJ, *Armed Activities on the Territory of the Congo (supra n. 22)* at para. 179.
75. *Case Concerning Pulp Mills on the River Uruguay, (Argentina v. Uruguay)* Judgment, ICJ Reports 2010, p. 14 at para. 101.
76. *Velásquez-Rodríguez v. Honduras*, July 29, 1988 Inter-Am. Ct. H.R. (ser.C) No. 4 at para. 172.

77. The ILC *Articles on the Responsibility of States* make an implicit reference to due diligence in Art. 14(3) that concerns the temporal dimension of the obligations to prevent. In that case the wrongful act for failure to prevent is continuous. See also the commentaries of the ILC discussing Arts. 9 and 10 of the norms. However, due diligence is not excluded *per se*; simply the ILC norms do not deal with fault, but leave that to the substance and scope of the primary norms.
78. P.M. Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility', 10 *European Journal of International Law* 371, at 378-382 (1999).
79. *González et al. ('Cotton Field') v. Mexico*, November 16, 2009, 1988 Inter-Am. Ct. H.R. (ser.C) No. 20 at para. 252. See also A. Tunk, 'La Distinction des Obligations de Résultat et des Obligations de Diligence', *La semaine juridique (Juris-classeur périodique)*, 1945, No. 449, as well as J. Combacau, 'Obligations de résultat et obligations de comportement. Quelques questions et pas de réponse', in D. Bardonnet et al. (eds.), *Mélanges offerts à Paul Reuter. Le droit international: unité et diversité* (1981), at 181-204.
80. P.M. Dupuy, 'Le fait générateur de la responsabilité internationale des États', 188 *RCADI*, at 102-103 (1986); and Pisillo Mazzeschi (1992) *supra* n. 73 at 18-21 and 49-50.

- Returning to the State: Due Diligence as a Substitute to the Absence of Individual Responsibility

The first direction concerns the power due diligence has to act as a supplement or even a substitute to the absence of a mature and fully developed framework of primary and secondary obligations directly regulating at the international level the conduct of so-called non-state actors. Indeed, human rights have been a major catalyst in the change of international law. However, society is now realising – often in a rather painful way – that the human being is not only a ‘victim’ in need of protection. The private factor proved to be an increasingly influential global player, having the power to affect the global economy, use force against states and other non-state actors, or to act as a pirate, a cyber-aggressor or a terrorist. A truly humanised order should contain rules regulating that conduct, establishing obligations for these private activities and holding their authors directly responsible at the international level. Yet, we know that, with the exception of the handful of international crimes, international law contains no such rules – at least not hard ones. Apparently, this creates a *lacuna*, a legal and institutional gap that somehow needs to be covered.

This is what due diligence can contribute. Within a state-centric legal system, apart from, or rather than resorting to ambiguous constructions and soft-law solutions about the responsibility of the private entities that breach human rights, pollute the environment or destroy monuments of the common cultural heritage of humanity, we can turn to the state.<sup>81</sup> Due diligence makes this possible. It requires states to protect, that is, to prevent – mainly through regulation – and punish wrongfulness. Clearly, it is an oblique solution. But it is a solution. Instead of holding accountable the subject to which the illicit conduct is directly attributable, we turn to its ‘legal guardian’. We expect states to control the author of the wrongfulness and, if they unduly fail to do that in an effective way, we (also) hold them responsible – instead of or next to the subject that has directly caused the wrongful result. It is the needs of the society that require states to assume part of the responsibility for the conduct of those found under their jurisdiction. After all, sovereignty should not only mean rights and prerogatives, but also responsibility and exercise of power against those found under that sovereignty. Of course, conditions apply. First, the state only has an obligation of means, that is, it will only be held liable if it had the means to act against conduct producing results prohibited by international law and it failed to do so. Second, in principle, the state must be exercising jurisdiction over the author of the illicit conduct. However, this is yet another huge topic of international law, which cannot be dealt with in the article. Suffice to

mention that both active and passive personality will be of great usefulness in extending due diligence obligations beyond state borders. Limiting jurisdiction to the territorial basis is not what the nature of the social behaviours at issue (such as international terrorism or cyber-crimes) requires. The needs of the globalised society are different.

- Combining the Two Tools: L’Union Fait la Force  
Last but not least, as Belgians say, *eendracht maakt macht* (it is unity that makes strength). The idea promoted here is the ‘synergy’ between the two systemic tools discussed in the article. The combination of the obligation to protect (limited for the purposes of the article to due diligence) with *erga omnes* may have a number of very interesting consequences.

First, if the obligation breached by a subject under the jurisdiction of a state is of *erga omnes* nature, then the positive obligation under due diligence of that state to prevent and punish that conduct will equally be *erga omnes*. *Ergo*, each and every state in international law will be allowed to react against the negligence of that state to make use of the pertinent positive measures.

The second scenario is slightly more complicated. It actually relies on the previous one, but is also adding a transnational element. According to that scenario, either the author (the perpetrator) of the breach of an international obligation a state owes *erga omnes*, or the victim of that conduct, are somehow (in principle, through nationality) linked to a third state. For instance, the citizen of state X, visits state Z as a tourist, where s/he sexually abuses a child. This will have two main consequences. First, more than two states (that is, as many states as the bases of jurisdiction, such as territory, passive or active nationality) will be expected to exercise concurrent (and for some of the states extraterritorial) jurisdiction in the light of due diligence.

Second, invoking the responsibility of the other involved states in case of failure on behalf of them to act in a diligent manner, will be one of the *means*<sup>82</sup> available to the state to fulfil its own obligations under due diligence. In that case, due diligence may convert the faculty, that is the discretion states enjoy to internationally (re)act in order to protect the values and common interests covered by *erga omnes* obligations into an obligation (of means) to actively (that is through positive action) protect these values and interests. In the light of due diligence, what is seen as a simple faculty, allowing states to act as ‘good samaritans’ whenever they feel like, transforms into a positive obligation of international law, calling the state to fight the breach of an *erga omnes* violation, to the best of its ability of course. However, as already explained, in principle, the way things stand

81. This is actually, one of the three ‘paths’ suggested by J. Ruggie, *Guiding Principles* supra n. 28, principles 1-10. See also Tzevelekos, supra n. 47, suggesting a ‘pathway’ on the basis of due diligence to hold responsible the home state for the wrongful conduct of its investors acting overseas.

82. *Ilaşcu and others v. Moldova and Russia* (supra n. 19) at para. 333, ‘The State in question must endeavour, with all the legal and diplomatic means available to it vis-à-vis foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention.’ See also, *Catan and others v. Moldova and Russia* (Judgment) 43370/04, 8252/05 and 18454/06, 19 October 2012 at paras 146-147.

now, this would not concern diplomatic protection,<sup>83</sup> as it remains a 'privilege' for states, and not an obligation...

#### 4. A Relativist Conclusion: Bridging the Worlds of 'Is' and 'Ought'

One cannot be but sympathetic, if not supportive, to the noble intentions of the theory of humanisation – especially if one happens to share the values, that is, the material sources that underpin and nurture the legal rules protecting the human being at the international level. Yet, it is one thing to ethically agree with the idea and the aims of human rights, both as an ideology, as well as positive international law, and another thing to suggest that human rights have given an entirely new, human face to what has traditionally been a sovereignist legal order. As it is one thing to understand the process of humanisation of international law as a (to the author's understanding, legitimate) movement, calling for change (towards what in the eyes of many, one should consider, constitutes western values);<sup>84</sup> but it is something different to perceive that very aim as a universal, well-digested, mature reality in positive law that has already succeeded in radically reforming the international order, so that the latter may now be seen as predominantly humanised, with sovereignty receding '*ipso jure*' in favour of the protection of community interests. On the other hand, one needs to acknowledge that international law has always been vacillating between apology and utopia. This is the price it has to pay for maintaining its decentralised architecture. It originated as – and it predominantly remains – an inter-subjective system of a limited number of primary subjects, which are, all, legally equal and sovereign. The preservation of sovereignty impeded the emergence of a centralised system that would comprise the principal features of a mature legal order, including what Hart calls the 'luxury' of a rule of recognition.<sup>85</sup> International rules heavily depend on state *voluntas*, that is, in a sense, on the auto-limitation of the powers of the sovereign subjects.<sup>86</sup> This leads to lack of objectiveness, with scholars wondering if general international law can ever form a coherent ensemble, organised as a system – and not a *bric-à-brac*.<sup>87</sup>

Within such an order, it is only natural that the line separating the *lex lata* from the *lex ferenda* becomes a fine one, and that the world of the positive 'is' mélanges with the universe of the normative 'should' – especially when the main vehicle for the generation of general international law is a *par excellence* circular<sup>88</sup> and, in essence, informal source that fails to favour legal certainty and which, to some extent, *is* law – thanks, quite often, to the judge –, because it *should* be law.<sup>89</sup> In a nutshell, apology and utopia, both, co-exist within international law – and this is somewhat inherent to it. This is what explains the *bras de fer* between ideology and positive law, or the (in a number of instances, distorted) image/vision of a humanised legal order, as opposed to the 'old' order, marked by Leviathan's omnipotence.

Be it recognised as an auxiliary source of law, legal scholarship is only of limited influence on law making. In a number of instances (and despite its many other successful cases) the theory-driven humanisation of international law has been tested in the 'real world' of international law, it has been duly appraised, and, despite its humanistic purpose and good intentions, proved to be of significantly lower weight than what theory suggested it really is/should be. That's life, as they say. At least that is life in international law, whose purpose is not only the protection of the values of the humanity and the common interests of its society, but also the peaceful co-existence of its sovereign actors.

The international system has traditionally been, and still is, structured on the basis of inter-subjectiveness and decentralisation. This cannot change, unless the primership of states is challenged. However, humanisation is miles away from establishing a truly humanised system. Such an ambition would require a combination of a much more integrated society, elements of Kantian cosmopolitanism, a degree of centralisation, judicial enforcement, and (why not?) individuals and other non-state actors to be vested with legal capacities analogous to their actual powers, in a system that would recognise their impact in law making.<sup>90</sup> This would be the end of the world, as we know it. Be it a dynamic source of change, humanisation is merely a process; as such it is far from overturning the existing order of international

83. In that respect, see the critical comments made by R.-P. Mazzeschi, 'Impact on the Law of Diplomatic Protection', in Kamminga and Scheinin (eds.), *supra* n. 1 at 222 *et seq.*

84. On 'cultural imperialism', among others, see: M. Koskeniemi, 'International Law in Europe: Between Tradition and Renewal', 16 *European Journal of International Law*, at 113-124 (2005).

85. H.L.A. Hart, *The Concept of Law*, at 214 and mainly 235 (1994).

86. L. Condorelli, 'Is Leviathan Still Holding Sway Over International Dealings?', in Cassese *supra* n. 2.

87. J. Combacau, 'Le droit international. Bric-à-brac ou système?', *Archives de philosophie du droit*, tome 31 (Le système juridique), at 96-97 (1986).

88. Koskeniemi (2005), *supra* n. 6 at 410 *et seq.* M. Koskeniemi 'The Politics of International Law', 1 *European Journal of International Law* 4, at 23 (1990); M. Byers, 'Custom, Power and the Power of Rules', *International Relations and Customary International Law*, at 136 (1999).

89. '[T]he genius of custom is to strike a bridge between the world of is and the world of the ought': C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', 281 *RCADI*, at 331 (2001). See also A.E. Roberts 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 *American Journal of International Law* 757 (2001), at 757 *et seq.* who defends the idea of a new custom of deductive nature mainly founded upon *opinio juris*.

90. Which, one should admit, as an idea is really close to the concept of global administrative law. For a comprehensive introduction, N. Krisch and B. Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order', 17 *European Journal of International Law* 1 (2006), as well as, B. Kingsbury, 'The Concept of "Law" in Global Administrative Law', 20 *European Journal of International Law* 23 (2009).



law and its foundations. Therefore, for it to succeed in its aims, it needs to be adjusted to, that is, to be *reconciled* with the structural characteristics of the international legal system. The order will remain decentralised and the state will preserve sovereignty. However, this will have to be *balanced* with the need to protect some important societal values and collective interests, within a pluralistic, if not fragmented, social *milieu*.

This is the reason why this paper opted for a more modest and ‘true-to-life’ approach that would allow humanisation to put international law’s feet on the ground. Thus, it pointed to obligations *erga omnes* and to the principle of due diligence, suggesting that, at its very basis, the humanisation of international law contains two powerful systemic tools. These tools do not aim – and definitely do not suffice – to fully reshape or reconstruct the system. Yet, they have been created by the system. They are the products of a system, which, while maintaining its basic structure, is slowly changing, following the direction its society evolves.

As a reality of positive international law, the two named tools are a proof of systemic evolution. As an opportunity, these very same tools have the potential to create the necessary space within that state-centric system so that the normative project of the humanisation – supported by the necessary societal consensus – progressively flourishes. Obligations *erga omnes* inherently reflect the idea of an international public order that has the potential to erode the omnipotence of the sovereign state and infiltrate other areas of law, which shall only be allowed to produce their effects as long as and/or to the extent that they do not infringe this (admittedly, still fragmented and anaemic) public order. Collective enforcement introduces a strong element of communitarianism within the decentralised order. At the same time, the generic concept of due diligence gives a new direction, a different scope to international law. States are expected to not only abstain from breaking the law, but also have, not a faculty, but an *obligation* to protect subjects under their jurisdiction in a pro-active way.

According to the paper, this is the very basis, the very core of the humanisation of international law. As such, it is partially a *reality* of positive law, and partially a *potential*, that is, a foundation and an opportunity for further humanisation, but always within the limits and the confines of a decentralised system marked by (an increasingly eroded) sovereignty that operates in a pluralistic social context. The potential for further humanisation only starts there where the reality of the humanisation ends. However, this is mainly a question of interpretation. Within a decentralised and highly disintegrated legal order, it is unavoidable that ideology meets positive law and that the line separating the *lex ferenda* from the *lex lata* becomes blurred. After all, one could respond to Professor Pellet, everything is so ideological. Even positivism. Only time, the dynamism of the society and judges, having the authority to validate evolution by exercising jurisdiction, that is, by *juris dire*, will tell. Until then, the battle shall go on...