Leiden Journal of International Law, 22 (2009), pp. 289–305
 Printed in the United Kingdom doi:10.1017/S0922156509005822

The Legal Relations of Collectives: Belated Insights from Hohfeld

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Abstract
Collectives and their interrelations are central to international law. Legal relations between collectives can be analysed with reference to the classic account of Hohfeld without reducing those collectives to mere aggregates of individuals and without recourse to the legal fiction of treating the collective, for example the state, as a quasi-individual. The rights of collectives have been widely if not conclusively explored within international law, but Hohfeld's 'field' approach to legal relations enables the scrutiny of the range of relations, including immunities, liberties, powers, and disabilities, as well as claim-rights and the corresponding obligations in others. The main substantive topics for discussion are the legal relations of collective entities such as peoples and minorities, and closely related matters such as self-determination. Applying Hohfeldian analysis to international law highlights the centrality of international collective entities of which the state represents only one variety. The approach described here therefore takes account of the dethroning of the state within contemporary international law and contributes to the theorization of that development. Nearly one hundred years after its first appearance, Hohfeld's analytic scheme continues to generate insights for international law.

Key words
collective; Hohfeld; peoples; responsibilities; rights; self-determination; statehood

1. Introduction

It could be said that international law as currently known struggles to comprehend collectives and the legal attributes of collectives. Of course, collective rights, such as the rights of women and the right to self-determination on the part of 'peoples', play an important (and burgeoning) role in contemporary international law and are therefore familiar if not entirely understood. But, in general, international law defines responsibility (such as duty) in ways that are either literally individualistic such that the bearer of responsibility is a natural person (as in the likewise burgeoning arena of international criminal justice) or quasi-individualistic in that

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entities such as 'the State of X' are held responsible, as a legal person, for specified actions or omissions.[1] 'Duties of peoples', as Ratner has observed, are 'not much part of international law's vocabulary'.[2]

An intuitive sense of reciprocity has a classic place in the theory of international law, at least with respect to relationships between states.[3] States are, of course, from an international legal point of view usually thought of as kinds of individual, yet at the same time reference to the state involves 'a reference to the social fact of a territorial community of persons with a certain political organization, in other words, a reference to a collectivity'.[4] Thus collective entitlements such as those of peoples or of minorities call for explication in terms that recognize a level of effective autonomy or of distinctiveness, ontological or otherwise, for the collective.[5] As Christopher Kutz has emphasized, the 'self' of 'self-government' 'is a "We", not an "I"'.[6]

Exploration of the responsibilities of collectives may contribute to our currently imperfect understanding of their entitlements. For example, the categorization of collective rights has proved problematic.[7] More generally, an emphasis on the collective may help to overcome the difficulties of excessive state-centredness in international law, a tendency that has been identified as troublesome for at least eighty years, according to Koskenniemi.[8] The state might come to be seen as just one kind (or a family of kinds) of the internationally salient collective entity, other kinds including, for example, international non-governmental organizations, multinational corporations, and the European Union, as well as peoples (indigenous or otherwise), children, and so forth. Such 'international collective entities' of course overlap, interpenetrate, and also form various hierarchical or nested structures, fluid or

1 For a critique of 'the state as Self', see S. Jodoin, 'International Law and Alterity: The State and the Other', (2008) 21 *Leiden Journal of International Law* 1, at 25. Westlake noted over one hundred years ago that 'startling results flowed from the absolute parity . . . asserted between the technical individual formed by the state and the natural man': J. Westlake, 'Chapters on International Law', in J. Westlake, *The Collected Papers of John Westlake on Public International Law*, ed. L. Oppenheim (1914), 65.

2 S. Ratner, 'Is International Law Impartial?', (2005) 11 *Legal Theory* 39, at 52. 'Duties of peoples' is an example of what will here be broadly referred to as 'collective responsibilities'.

3 It should be emphasized that the reciprocity discussed in this paper is 'external', as between different states in this example, as when a duty in state X correlates with a (claim-)right in state Y. What might be called 'internal' reciprocity – intrinsic links between a right in X and a duty in X – is also a familiar notion within international law, for example in Huber's well-known argument in *The Island of Palmas* arbitration that a state's territorial sovereignty rights bring with them important correlated responsibilities. A synthesis of external and internal analysis has been attempted in the literature (see *infra*, note 18); that project is not pursued here.

4 J. Crawford, 'The Rights of Peoples: "Peoples" or "Governments"?', in J. Crawford (ed.), *The Rights of Peoples* (1988), 55 at 55. At the same time a state is of course much more than just a 'factual collective entity'. J. Crawford, 'Multilateral Rights and Obligations in International Law', (2006) 319 RCADI 329, at 460.

5 'Groups of individuals, such as nations or ethnic minorities, plausibly have rights as well.' A. Marmor, *Law in the Age of Pluralism* (2007), at 233. Similarly, Waldron has emphasized that '[t]here is no logical difficulty with the idea of group rights'. J. Waldron, 'Taking Group Rights Carefully', in G. Huscroft and P. Rishworth (eds.), *Litigating Rights: Perspectives from Domestic and International Law* (2002) 203, at 203.

6 C. Kutz, 'The Collective Work of Citizenship', (2002) 8 *Legal Theory* 471, at 47; on the international legal 'self', see K. Knop, *Diversity and Self-Determination in International Law* (2002), at 118.

7 Crawford, *Rights of Peoples*, *supra* note 4.

8 M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', (2007) 70 *Modern Law Review* 1, at 3.

otherwise.[9] Some are unique and exclusive, some are multiple. Relationships both theoretical and empirical between states and these other kinds of international collective entity might become more open to scrutiny if the collective as such is brought into sharper theoretical focus. After all, the state should not be excessively reified and certainly not deified within the jurisprudence of international law. Statehood is 'a contingency not a category'[10] and states are 'contingent and transformable'.[11]

In this conceptual process of 'flattening out' the state relative to the larger landscape of the collective, in order the better to examine and to articulate legal relations at the international level, attention to those relationships as such will be more important than attention to the definition of the 'subjects' or bearers of those relationships. That is to say, it will be important not to get hung up on questions of definition of legal personhood. As Ratner observes, the issue of 'legal personality' is either circular or unhelpful in thinking about claims and duties in international law.[12] Similarly, Crawford has emphasized the importance of a pragmatic approach, focusing on the nature of legal relationships rather than on doctrinal questions:

> [N]o further implications may be drawn from the existence of legal personality: the extent of the powers, rights and responsibilities of any entity is to be determined only by examination of its actual position.[13]

The most influential theoretical contribution to the interrelation of rights, duties, privileges, and so on is the tabular formulation of Hohfeld, first published close to one hundred years ago.[14] Here, structural interrelationships between the various attributes are displayed. Hohfeld's scheme thus systematically anatomizes the interrelationships between the various attributes of what Hohfeld calls 'legal quantities'.[15] Most particularly, Hohfeld emphasizes the correlativity of certain pairs of attributes. For example, Hohfeld argues that no right, properly described as such, can exist without a strictly corresponding duty in another.

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9 This notion chimes with, but perhaps extends even more broadly than, Jodoin's 'baroque' notion of 'non-exclusive, overlapping, non-territorial, dissimilar, heteronomous logics of organization whereby individuals [are] subject to multiple sovereignties and authorities'. Jodoin, *supra* note 1, at 25–6. The International Court of Justice has examined the generic (international) 'legal entity' in the *Western Sahara* Opinion; see Knop, *supra* note 6, at 119.

10 J. Crawford, 'Foreword', in C. Tams, *Enforcing Obligations* Erga Omnes *in International Law* (2005), xiii.

11 J. Crawford, *The Creation of States in International Law* (2006), at 324.

12 Ratner, *supra* note 2, at 47.

13 Crawford, *supra* note 11, at 30; thus legal personality 'is a compendious way of inferring certain capacities and powers in international law; it is the conclusion to be drawn from the answers to more fundamental questions as to the rights, powers and responsibilities of the particular entity'. Ibid., at 350.

14 W. N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', (1913) XXIII *Yale Law Journal* 16. Hohfeld's scheme may be outlined as follows:

(Claim-)RIGHT ← – – – – – – – – – – – →	DUTY in another
LIBERTY (PRIVILEGE) ← – – – – – – – – → [*incompatible with Duty*]	NO-RIGHT in another [*incompatible with Right*]
POWER ← – – – – – – – – – – – – – – – → [*to change certain legal relations*]	LIABILITY in another [*to have legal relations changed*]
IMMUNITY ← – – – – – – – – – – – – – → [*incompatible with Liability*]	DISABILITY in another [*incompatible with Power*]

15 Ibid., at 49.

https://doi.org/10.1017/S0922156509005822 Published online by Cambridge University Press

This general claim (whether linked to Hohfeld's account or independent of it) has not been without impact on international law, and 'some have considered the correlation of obligations and rights as a general feature of international law'.[16] It should be emphasized that a legitimate application of Hohfeld must adhere to the basic insight of the coupling of any claim-right in one legal person (perhaps collective) with a strictly corresponding obligation in another. For example, to make practical sense, a 'right to housing' must be 'opposable as against those who have the capacity to provide it'; 'where there is no right there is no obligation and *vice versa*'.[17] Therefore it would be illegitimate to seek to apply Hohfeld to the question of inherent 'internal' connections of rights and responsibilities as within the same legal person – arguably a question for ethics or for politics.[18]

At the outset it must, however, be acknowledged that such a formal approach might be said to be excessive and perhaps misleading in the context of international law, whatever its explanatory merits within a municipal legal system. It might be said to be at best obsolete. Indeed, what has been called the rejection of 'classical bilateral right–duty relations'[19] by the International Court of Justice (ICJ), in its development of the obligation *erga omnes* in the *Barcelona Traction* case, would seem to be quite precisely a rejection of the Hohfeldian approach. That is to say, the Court's previous adherence to a narrow view of standing and privity in the *South West Africa* cases, such that the competence to take action on a breach would depend on a state's (as it were) 'plaintiff' status as an injured party, might itself seem to have represented a Hohfeldian approach: an approach modelled, perhaps in a 'blinkered' fashion, on 'the dyadic right–duty relationship of a bilateral treaty'.[20]

It might thus be argued that international law has already moved well and truly 'beyond Hohfeld'. Human rights conventions are after all 'non-synallagmatic' – that is to say, not reciprocally binding in the manner of the typical municipal contract[21] – and indeed the same can in many ways be said about any multilateral treaty. But such a conclusion would be too hasty. There are several considerations that render the application of Hohfeld's scheme to international obligations rather more complex and perhaps fecund. In particular, it is the capacity of the Hohfeldian scheme to explicate the legal interrelations of *collectives* that most strongly suggests that no

16 Crawford, *supra* note 11, at 83; D. Makinson, 'Rights of Peoples: Point of View of a Logician', in J. Crawford (ed.), *The Rights of Peoples* (1988), 69 at 70; Crawford, 'Rights of Peoples', *supra* note 4, at 55.

17 M. Craven, 'The Violence of Dispossession: Extra-territoriality and Economic, Social, and Cultural Rights', in M. Baderin and R. McCorquodale (eds.), *Economic, Social, and Cultural Rights in Action* (2007), 71 at 81, 82.

18 Trakman and Gatien agree that a Hohfeldian analysis can be applied to groups: L. Trakman and S. Gatien, *Rights and Responsibilities* (1999), 188. However, their approach is based on supplementing Hohfeld's 'external' analysis of correlations (as between actors) with a non-Hohfeldian account of 'internal' limits; ibid., at 9, 18. Further, it is simply incorrect to present the paradigmatic Hohfeldian relation as an overriding right in A coupled with the consequence that '[a]ll others are disadvantaged by having a duty to respect that right'. Ibid., at 53. More strikingly erroneous is Trakman and Gatien's characterization of the Hohfeldian rights-holder as enjoyer of 'a *free lunch* at the expense of others' (!). Ibid., at 60 (emphasis in original). One aim of the present paper is to indicate the value of a rigorous Hohfeldian approach to collective legal relations.

19 J. Crawford, *The International Law Commission's Articles on State Responsibility* (2002), 25.

20 Crawford, *supra* note 11, at 7.

21 Ibid., at 41.

dead horse is being flogged in the present exercise of a Hohfeldian exploration of the jurisprudence of international law.[22]

Thus while Hohfeld's own view was that a collectivity's jural position – in particular collectively held rights – must be thought of as equivalent to (reducible to) the (distributed) positions of a set of individuals,[23] other readings of Hohfeld are available. In his recent development of the Hohfeldian framework, Matthew Kramer argues that 'Hohfeld's jurisprudential framework is well suited to convey the nature of collective entitlements'[24] and that Hohfeld's analytic scheme 'can handle corporate rights and other corporate entitlements with ease'.[25] It may be possible and of theoretical interest to illuminate the Hohfeldian matrix by thinking about collectives as paradigmatic rather than as exceptional. Thus Hohfeldian questions may be asked concerning the correlatives and disjunctions of the various attributes (rights, powers, liberties, immunities) in the context of collective rights and state rights, generating some proposals concerning collective responsibilities. This might re-energize the Hohfeld scheme so far as its uptake in international law is concerned.[26] At the same time the hazards of the collective approach need to be kept in mind.[27]

Hohfeld's relational or what may be termed 'field' approach will be followed in this paper, in the course of exploring what might be meant by collective versions of legal relations such as rights, powers, privileges, immunities, and so on (section 3). As will be shown, the so-called 'rights' of minorities and of peoples may well be more precisely and more usefully articulated in terms of the latter three kinds of relation. The threads are drawn together in section 4, in which some overall observations are made concerning what may somewhat informally be referred to as the rights and responsibilities of collectives. There, an attempt is made to indicate the implications of the preceding argument for the issue of hierarchy in responsibility (such as attribution of responsibility of individuals to a collective as a whole, and vice versa). Some concluding remarks are made in section 5. First, it is important to give an account of the relevant aspects of Hohfeld's analytic contribution in the context of international law.

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22 Indeed, a focus on the collective aspect or reading of a Hohfeldian scheme helps to rehabilitate Hohfeld more generally. For one difficulty with Hohfeld's analysis is that some of the common municipal duties (for example to pay one's taxes or to serve in the military) do not seem to correspond to a correlative right in an individual rights-holder. But 'any public duty is owed to a collectivity (the state, the nation, the community) which holds the correlative right'. M. Kramer, N. Simmonds, and H. Steiner, *A Debate over Rights* (1998), at 59.

23 Ibid., at 49.

24 Ibid., at 54.

25 Ibid., at 53.

26 The collective-focused, 'field' application of Hohfeld should contribute to defining the genuinely multilateral legal relations ('which involve rights or obligations held in common by a group or class of legal persons as such') and thereby distinguishing them from bilateral relations however much duplicated among parties as in many multilateral agreements: Crawford, 'Multilateral Rights', *supra* note 4, at 346.

27 As Kutz remarks, needed is a 'way of incorporating into liberal theory a conception of social and political agency that recognizes the pervasiveness of collective agency but that does not lapse into Romantic (or fascist) organicism'. Kutz, *supra* note 6, at 472 ('organicism' might be thought of as an extreme form of communitarian analysis); see also D. Dyzenhaus (ed.), *Law as Politics* (1998). The hazards are noted by Carty in the international law context: A. Carty, 'International Legal Personality and the End of the Subject: Natural Law and Phenomenological Responses to New Approaches to International Law', (2005) 6 *Melbourne Journal of International Law* 534, at 540.

https://doi.org/10.1017/S0922156509005822 Published online by Cambridge University Press

2. A COLLECTIVE HOHFELD

2.1. Hohfeld's scheme outlined and re-represented

As is well known, Hohfeld's scheme portrays at the same time a series of axiomatic reciprocal dyadic entailments and a series of axiomatic disjunctions. For example, any (claim-)right entails a correlative duty, any immunity is incompatible with a corresponding liability, and so on. Correlations (such as right–duty) and disjunctions (such as immunity/liability) apply strictly in respect of the same content and as between the same parties (that is to say, narrowly).[28] It is important to stress the narrowness of the relevant correspondences. Hohfeld's scheme offers precision to the analysis of legal relations. It is not that Hohfeld's scheme can necessarily be employed, without supplementation, to determine a factual, substantive counterpart to a given (factual) right (for example). This may sometimes be the case, but more generally the scheme provides a salient caveat, a reminder that some such counterpart is necessary for the assertion of the right to be attributed any weight. Consistent with the Bentham tradition in this regard,[29] Hohfeld's is a contribution to a sceptical and positivist legal orientation.

As Simmonds has explained,[30] Hohfeld rejected the (Kantian) notion of complexity in rights. That is to say, instead of looking for an *internal* structure within (legal) 'rights', Hohfeld's project was to define the distinct legal relationships which may be ambiguously referred to by the one term ('right'), by setting out the *external* character of claim-rights and of other legal relationships. This concern with the relationships between simple and indivisible monads is what is meant to be conveyed by the term 'field'. Rather grandiosely at this preliminary point it could be said that international law is all about relationships rather than about entities as such; therefore it is a field theory that will be appropriate.[31] This helps to clarify what Hohfeld was doing and what he was not doing. As noted, Hohfeld was not seeking to articulate the internal structure or content (of rights, duties, and so on) in any direct sense. Nor was he seeking to do so indirectly. Thus Hohfeld was not attempting to determine the nature of legal disability (for example) by means of the 'triangulation' exercise of tying down its correlative relationship with immunity and at the same time its disjunctive relationship with power. On the contrary, it was the correlative and the disjunctive relationships themselves that were, for Hohfeld, the matter for enquiry.

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28 On the application of Hohfeld in the area of human rights, Hinsch and Stepanians advocate Hohfeld's 'classical' account of rights correlated with duties, both treated individualistically: see W. Hinsch and M. Stepanians, 'Severe Poverty as a Human Rights Violation – Weak and Strong', in A. Follesdal and T. Pogge (eds.), *Real World Justice: Grounds, Principles, Human Rights and Institutions* (2005) 295, at 301, 311; also see T. Pogge, 'Severe Poverty as a Human Rights Violation' in T. Pogge (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (2007), 11 at 48; A. Sengupta, 'Poverty Eradication and Human Rights', in T. Pogge (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (2007), 323 at 326.

29 J. Waldron, 'From Authors to Copiers', (1993) 68 *Chicago-Kent Law Review*, 841 at 843.

30 N. Simmonds, *Law as a Moral Idea* (2007), at 193.

31 This comment might suggest endorsement of a classic 'Vattelian' approach to international law, according to which sovereign states are monad-like (their internal structures and affairs being of no concern). However, while such an approach is a valid example of the field orientation, that orientation is not exhausted by the example, as the rest of the paper will attempt to demonstrate.

Hohfeld presented his scheme in diagrammatic form. With care, one may modify the original diagrammatic representation of Hohfeld's scheme while retaining its analytic content.[32] In particular, one would wish to emphasize, in a way that Hohfeld's pictorial representation does not (but that Hohfeld's text of course does), that legal relationships come 'not single spies but in battalions'. The same parties and overlapping parties are interlinked with a variety of relationships concerning both the same and different content, something of a Darwinian 'tangled bank'[33] with its ecological sense of complex interdependence. One way of re-visualizing Hohfeld's scheme to this end is as a three-dimensional space in which a first ('vertical') dimension represents mutually exclusive alternatives comprising two strictly incompatible options in each case, such as immunity and liability. The second ('depth') dimension arises from the fact that 'behind' every immunity is a disability, behind every liability a power, and so on. The second dimension therefore represents the dyadic entailments, the 'other side of the coin' in each case (or the 'downhill' that corresponds to every 'uphill'), for 'no matter whether rights belong to collectivities or to individuals, they must always correlate with duties'.[34] This second dimension is therefore, so to speak, of minimal thickness, just enough, like a membrane or piece of cloth, to have two sides.

The third ('horizontal') dimension represents the series, sequence, or sentence[35] of extended circumstances pertaining to a specific factual matrix, the panoply or manifold.[36] For example, one might think of a situation in which there coexist (with respect to certain parties) an immunity or a liability with respect to issue A, another immunity or a liability with respect to issue B, a power or disability with respect to issue C, and so on, with the legal relations strung together like beads on a string or like the genetic material in the chromosome. The whole string (or chromosome) might be thought of as representing a norm of one kind or another.[37] A virtue of this 'bead and string' analogy is to emphasize the extensiveness of the empirical dimension of coinciding contingencies – in the real world very many examples of obligation and of entitlement are at play in any given context – while at the same time noting the very small number of options at any particular point, as in the code of bases in the nucleic acids. If the previous image is followed through and combined with the above, then one arrives at something like an extended banner or scroll.

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32 A. Halpin, 'Fundamental Legal Conceptions Reconsidered', (2003) 16 *Canadian Journal of Law and Jurisprudence*, 41 at 41.

33 J. R. Morss, 'Good Global Governance: Custom, the Cosmopolitan and International Law', (2007) 3 *International Journal of Law in Context*, 59 at 69.

34 Kramer, Simmonds, and Steiner, *supra* note 22, at 60.

35 The sentence as model is inspired by the paradigmatic/syntagmatic in the structuralist linguistics of Barthes: E. Leach, *Levi-Strauss* (1970), at 47.

36 Kramer, Simmonds, and Steiner, *supra* note 22, at 47. In a second *Yale Law Journal* article (with the same name) four years later, Hohfeld examined the application of his scheme to legal relations in the sphere of real property, observing for example that the fee-simple involves 'a complex aggregate of rights (or claims), privileges, powers and immunities'. W. N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', (1917) 26 *Yale Law Journal* 710, at 746; yet the aggregation is merely contingent, since analytically rights and privileges are distinct and independent. Ibid., at 748.

37 Kramer, Simmonds, and Steiner, *supra* note 22, at 81, 84.

2.2. The collective account

As noted above, Hohfeld's scheme is usually treated as an account of individual rather than collective entitlements and obligations. Hohfeld's approach to collective matters was indeed a nominalist one, so that a statement concerning collective responsibilities or rights was for Hohfeld to be treated as a mere locution for an aggregate of individual relationships. As Kramer has shown, this position on the ontology of the collective may be separated without difficulty from Hohfeld's larger contribution. For Kramer, Hohfeld must surely be incorrect in asserting that 'the protections offered by rights and immunities (and the constraints imposed by obligations and disabilities)' cannot validly apply to groups other than by mere summations of the characteristics of individuals as such.[38] Thus, for Kramer, irreducibly collective rights can indeed be articulated within Hohfeld's scheme. Indeed, recognition of collectivity such as group membership may well be essential to a Hohfeldian analysis of certain cases. Kramer continues,

> [T]o declare that a group bears a duty which correlates with someone else's right is merely to say that someone enjoys moral or legal protection against the group in a certain specified way. Far from being mystificatory or fanciful, these ascriptions of legal rights and duties are straightforward Hohfeldian ascriptions.[39]

In general, there seems no reason not to entertain the possibility of intrinsic reciprocity between rights held collectively and correlative obligations ('duties') also held collectively, between collective immunities and collective disabilities, and so on. As a preliminary step in the present essay, some comments should be made on the ways in which the component Hohfeldian quantities may be plausibly understood in the collective context. (While a variety of roughly synonymous terms is available for several quantities, the term that will in each case be used most extensively in what follows is here emphasized for clarity).

Thus claim-*right* and *duty* (obligation) are correlates. In Hohfeld's framework an entitlement that is described as a right by its bearers or others, yet fails to correspond precisely to an identifiable duty, is no right (although it may turn out on inspection to be an immunity, a liberty, or a power, for example). In turn a *liberty* or privilege correlates with a '*no-right*' on the part of another or others, for liberty consists of an untrammelled permission to do something (that is, to elect to do something) so that the trammelling of that exact facility, in the form of a right to forbid me from doing that something, is specifically proscribed in tandem. As always in the Hohfeldian scheme the correlates must be read as presupposing a precise correspondence with respect to parties and to content. If some collective enjoys a particular liberty then some other collective or perhaps individual suffers a corresponding no-right. Duty

38 Ibid., at 51.

39 Ibid., at 53. Of course, each and every member of a group may, as an individual, bear the same (distributed) substantive duty toward some other individual. Such plurality of 'orthodox' Hohfeldian obligations or entitlements may well play an important role in international law, and may thus contribute to a particular factual matrix. But in the interests of clarity of exposition and of theoretical innovation, the primary focus here will be on collectives as such, not on pluralities or aggregates of individuals, all of whom may exhibit certain attributes.

and liberty are of course incompatible: one cannot get from a 'must' to a 'may' or vice versa.

Power is the ability to modify certain legal relations; hence *liability* means being at the disposal (as it were 'at the receiving end') of the former. Hohfeld's examples of power include the transfer of interest, abandonment, and also agency; public officials wield power. Both parliaments and those populations that elect them may be said to wield power(s). In both cases corresponding liabilities may be identified. Power is incompatible with *disability*, which connotes an absence of power to change specified legal relations. At the same time as enjoying various powers (each corresponding to various liabilities in others), parliaments may be disabled in other respects: and every disability will bring with it an *immunity*. A curb on the scope of effective control corresponds to a protection extended to another or to others. Immunity is incompatible with liability: being at the disposal of an alteration in legal relations at the hands of another or others is the antithesis of enjoying a guarantee of protection with respect to the very same matter. Of course immunity with respect to one matter is entirely consistent with liability with respect to another, even when all other factors (such as parties involved) are the same.

Power can be exercised in a collective manner and vulnerability to the exercise of power can likewise be collective. Discrimination may be said to be intrinsically collective albeit its effects may be felt by individuals. It may be that discrimination can be located more satisfactorily as a power–liability or an immunity matter than as a right–duty matter. In any event it seems clear that immunities are capable of being shared, not merely in the plural or distributed sense that all members of the diplomatic team of state Z resident in host state P might enjoy formally identical protection, but that the nature of the protection might be thought of as inherently collective. Likewise, citizenship may be thought to confer as many immunities as it does (Hohfeldian) rights, and citizenship is surely absurd except in the context of a collective. Certain collective senses of immunities and disabilities seem patent. Indeed, from this perspective (and in this case) the individualist sense of disability (so to say 'state X, which is an individual, is constrained') would seem like a legal fiction.

What has been argued above is that the collective reading of Hohfeld's scheme is plausible within the context of international law. Next, some indicative flesh will be added to these bones with reference to a related set of topics in international law.

3. Rights of peoples and of minorities: applying the collective Hohfeld

3.1. Minorities and peoples

James Crawford's authoritative typology of the conceptually well-established rights of peoples includes two categories: unequivocally collective rights of peoples, and rights which on inspection would appear to be more accurately described as rights of individuals.[40] The former category comprises self-determination and the rights

40 Crawford, *Rights of Peoples, supra* note 4, at 58.

https://doi.org/10.1017/S0922156509005822 Published online by Cambridge University Press

conferred by the prohibition of genocide. In both these cases the rights and protections guaranteed (or at least indicated) by various instruments are expressly collective. The latter category comprises, broadly speaking, the rights of minorities at least as understood and enacted in contemporary international law. In Crawford's analysis, where for example the International Covenant on Civil and Political Rights at Article 27 guarantees the right of persons of minority groups to enjoy their own culture, employ their own language, and so on, 'in community with the other members of their group', this provision 'hovers between' the protection of genuinely collective rights and the extrapolation of individual human rights of a broadly anti-discriminatory variety.[41]

There is no doubt that rights of minorities, typified by the anti-discriminatory provisions of Article 27, differ from the unequivocally or strongly collective entitlements and that Crawford's warnings to respect the distinction must be heeded. Yet rights of minorities, even if properly conceptualized as individual rights writ large, hardly make sense except in a collective context – much like other protections against discrimination. Similarly, the prohibitions on (relatively) minor persecution over religious affiliation or language are continuous in intent and in effect with the prohibitions on the major persecution of genocide in its various forms.

Therefore collective dimensions to the supposed rights of minorities must also, with caution, be entertained. Doing so makes it possible to re-examine the complex relations between 'minorities' and 'peoples'. The definition of a 'people' must be context-dependent; the definition appropriate for one postulated right might not be the same as for another.[42] If a particular minority group is a people, and enjoys some rights as such, it can hardly lose those rights just because it becomes a majority within a particular state (for example as a consequence of mundane demographic processes).[43] Thus a right to self-determination is clearly not compromised by majoritarian status; indeed, a perfect majoritarian status (no minority peoples at all) is extremely conducive to international recognition of sovereignty and hence, presumably, to the honouring of the right to self-determination more or less by definition in the case of such a perfect 'nation-state'. (It should be stressed that the perfection referred to here is perfection of a theoretical kind, not of a political, moral or ideological kind. In any case an imperfect majority is more realistic.) However, rights of minorities as such might need to be redefined if majority status were achieved. Hohfeld's scheme might assist here. Rights of minorities must presuppose obligations by others (perhaps quite simply obligations of a majority within the same state, or of the agents of a majority in the form of officials). In the absence of such correlative obligations in others, as might well become the case with respect to 'minority' rights in a (now) majority group, rights of minorities simply evaporate into (so to speak) thin paper.

41 Ibid., at 60; J. Crawford, 'The Rights of Peoples: Some Conclusions', ibid., 159 at 162.
42 Ibid., at 169.
43 Ibid., at 61.

Of course, to the extent that the term 'minority' in the phrase 'minority rights' is being applied in a manner other than numerical – qualitative or evaluative[44] rather than quantitative – the consequences of a numerical change from minority to majority status will vary and will probably diminish. The term 'minority' may be a proxy for 'oppressed' and a majority may be oppressed by a minority given certain political and military infrastructure as in apartheid or indeed, arguably, in any situation of dictatorship, whether military, civil, or religious. Again the point is made that rights of minorities are collective phenomena even if not in the sense of the self-determination rights of peoples as such.

But the larger question must be posed: are rights of peoples or of minorities properly conceptualized as rights at all? From a Hohfeldian standpoint it is clear that if no substantive obligations arise from a postulated right, there exists no such right. It might be helpful to rephrase the issues in terms of liberty (privilege). Self-determination, for example, would seem to connote corresponding restraints on others rather than obligations (or perhaps in significant addition to obligations), that is to say, in Hohfeldian terms, 'no-rights' rather than duties. Therefore self-determination might be more usefully considered a liberty than a (claim-)right. (The equivalent term 'privilege' might seem a provocative one to use in this context, yet is not without conceptual interest). The bearer of the liberty is a group as such. The group is permitted to determine itself, so to speak, in a variety of possible ways and on its own schedule. Corresponding no-rights constrain the conduct of other collectives (or individuals) to impede the exercise of the permission, but no duties arise on the basis of a liberty. Self-determination might also seem to constitute a power (to effect changes in legal relations affecting others who correspondingly bear liabilities in that respect). This power, like the liberty, is most salient in the international context.[45] What we call colloquially a 'right' to self-determination might be better thought of as a normative package (or string) including liberties and powers.[46]

3.2. Self-determination and the international community

It is of interest that self-determination was added by the ICJ to the list of protected freedoms to which *erga omnes* in some manner applies.[47] Indeed, the collective reading of Hohfeld's scheme would seem to recall more generally the notion of obligations '*erga omnes*' – obligations 'towards the international community as a whole' as originally alluded to by the ICJ in *Barcelona Traction, Light and Power Co.*[48]

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44 Or, as one might say, rhetorical, as with the term 'menshevik' (as contrasted with 'bolshevik') in Russian political history.

45 See Crawford's commentary on Art. 48: Crawford, *supra* note 19, at 278.

46 This approach is consistent with the effect, if not with the verbal formulation, of Buchanan's analysis: A. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (2004). Relatedly, Buchanan warns against the employment of the term 'right' in relation to self-determination, at 333.

47 In the *East Timor* case at the International Court of Justice (1995): see Crawford, *supra* note 19, at 278.

48 According to the ICJ obligations *erga omnes* arise in relation to certain ubiquitous rights including the protection of individuals from slavery and from racial discrimination: Tams, *supra* note 10, at 257; [1970] ICJ Rep. 3; see Crawford, *supra* note 10, at xiii; Crawford, 'Multilateral Rights', *supra* note 4, at 415. The 'international community as a whole' is clearly a collective entity of some kind. It should not be thought of as limited to the set of presently recognized states even though the latter must be part of the international

Some of the most important and ancient of *erga omnes* (or cognate) effects relate to the high seas (and thus engage with some form of international law).[49] Ragazzi has argued[50] that *erga omnes* obligations are indeed true Hohfeldian obligations (or duties), as distinct, for example, from liabilities or disabilities or no-rights.[51]

Some clues may also be found by a consideration of the peremptory norm (*jus cogens*). While the concept of peremptory norm has been said to be 'twinned' with that of obligations to the international community as a whole,[52] to the extent that the former applies to states and not to other international collectives such as peoples,[53] the correspondence is only partial. Without entering the quagmire of the definition, intensive or extensive, of the peremptory norm, it can be said that certain non-derogable obligations of a quasi-customary nature have been judicially held to apply to some international collective entities (namely states) on this basis. Examples would include a prohibition on the use of force to settle disputes except where such use of force is provided for by the interrelated circumstances of self-defence and Security Council sanction, that is to say except where use of force would be lawful.

This example, not directly connected with issues of self-determination or of the legal position of collectives, may be informative in the following way. To the extent that international use of force may be in some circumstances lawful (in particular under Chapter VII provisions of the Charter of the United Nations), the protection normally afforded 'victim' states (i.e., when these circumstances do not apply) might be best classified as an immunity. All states would thus suffer the disability by which they may not alter the legal status of any other state as, specifically, defining such other state as a legitimate military target would purport to do. This seems convoluted, yet in this formulation both members of the Hohfeldian analytic dyad – the immunity and the disability – are honoured. To the extent this analysis is correct it may be that purported 'obligations' (and therefore purported rights) in the *erga*

community as a whole and must indeed be pre-eminent within it given present-day political realities: Crawford, *supra* note 19, at 278; Crawford, *supra* note 10, at xiv; Crawford, *supra* note 11, at 41; Crawford, 'Multilateral Rights', *supra* note 4, at 447.

49 See D. Guilfoyle, 'Interdicting Vessels to Enforce the Common Interest: Maritime Countermeasures and the Use of Force on the High Seas', (2007) 56 ICLQ 69. More generally, while a set of exemplars of the provision *erga omnes* is available, it has been commented that there currently exists little more than 'a patchwork of loosely related *erga omnes* effects'. Tams, *supra* note 10, at 115.

50 M. Ragazzi, *The Concept of International Obligations* Erga Omnes (1997).

51 The international community as a whole is thus larger than the set to which reference is made in the definition of peremptory norm under the Vienna Convention on the Law of Treaties; peremptory norms are said to be norms 'accepted and recognized by the international community of States as a whole'. 1969 Vienna Convention on the Law of Treaties (1969), Art. 53. To the extent that obligations (or other 'Hohfeldian' legal relations) can properly be said to obtain in relation to the international community as a whole, it would be clear that the latter is a collective of an extraordinary variety, a collective much further removed from the natural individual person as legal bearer of rights, duties, and so on even than the state qua collective.

52 Crawford, *supra* note 11, at 37; Crawford, *supra* note 10, at xiv. Of course it may well be observed that all true duties are peremptory, as is emphasized by H. L. A. Hart: Hinsch and Stepanians, *supra* note 28, at 298; see also J. R. Morss, 'Sources of Doubt, Sources of Duty: H. L. A. Hart on International Law', (2005) 10 *Deakin Law Review* 41.

53 However, the applicability of peremptory norms to peoples has been canvassed: A. Orakhelashvili, *Peremptory Norms in International Law* (2006), 1.

omnes context are better thought of as 'immunities' (and correspondingly disabilities) *erga omnes*.[54]

The protections that are seen to arise in relation to 'the international community as a whole' may on occasions comprise protection of a people as such (in the *South West Africa* cases)[55] or protection of a state as such (from interstate aggression). Protection of individuals (for example, from slavery) is also envisaged. The international community as a whole might thus be conceptualized as inclusive of states, of peoples, and of individual natural persons, so that the ontological or political differences between these different entities are bracketed in order to highlight their communalities. One such communality might be a no-right arising in relation to the recognized liberty of some collective (a people) to self-determination: a correlative to the fact that the people concerned is so to speak 'licensed' by the international community to exercise self-determination.

More generally, the anti-discriminatory or anti-persecutory provisions of international human rights and cognate conventions, from relatively minor to major, clearly set out prohibitions and other curbs on the actions of collectives, especially governmental collectives. Taking these at face value in a 'Hohfeldian grammar' sense, the prohibitions would seem to constitute duties. But other curbs would include the disability with respect to the changing of legal relations of a (minority or oppressed) group to its disadvantage. In the latter respect the group is bearer of immunities, not of rights.

It is hoped that enough has been said, in relation to the areas selected, to indicate the contribution of the Hohfeldian approach in its collective presentation. What Hohfeld contributes is analytic precision and, relatedly, an articulation of legal relations that avoids the non-negotiable, peremptory tone of many claims to rights.[56] By deploying the full range of Hohfeld's distinctions, assertions become more nuanced and thereby open to less heated contestation and to adjudication, rather than the absolute, 'take it or leave it' tone that often characterizes rights claims. The dignity of contestation might be thought to relate closely both with 'the dignity of groups' and with 'the dignity of legislation'.[57]

4. Collective rights and collective responsibilities in international law

It is helpful to draw some of the threads together in order to overview the results of adopting the collective-Hohfeldian formula. The term 'right' in everyday parlance is a 'catch-all' term which can be said to include the more precisely defined immunity, liberty, power, and (claim-)right in Hohfeldian vocabulary. Correspondingly, the colloquial term 'responsibility' might somewhat informally cover all the Hohfeldian

54 The Latin grammar is somewhat awkward ('obligations against all'), so that *erga* should be glossed as 'with respect to.'

55 Crawford, *supra* note 19, at 279.

56 Waldron, *supra* note 5, at 220.

57 J. Waldron, 'The Dignity of Groups', Public Law and Legal Theory Research Paper Series, Working Paper No. 08–53, NYU School of Law, 2008, http://ssrn.com/abstract = 1287174 (accessed 11 November 2008).

'legal disadvantages'[58] – that is to say, no-rights, liabilities, disabilities, and duties. There is a sense in which the disadvantages are of more immediate, practical import in international law, as more closely connected with remedies and 'enforcement' more generally – the 'sharp end', so to speak.

Some examples might be given of each kind of disadvantage to clarify the discussion. *Liabilities* are legal vulnerabilities to powers wielded by others. Thus to the extent that states are collectives and to the extent that they accept the jurisdiction of the International Court of Justice, they suffer liability. The rules of citizenship (for example for recent immigrants) are generally open to alteration by the executive governments of states, and the details of special forms of enfranchisement for an indigenous group (for example reserved 'quota' seats in a parliament) arise in relation to a collective liability (to be 'disposed of' by the power-wielding government). The widespread if not universal disenfranchisement of children (and sometimes prisoners) might also be thought of as reflecting a liability of children (etc.) as a social group. More controversial forms of discrimination such as those implemented in Italy in 2008 against Roma people would also illustrate liability (and therefore, of course, power).

Disability in a collective is illustrated by the effect of an immunity such as a human rights protection (broadly defined). Protection of children's rights and protection against discrimination give rise to disabilities in government agencies and other (commercial) organizations, including multinationals, for example in relation to the varying of employment conditions. In a people, disability might be said to arise if a distinct minority people coexists with it and if that minority enjoys some immunities against the people as such.

Duties of a collective such as a people would include those obligations correlative with any true Hohfeldian (claim-)rights against it of a minority in their midst, such as a right to practical guarantees of freedom of religious observance. Duties of states as collectives are already familiar. Overall, however, right–duty pairings may be relatively infrequent at the international level in comparison with other Hohfeldian relations. Indeed, the language of rights may have been overextended.

The suggestion above in section 3 that self-determination might be thought of as a liberty (privilege) rather than as a true Hohfeldian right repositions self-determination in a significant manner. If this analysis is correct, self-determination gives rise to no obligations in others. The territorial claim of a state might be thought of as a collective liberty, so that corresponding *no-rights* apply to other states as collectives, as well as to other international collectives. Such collective entities would be 'burdened' by the lack of any right to deal with (for example, 'enjoy') the territory in question (and hence also burdened by the absence of the hypothetically correlative obligations in others). Similarly, if access to some land for group A is validly defined as a liberty, then one or more other groups or individuals B, C . . . Z

58 Trakman and Gatien, *supra* note 18, at 231. None of these terms is entirely felicitous, since 'advantage' and 'disadvantage' are evaluations distinct from the Hohfeldian analysis as such and stand in no necessary relation to it; 'disadvantage' should be thought of as including 'risk of disadvantage', since liability (for example) may involve receipt (from the 'power-wielder') of a gift, which might turn out to be advantageous or disadvantageous: A. Halpin, 'Rights, Duties, Liabilities, and Hohfeld', (2007) 13 *Legal Theory* 23, at 26.

suffer(s) a no-right in the corresponding sense. B might be the government of a relevant state, C might be a group of citizens not included in A. Such a no-right would likely distribute to individuals in C, and in some other kinds of collective. In the case of B the individual distribution of the no-right (i.e. an extension to individual officers of the state) constitutes an implementation of the curbing on the collective with negligible individual dimensions from a legal point of view, since the actions of officers may well be attributed to the state in any case. Of course, as individual persons as well as in the collective they may well be debarred from certain forms of access to the land in question. But if so this would be based on a duty (of a prohibitive variety), that is to say on a distinct legal relation possibly forming, however, part of the same norm.

In this connection it seems important to indicate some of the consequences for our approach to culpability[59] in the international domain of adopting the approach suggested in this paper. Broadly speaking, culpability is at present understood within international law either as radically individual (the criminal or quasi-criminal culpability of a natural person) or as the culpability of a fictional kind of legal person such as an international corporation or state. The thrust of the present paper is to focus on collectives as such instead of individuals or quasi-individuals. The ways in which different international collective entities nest or otherwise form hierarchies, to some extent exemplified in new 'quasi-hierarchies' of regimes or tribunals emerging from legal developments in the European Union,[60] suggest that culpability at collective levels needs to be articulated. Relevant possibilities emerge from international dispute resolution processes such as those of the World Trade Organization,[61] and those designed for the regulation of the fishing industry – overlapping regimes with overlapping memberships, to a significant extent repositioning states as representatives of various interests rather than as sovereign actors as such.[62]

5. Conclusion

In the context of international law, 'where legal connections are at times not merely "separate" but rather "solidary"',[63] combinations of legal relations are encountered,

59 To avoid confusion with the rather general term 'responsibility', the term 'culpability' will be employed here to indicate the actionable attribution of wrongfulness either in a criminal or quasi-criminal sense (as in international criminal justice systems), or in the sense of a dispute over an international wrongful act between international entities such as states.

60 P. Nevill, 'Reconciling the Clash between UK Obligations under the UN Charter and the ECHR in Domestic Law: Towards Systemic Integration?', (2008) 67 *Cambridge Law Journal* 447.

61 M. Young, 'The WTO's Use of Relevant Rules of International Law: An Analysis of the Biotech Case', (2007) 56 ICLQ 907.

62 M. Young, 'Toward a Legal Framework for Regime Interaction: Lessons from International Trade and Fisheries Regimes', Seminar, Lauterpacht Research Centre for International Law, Cambridge University, 21 November 2008.

63 Crawford, 'Multilateral Rights', *supra* note 4, at 346. It can also be said that citizens share in the responsibilities of their state (for example over human rights) as an institutional order which they as citizens play a part in maintaining: T. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (2002), 67. Going far beyond this, but with a boundary that is hard to mark, is the form of responsibility in the individual citizen that is asserted when she or he is 'blamed' for a state's actions, as would seem to be the case with a terrorist attack: Jodoin, *supra* note 1, at 19.

for example some rights, some liberties, some powers, some liabilities, and so on, the parties to which overlap.[64] As Waldron observes, 'factual thickets are the normal habitat of group rights'.[65] The Hohfeldian scheme, in its collective version, responds to the challenge of this complex 'ecological' phenomenon. It makes possible the contextualization of the various legal relations as they arise 'packaged' into norms of various kinds. To develop the vocabulary further, an (organized) package of norms is perhaps what we call a 'regime'.[66] A hierarchy of a kind therefore emerges, between legal relations, norms, and regimes, but importantly there is no suggestion of a hierarchy *among* norms.[67]

In conclusion, several pointers may be indicated. The Hohfeldian approach, in its collective-friendly form, may assist in untangling the problematic notion of consent at the international level – a notion problematic in its connections with customary international law, for example.[68] Again, the capacity of the international community as a whole to be a bearer of rights, duties, and so on is itself moot and may be clarified by recourse to the present analysis. It has been observed that the international community as a whole would not seem to be a legal person,[69] in contrast, for example, to the United Nations, to which it would appear in some ways similar, but which in some circumstances is an orthodox legal person.[70] Approaching Hohfeld's theory as a field theory rather than as a theory of discrete components may assist in this aspect of the 'multilateralist project'.

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64 Allen Buchanan describes the claim-right (as exemplified by human rights) as having as an essential element a permission or liberty (privilege) as well as a correlative obligation: Buchanan, *supra* note 46, at 123. This is, of course, not Hohfeld's position, but instead an assertion relating to a norm as I here define it – that is, a package of Hohfeldian relations. The right as such (identified by Buchanan in Hohfeldian vocabulary) is correlated with no liberty. Buchanan restates his position in A. Buchanan, 'Human Rights and the Legitimacy of the International Legal Order', (2008) 14 *Legal Theory* 39, at 45, 57. Buchanan further notes (ibid.) that some claim-rights such as freedom of conscience also include related immunities. Again the proposal should be seen as being about norms rather than about rights, otherwise a category mistake is being made. This comment is intended to clarify rather than to evaluate (still less dismiss) Buchanan's contribution to the debate.

65 Waldron, *supra* note 5, at 218.

66 This attractively simple hierarchical formulation suggests that the creation of norms is to be considered distinct from the operation of legal power as such, that is to say operating at a different level. To treat the concept of legal jurisdiction as connoting a norm-creating form of Hohfeldian power, that is to say to treat it along the lines urged by Alexy, would thus be considered incoherent. Debate over the difficult concept of legal jurisdiction is therefore sharpened by the articulation of a collective-Hohfeldian account as attempted here. For a careful and stimulating account of legal jurisdiction favourable to Alexy's analysis see P. Capps, M. Evans, and S. Konstadinidis, *Asserting Jurisdiction: International and European Law Perspectives* (2003), xvii at xix.

67 See P. Weil, 'Towards Relative Normativity in International Law?', (1983) 77 AJIL 413.

68 P. Capps, 'Positivism in Law and International Law', in K. Himma (ed.), *Law, Morality, and Legal Positivism* (2004), 9 at 14; C. Kutz, *Complicity: Ethics and Law for a Collective Age* (2000), 71; Morss, *supra* note 33, at 62; Ratner, *supra* note 2, at 57. A Hohfeldian contribution to the general law of consent is explored by D. Beyleveld and R. Brownsword, *Consent in the Law* (2007). A topic for future consideration is the relevance for international law of the debate between 'will' and 'interest' theories of rights as informed by a Hohfeldian analysis (see Kramer, Simmonds, and Steiner, *supra* note 22). In the international law context, legal senses of both voluntary choice (in the form of state 'will', especially as represented by consent) and objective benefit – features on which weight is placed under the will and the interest theories of rights, respectively – may be identified.

69 Crawford, *supra* note 11, at 40.

70 Ibid., at 30. However, as noted above, questions of legal personhood or subjecthood should be considered secondary to investigations of actual legal position and might indeed be illuminated by the scrutiny of the latter.

It is suggested that there remains some gold in the Hohfeldian lode so far as the analysis of international legal relationships is concerned. In conclusion, a coincidence might be noted. Hohfeld's seminal article is the second item in its issue of the *Yale Law Journal* in 1913. The first item is by Samuel Elder, an address to Yale law students, entitled 'Progress toward International Accord'. Remarkably prescient in several respects, Elder describes how

> [h]eavier and heavier has grown the burden of armament, till nations, like knights of old in chain and plate, stumble about or stand still from their weight of preparedness.[71]

The metaphor of nation as person has been employed many times before Elder and many times since, but rarely to such effect and not only with hindsight. The collective as individual is a powerful trope, but other forms of language must also be entertained, enabling recognition of the collective as collective. As for Elder's cautious optimism concerning the promise of international law, and the happy location of its expression in print immediately preceding Hohfeld's anatomization of legal relations, one can only say, 'Hohfeld and international law: together again, at last.'

71 S. Elder, 'Progress toward International Accord', (1913) 23 *Yale Law Journal* 1, at 4.

https://doi.org/10.1017/S0922156509005822 Published online by Cambridge University Press