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Name: KATSELLI, Eleni

Title: *Countermeasures, the Non-Injured State and the Idea of International Community*

Supervisor: Professor Colin Warbrick

Degree: Doctor of Philosophy (University of Durham)

Year of Submission: 2005

Abstract

The evolution of the concepts of *jus cogens* norms and obligations owed to the international community as a whole has had a strong impact on the work of the International Law Commission for the codification of the law on State responsibility. The acceptance that not all primary international norms were of the same gravity or significance because of the nature of the rights they seek to protect could not but influence the legal consequences to derive from the violation of such norms. However, the categorization of internationally wrongful acts to serious and less serious raises significant questions concerning the enforcement of these 'superior' norms, but also the subjects entitled to invoke the responsibility of the wrongdoing State in case of their infringement. Yet, the adoption of the 2001 Final Articles on State Responsibility has far from concluded the debate over the entitlement of States other than the individually injured to resort to countermeasures. Whilst the ILC has found that State practice supporting a right to third-State countermeasures in response to the violation of these collective interests is still inconclusive, Article 54, which makes a general reference to "lawful measures" rather than "countermeasures", leaves the settlement of the issue to the further development of international law. The question of third-State countermeasures becomes even more compelling in the absence of effective and compulsory mechanisms for the protection and enforcement of the most fundamental interests of the international community.

The current research attempts to unfold the notion of third-State countermeasures as explored in the work of the ILC and as developed in international theory and practice. Most important, and in view of the possibility of the recognition of a right to third-State countermeasures in the future, this work places particular emphasis on the need of restraint, and in particular on the principle of proportionality.

DEPARTMENT OF LAW
UNIVERSITY OF DURHAM

*Countermeasures, the Non-Injured State and the
Idea of International Community*

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Doctor of Philosophy

2005



07 DEC 2005

DECLARATION

No part of this thesis has previously been submitted for the award of a degree in the University of Durham or in any other university. This thesis is based solely upon the author's research.

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To My Parents, Andreas and Yiannoula

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ACKNOWLEDGEMENTS

My grandmother used to tell me that when a door closes it is because a big gate waits to open. I guess this is what this Ph.D. is all about: the big gate in my life – because irrespective of what I further accomplish in the future nothing will be as significant as this Ph.D. – that opened when a small, negligible even, door had been closed to me. I owe this opportunity to Professor Colin Warbrick, whom I deeply admire and respect, since it was due to his own efforts that the required funding to pursue my doctoral studies was found. But I am also most grateful to him for entrusting the research of this fascinating topic to me. The result of this research, short of any omissions or mistakes for which the author alone must be blamed, is as much his work as it is mine. Professor Warbrick, a ‘thank you’ is simply not enough to correspond to what you have done for me all these years.

My gratitude also goes to the Law Department of the University of Durham for generously funding my studies. Without this scholarship I would not have even dreamed of pursuing a Ph.D. I further want to thank my internal and external examiners Dr. Kaiyan Kaikobad and Sir Michael Wood for their fruitful comments which have significantly helped improve this thesis. I would also like to express my appreciation to Ms Sarah Williams, Lecturer at the University of Durham, for thoroughly proof-reading my thesis, but also to Mr Dapo Akande, now Lecturer at the University of Oxford, for kindly accepting to read part of my work and to give me his comments and advice.

I would further like to thank my fellow colleagues and friends in the research room for making studying much more pleasant with their company, and the librarians of Palace Green Library for their valuable assistance throughout the years. It would be a great omission on my part not to mention Alisoun and Chris Roberts who have treated me like a member of their family.

At a more personal note I would like, through these lines, to send the message to my parents and brother, that no distance between us can reduce my love for them. Their continuous support through so many sacrifices, their endless love, and their strong faith in my efforts enlighten my life forever. Παπάκι, μαμμί μου γλυκό, αγαπημένο, Νίκο μου, λατρεύω σας!

Finally, to Nick, I don't have too much to say as deeds speak better than words at times - apart from that you have painted my life with beautiful, colourful surprises, the biggest of all being you!

LIST OF ABBREVIATIONS

ACP	<i>African, Caribbean and Pacific Group of States</i>
AJIL	<i>American Journal of International Law</i>
Aus.JIL	<i>Austrian Journal of International Law</i>
AVR	<i>Archiv des Volkerrechts</i>
BYIL	<i>British Yearbook of International Law</i>
CFSP	<i>Common Foreign and Security Policy</i>
CYIL	<i>Canadian Yearbook of International Law</i>
EC	<i>European Community</i>
ECom.HR	<i>European Commission of Human Rights</i>
EConv.HR	<i>European Convention of Human Rights</i>
ECHR	<i>European Court of Human Rights</i>
ECJ	<i>European Court of Justice</i>
ECR	<i>European Court Reports</i>
ECSC	<i>European Coal and Steel Community</i>
EEC	<i>European Economic Community</i>
EJIL	<i>European Journal of International Law</i>
EPC	<i>European Political Cooperation</i>
EU	<i>European Union</i>
FPRY	<i>Federal People's Republic of Yugoslavia</i>
FRY	<i>Federal Republic of Yugoslavia</i>
GA	<i>General Assembly</i>
HLR	<i>Harvard Law Review</i>
HRLJ	<i>Human Rights Law Journal</i>
ICCPR	<i>International Covenant on Civil and Political Rights</i>
ICJ	<i>International Court of Justice</i>
ILC	<i>International Law Commission</i>
ILM	<i>International Legal Materials</i>
IYIL	<i>Italian Yearbook of International Law</i>
JAIL	<i>Japanese Annual of International Law</i>
Max Planck YBUNL	<i>Max Planck Yearbook of United Nations Law</i>
MJIL	<i>Michigan Journal of International Law</i>

NJIL	<i>Nordic Journal of International Law</i>
NYIL	<i>Netherlands Yearbook of International Law</i>
NYUJInt'lIL&Pol.	<i>New York University Journal of International Law and Policy</i>
OAS	<i>Organization of American States</i>
PASIL	<i>Proceedings of the American Society of International Law</i>
PCIJ	<i>Permanent Court of International Justice</i>
RIAA	<i>Reports of International Arbitral Awards</i>
RdC	<i>Recueil des Cours de l'Academie de Droit International</i>
SA	<i>South Africa</i>
SAYIL	<i>South African Yearbook of International Law</i>
SC	<i>Security Council</i>
SFRY	<i>Socialist Federal Republic of Yugoslavia</i>
SU	<i>Soviet Union</i>
TEU	<i>Treaty of the European Union</i>
UN	<i>United Nations</i>
UNCLT	<i>United Nations Conference on the Law of Treaties</i>
UNYB	<i>United Nations Yearbook</i>
US	<i>United States</i>
USSR	<i>Union of Soviet Socialist Republics</i>
VCLT	<i>Vienna Convention of the Law on Treaties</i>
VJIL	<i>Virginia Journal of International Law</i>
WCR	<i>World Court Reports</i>
WLR	<i>Weekly Law Reports</i>
WWI	<i>World War One</i>
WWII	<i>World War Two</i>
YbECHR	<i>Yearbook of the European Convention on Human Rights</i>
YBILC	<i>Yearbook of the International Law Commission</i>
ZaoRV	<i>Zeitschrift fur ansländisches öffentliches Recht und Volkerrecht</i>

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NOTE ON FOOTNOTES

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In the case of the reports of the Special Rapporteurs on the law on state responsibility or on the law of treaties, I cite these by making reference to the number of the report, the name of the Special Rapporteur, the year, the page number, and in brackets the paragraph number. For example, Fifth/Report/Ago/1976/43/(67). Similarly, for the ILC reports I refer to them as follows: ILCreport/1976/12/(15).

Regarding the judgements of the PCIJ or the ICJ, reference is first made to the name of the case, unless already mentioned in the main text, where they are cited, i.e. World Court Reports (WCR) or ICJ Reports, the year, and the relevant pages and paragraphs. For instance, *Corfu/Case/ICJreps/1949/45/(56)*. Where I make reference to the dissenting or separate opinion of a judge then I do so with reference to the name of the judge, the name of the case, the source, page and paragraph. For instance, *Shahabudeen/Nuclear/Weapons/Legality/ICJreps/1996/371*. However, most of the times, a piece of information has been retrieved from internet sources. In these cases, there is only reference to the name of the judge, the name of the case, the year, and the page or paragraph. I.e. *Shahabudeen/Nuclear/Weapons/Legality/1996*. Full information can then be found in the List of Cases.

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INTRODUCTION

“Do Not Command What You Cannot Enforce”¹

In the absence of a structure equivalent to that existing in domestic legal systems, with compulsory legislative, judicial and enforcement procedures, international law has often come under attack as not being “real” law,² but rather a system of moral values and principles which vanish whenever the geo-political or other interests of the stronger components of the international community are at stake. Whilst law-making takes place in the international legal order in the form of customary and conventional rules and general principles, and adjudication finds expression in the jurisdiction, even if consensual, of the International Court of Justice and other international tribunals, the lack of an automatic and compulsory enforcement mechanism is the most striking feature of public international law. Yet, the legal loophole is not filled with the existence of the SC whose role is merely restricted to the safeguarding of international peace and security and not, although it may at times coincide, to the enforcement of international law. As a consequence, compliance with international law and with the fundamental principles of the international community as a whole still, and to a great extent, relies on the good will of each state.

In such a decentralized legal system in which as a matter of general rule resort to the use of armed force is prohibited, the notion of *peaceful* countermeasures comes to fill the legal lacuna and to an extent contributes towards compliance with and even the enforcement of international law. As noted, “Countermeasures are mechanisms of private justice that find their *raison d’etre* in the failure of the institutions”.³ In particular, this notion corresponds to *peaceful* measures, unilateral in character, taken in response to an internationally wrongful act which was previously committed by the state against whom they are turned and which, under normal circumstances, they would themselves be unlawful as infringing the rules of international law. The concept of countermeasures finds justification in the need to restore the equality between sovereign

¹ Koskenniemi M., Erik Castren Institute of International Law and Human Rights Seminar on The Enforcement of International Law, August 2002 quoting Pascal.

² See for this purpose the Austinian school of thought in Reisman/1971/645.

³ Alland/2002/1226.



states and to restore the balance that has been disturbed with the commission of the internationally wrongful act. Despite the fact that they are otherwise internationally wrongful acts themselves, countermeasures are justified, and thus responsibility is precluded, by reasons of self-protection, reciprocity, and the need to induce the defaulting state to cease the wrongful act, to offer reparation for the injury suffered by the aggrieved party, and to secure guarantees for non-repetition in the future. It is now clearly established that for countermeasures to be legitimate they must not be aimed at revenge and they must have temporary effect.⁴ Nevertheless, whilst the right to resort to countermeasures by an injured state is undisputed, the same does not apply with the right of third states to respond with countermeasures or, as otherwise known, solidarity measures,⁵ whenever the fundamental interests of the international community as a whole are endangered.

Bearing in mind that in some cases of gross violations of international law there is no injured state but injured people, nationals of the same state committing the violation such as in the case of genocide, apartheid and torture, to preclude the possibility of peaceful but nonetheless coercive action by independent components of the international community means to deny those most in need the hope of justice. Furthermore, and although aggression has for long been considered as the most serious offence of international law threatening peace and security, now other violations such as the ones mentioned above are worth of equal attention. The paradox however lies on the fact that whilst third states are entitled to resort to the use of force on the basis of collective self-defence in response to armed attack, the current international legal order seems to prohibit third states from resorting to milder means, such as countermeasures, in reaction to serious infringements of specific international rules, including aggression.

The concept of third state countermeasures is closely associated with the early realization in international legal doctrine that not all internationally wrongful acts were of the same legal weight, significance and effect. In 1915 for instance Professor Elihu Root, making a comparison between municipal and international law, pinpointed to the necessity for a distinction in the international legal order between wrongs that affected only the parties directly involved in the dispute and wrongs which inflicted a legal

⁴ Elagab/1988/46. Also see Crawford/2003/283.

⁵ Koskeniemi/2001/339.

injury to every nation.⁶ This early understanding was later to have a great impact on the field of state responsibility, in other words on the legal consequences to arise as a result of the infringement of primary international norms. However, it was not until the end of the Second World War that “a real current opinion emerged” according to which general international law provided for two different regimes of responsibility: one that would apply as a result of the breach of obligations of great significance to the international community as a whole, and another that would apply to breaches concerning obligations of lesser importance.⁷ This debate led to the realization that there may be different ways in which a state is affected by the commission of a wrongful act and that the legal consequences of certain violations do not leave unaffected the international community as a whole. It has been therefore acknowledged that should a violation of obligations established for the collective interest of a group of states or even of the international community as a whole occur, these states should be entitled to invoke the responsibility of the defaulting state. By what means they may be entitled to do so has been in the centre of much controversy and it will be at the main focus of this work.

Consequently, contemporary international law has been enriched with new principles, new rules and new concepts. In a highly interdependent world, community values have surfaced formulating a distinction between wrongful acts and legal consequences, whilst widening the spectrum of actors which have an interest to invoke the responsibility of the wrongdoing state. In this regard, current international law consists of more than just reciprocal obligations between two states: the recognition of interests and values placed to serve collective interests and the international community is now undisputed. Most significantly, international law is now moving towards adopting new mechanisms for its enforcement in an attempt to escape from the legal stagnation imposed by its own lack of compulsory enforcement jurisdiction over the most flagrant violations of international law. Similarly, the role of individual in contemporary international law has been enhanced: thus, international law is not merely drafted to protect sovereign states, but also individuals and peoples.

It is with this new orientation of international law in mind that this research was carried out and which was also the result of a deep urge to shed some light to the general

⁶ Root/1915/9.

⁷ Fifth/Report/Ago/1976/26/(80).

question, 'What is, and what should be, the function of international law today?'. In a more specific context, this thesis evolves around the law on state responsibility and the categorization of internationally wrongful acts, both in respect of their gravity/seriousness, as well as of the international actors entitled to take action, by way of countermeasures, in order to remedy a certain infringement. The emphasis is therefore placed upon the notion of "solidarity measures", or countermeasures by states other than the injured and how this notion is accommodated in international legal doctrine today.

The examination starts with an analysis of the attempts of the ILC to codify the law on state responsibility - a painstaking work that has lasted for almost five decades - and to categorize the legal consequences of a given international wrongdoing in accordance with the significance of the rule infringed. This study intends to set the background within which the need for differentiation between serious and less serious violations of international law and more specifically between "crimes" and "delicts" emerged in the law on state responsibility, and the strong impact it had on the determination of the legal consequences to arise therefrom and of the subjects entitled to invoke the responsibility of the wrongdoing state. The second chapter builds on this analysis and turns its attention on specific notions such as *jus cogens* norms and obligations *erga omnes* which have signified the fundamental changes the international community and international law itself have undergone with the passage from "pure" bilateralism to the recognition of community values. The chapter also examines how these notions are reflected in the final articles on state responsibility adopted by the ILC in 2001, and their significance for the determination of the question "who is entitled to do what" in the event of their infringement. In the third chapter the study takes a different direction: it attempts to shed light to the relationship between *lex specialis* and the so-called self-contained regimes on the one hand, and the general law on state responsibility and countermeasures on the other. The issue gains particular significance in view of the multiplication of agreements in the international legal order, thus narrowing significantly the content of the international responsibility of states, and especially of countermeasures, even whenever the most flagrant violations of international law are involved. The analysis leads to the examination of another, closely linked phenomenon, that of the fragmentation of international law. Should the international legal order be construed, as it is, as consisting of multiple "anarchical" legal systems that exist in parallel but which at times clash between them, the danger of fragmentation then

becomes evident. The fourth chapter is driven by the need to further examine the conclusions of the ILC in its 2001 articles that state practice permitting countermeasures by states other than the injured is sparse and embryonic. Whatever the outcome of the investigation, the author believes that it will have something important to say about the direction the international community has moved, or is moving on the matter, since such countermeasures, in the absence of other satisfactory enforcement mechanisms, may at times constitute the only means to respond to violations that affect collective interests. Finally, the last chapter, and in view of the recognition that countermeasures may be used and abused especially by powerful states, turns its attention on the question of proportionality. This study is carried out upon the realization that should countermeasures, especially by states other than the injured, be permitted, this should only be done in accordance with the most stringent conditions.

CHAPTER 1

The Work of the International Law Commission on the Law on State Responsibility

1. Introduction

The present study will focus on the concept of state responsibility as this was conceived and formulated over the years by the ILC within its attempts to codify the law on state responsibility, and ultimately, to either conclude an international treaty on the matter or endorse the ILC's final work in a United Nations General Assembly resolution. Whilst the ILC finalized its study on the question of state responsibility in 2001, the fate of the final articles has not definitely been determined. More specifically, and despite the fact that the GA incorporated the articles soon after their completion by the ILC in resolution 56/83,⁸ it did so without prejudice to the question of whether they will be further incorporated in an international convention or whether they will be merely reflected in a GA resolution, an issue that until this day still remains unsettled.⁹ In September 2004 the GA allocated the topic of the Responsibility of States for Internationally Wrongful Acts to the UN Sixth Committee for further discussion. On its part, the Sixth Committee, in draft resolution A/C.6/59/L.22 adopted in November 2004, highlighted the significance of the final articles to the relations between states and it requested from the UN Secretary-General to call governments to make recommendations concerning the legal future of the articles. At the same time it requested the Secretary-General to prepare a compilation of all decisions by international courts and tribunals and other bodies in which reference to the final articles is made, and to call governments to provide information regarding their use and reliance on these provisions. The draft resolution also provided that this information

⁸ GA/Resolution/56/83 of 12 December 2001.

⁹ Various arguments have been produced supporting the one or the other solution which go beyond the scope of the current examination. It suffices however to say here that whilst a treaty would be a more legally attractive solution as it would solidify the norms reflected in the articles, the possibility of many states not signing and ratifying it would put in jeopardy the customary character of some of the norms codified by the ILC. On the other hand, a General Assembly resolution would lack any legally binding effect. Yet, the incorporation of the Articles on State Responsibility in such a resolution would create hopes for the future development of at least some of the provisions as customary rules of international law.

should be submitted before the 62nd session of the GA scheduled to take place in 2007.¹⁰ This draft resolution was later incorporated in a GA resolution in December 2004.¹¹

This research is considered necessary due to the immeasurable impact of the ILC's conclusions on the law on state responsibility and which intended not only to codify already established international norms, but also to incorporate concepts which have evolved through the progressive development of international law. Accordingly, the legal significance of the ILC's final articles on this area of international law lies not only on the fact that they identify what the law is, but also on the fact that they indicate how the law on this particular area could and perhaps should develop in the future.

More particularly, the attention of this work will be drawn on two major, inter-related issues regarding the legal nature of the regime on state responsibility on the one hand, and the legitimacy of third state reaction in international law as a response to the commission of an internationally wrongful act by another state on the other. This study is essential for the comprehension of the background from which the notion of countermeasures taken by states other than the (directly) injured emerged in contemporary international law. Furthermore, and in view of the development in the international legal thought of a theory concerning "international state crimes" as opposed to the notion of "international state delicts", the main concern here will be on how the law of the international responsibility of states was considered by international jurisprudence, the literature and state practice on the basis of such a distinction: did states aim at attaching to the regime of state responsibility a punitive character, in which case the "criminal" element of the wrongful conduct committed by a state is recognized? Or did they merely see it as a delictual regime of responsibility identical to the one applicable in the domestic legal order, entitling the injured state to obtain reparation for the injury it has suffered?

It is therefore suggested to initiate the examination from an in-depth analysis of the conclusions of the second Special Rapporteur appointed by the ILC, Mr Roberto Ago, whose input has been immeasurable in the later development of the work of the ILC on the matter, and then proceed with an analysis of the Special Rapporteurs appointed at a following stage, namely Mr Riphagen and Mr Arangio-Ruiz. The conclusions of the last

¹⁰ UN/Sixth/Committee/Report/2004.

¹¹ GA/Resolution/59/35 of December 2004.

Special Rapporteur appointed to codify the law on state responsibility, Professor Crawford, due to their significance and impact, constitute the subject of separate examination included in the second chapter which elaborates further the notions of *jus cogens* norms and obligations *erga omnes*.

2. Review of the Work on State Responsibility: 1969-1979

2.1. The Beginning of a New Era?

It is true that the lack of a centralized enforcement mechanism in international law has often brought it under cross-fire, although most times not unjustifiably. Yet, international law remains a field of law with strong dynamics in the reality of contemporary international relations. An affirmation of this position is the development of the concept of the international responsibility of states, in other words the establishment of legal consequences imposed upon states as a result of their failure to conform with their obligations under international law, and in this way precluding their imputability in the international arena.

The international responsibility of states was a concept already very deeply rooted in the theory of international law, and upheld in the international state practice and international jurisprudence. However, and although the codification of the rules governing the responsibility of states in the international plane had for long been in the attention of scholars, the diversity of opinions and the uncertainty of law on the matter on the one hand, and the failure of previous attempts to see the regime of state responsibility as a distinct field of international law on the other, delayed any further development on the study concerning state responsibility.

With the memories of the atrocities of the Second World War still vivid in the conscious of mankind, the doctrine of the international responsibility of states found its justification on the consensus that the international community is structured on the basis of legal norms that impose legal obligations on states. As such, it has been unanimously accepted by the jurisprudence, state practice and theory of international law that the commission of an internationally wrongful act creates new international legal relationships that differ from the ones existent before the commission of such act and which entail the accountability of the wrongdoer. Already in 1938 the PCIJ affirmed in

the *Phosphates in Morocco Case* that, whenever a state is guilty of an internationally wrongful act against another state, then international responsibility is established “immediately as between the two states”.¹² In what ways this latter position developed in international law is the object of later consideration. It is important however within the scope of the present presentation to stress that the law on state responsibility aims to ascertain on the one hand the powers of the injured state in the event that its rights by another state have been infringed, thus determining the legal consequences of the violation of international law, and on the other to protect the defaulting state from excessive, abusive or unrestricted reaction by the injured or any other state.

After the end of World War II, and in the footsteps of the legacy of the League of Nations for codifying the rules concerning the international responsibility of states, the General Assembly, realizing the significance of such a codification in contemporary international law, established the ILC which was empowered with the authority to gradually codify international law, including the rules governing the law on state responsibility. Under a recommendation passed by the General Assembly in 1953 the ILC was eventually authorized to initiate its work on the law on state responsibility. In the years that followed, the Special Rapporteur appointed at the time, Mr Amador, submitted six reports on the matter. According to him, the law on state responsibility was not viewed merely as the responsibility of the defaulting states to make reparation, but also as an international criminal responsibility on the basis of a distinction between “merely wrongful acts” and “punishable acts”, according to which even individuals were entitled to bring a claim against the violating state before international bodies and tribunals. At the same time, he associated the responsibility of states with the responsibility that arises as a result of violations concerning the treatment of aliens. These views met the reaction of many states which rejected a concept of “criminal” international responsibility of states and opposed the attempts to limit state responsibility merely to injuries caused to the property and person of aliens thus ignoring other substantial areas of state responsibility.

When Mr Ago took over as the new Special Rapporteur, and contrary to his predecessor, he took the position that the codification of state responsibility should concern the responsibility of states resulting from the violation of their international

¹² WCR/1936-42/Vol.IV/325 in Second/Report/Ago/1970/179/(12).

obligations, irrespective of the nature, origin or object of the obligations concerned.¹³ In this regard he made a distinction between “primary” rules of international law, that is to say rules that impose certain obligations upon states in the international plane, and “secondary” rules, in other words rules that determine the legal consequences that arise when a “primary” rule has been infringed. Only the latter rules fall within the sphere of state responsibility. In this context, the rules relating to the legal consequences that derive as a result of the breach of an international obligation come to supplement some other rules that define what the obligation of the state is, and therefore, what its conduct should be. More specifically, “the link between the breach of an international obligation and the incurring of further obligations or sanctions as a consequence of that breach, demonstrates that the rules relating to the international responsibility of the State are, by their very nature, complementary to those which give rise to the legal obligations which States may be led to breach”.¹⁴ The law on state responsibility constitutes only one particular aspect of international law; thus, any attempt to codify the principles governing the law on state responsibility cannot possibly lead to the codification of international law in its entirety. This approach was repeatedly endorsed by the ILC which affirmed that any attempts of codification should be independent from the codification of the so called “primary” rules of international law stressing at the same time that there shouldn’t be confusion between these two spheres of international law.¹⁵

It was further agreed by both Mr Ago and the ILC that the examination of the law on state responsibility would be divided in three parts. Accordingly, the first part would be dedicated to the subjective and objective elements of state responsibility and to the circumstances the existence of which might preclude the wrongfulness of the act of the state. The second part would concentrate on the forms and degrees of state responsibility in the light of the significance of the rules giving rise to the international obligations of states, and in view of the seriousness of the violation of such rules. In the same context, the ILC would also turn its attention to the subjects entitled to invoke the international responsibility of the state, in other words to the question as to whether the violation of an international obligation established a legal relationship merely between the injured and the defaulting state, or as to whether, in cases of serious breaches of international law, it could give rise to legal relationships between the defaulting state and a group of states or the international community as a whole. Furthermore, the ILC

¹³ First/Report/Ago/1969/127/(6).

¹⁴ Fifth/Report/Ago/1976/4/(1).

¹⁵ ILCreport/1976/71/(68).

concluded that the determination of the various degrees of responsibility would unavoidably also have an impact on whether a state had a right to seek reparation and/or to impose sanctions against the defaulting state.¹⁶ Finally, a third part would concentrate on the implementation of the responsibility, and the settlement of disputes.

It was from the beginning acknowledged that international state responsibility could not be invoked unless two requirements are fulfilled, a subjective according to which the wrongful act is attributed to a state as a subject of international law, and an objective according to which there exists a failure of that state to comply with an international obligation incumbent upon it.¹⁷ Such obligation could derive from the decision of an international judicial or arbitral body, the decision of an international organization, an international treaty, customary international law or general principles of international law. It was mentioned in this regard that “the contrast between the State’s actual conduct and the conduct required of it by law constitutes the essence of the wrongfulness.”¹⁸ Mr Ago took the view that the objective element was based on the correlation between a legal obligation on the one hand, and a subjective right on the other. As it had been very characteristically remarked on this particular point, “as distinct from what is said to be the situation in municipal law, there are certainly no obligations incumbent on a subject which are not matched by an international subjective right of another subject or subjects, or even... of the totality of the other subjects of the law of nations”.¹⁹

For the purposes of the present paper, the examination will next focus on the objective element of state responsibility, as this was conceived and thoroughly explained by Mr Ago. Especially the attention will be turned on the content of the international obligation breached and the impact it may have on the characterization of an act as an internationally wrongful and on the legal consequences applicable as a result.

2.2. The Content of the Obligation Breached

Before examining in depth the implications that may be born from the content of the infringed obligation, it is only appropriate to mention here that the source of the

¹⁶ ILCreport/1969/233/(79-82).

¹⁷ Third/Report/Ago/1971/214.

¹⁸ Second/Report/Ago/1970/191/(41).

¹⁹ Third/Report/Ago/1971/220-21/(65).

obligation, and in particular whether customary, conventional or other, should bear no significance on the characterization of an act committed by a state as wrongful or on the legal consequences (international responsibility) to derive therefrom, unless general international law provided so (such as for instance a treaty, in which case it would take precedence, as *lex specialis*, over the general provisions on state responsibility).²⁰

One of the most crucial questions next dealt with by Mr Ago and the ILC related to the impact that the content of the obligation breached may have on the “determination of the type of responsibility that international law attaches to different kinds of internationally wrongful acts, namely the problem of deciding whether a basic distinction should be made between internationally wrongful acts according to the degree of essentiality that respect for the obligation concerned has for the international community, precisely because of the content of the obligation, and according to the seriousness of the breach of that obligation”.²¹ Observing that at the time of the preparation of his Fifth report precedents on the above two questions were few, Mr Ago noted that his examination was based on the “true requirements of the contemporary international community and to the more authoritative ideas and tendencies which are emerging”.²²

It was early realized that the commission of an internationally wrongful act incurred the responsibility of the defaulting state in the international level irrespective of the content of the obligation breached.²³ Quite distinct from that stood the question as to whether the content of the breached obligation affected the regime of responsibility applicable in each particular case, in other words as to whether international law accepts the existence of a single regime of responsibility for all international wrongs, or whether different regimes of responsibility are applicable on the basis of international obligations with different content. Mr Ago, in what he described as one of the most difficult aspects of codifying the law on state responsibility, suggested two elements to be taken into consideration: the significance of respect of that particular obligation for the international community as a whole on the one hand and the seriousness of the breach on the other.²⁴

²⁰ ILCReport/1976/180/(5); Fifth/Report/Ago/1976/7-8.

²¹ Fifth/Report/Ago/1976/5/(9).

²² Ibid/6/(11).

²³ Ibid/24-25/(72-73).

²⁴ Ibid/5/(9,26,79).

The argument was further made that there would be no point in making such a differentiation between various wrongful acts in accordance with their content, if the same legal consequences were to be applied for every single internationally wrongful act. In the past, in the great majority of cases, such responsibility was associated with the duty of the offender to offer reparation. Nevertheless, even where other consequences were provided such as the duty to restore the *status quo ante* and to execute the obligation breached, such a distinction was never based on the content of the obligation, except from very few cases in which international arbitral tribunals had ordered the payment of “penal” damages”.²⁵

Thus, the prevailing view among international jurists and authors was that international law concerning state responsibility provided for a single regime of responsibility applicable to all wrongful acts irrespective of the content of the obligation that had been infringed. In the period between the two World Wars the “classical” position came under serious criticism. However, it was at the end of the Second World War that the concept of two different regimes of responsibility began to gain territory. The one would apply as a result of the breach of obligations of great significance to the international community as a whole, such as the prohibition of aggression, genocide and apartheid, and another that would apply to breaches concerning obligations of lesser and less general importance.²⁶ This distinction paved the way to the appearance of the notion of state crimes.

2.3. The Subjects Entitled to Invoke State Responsibility

The question regarding the differentiation between two types of internationally wrongful acts and accordingly of two types of responsibility is closely related to the determination of the subjects entitled to invoke the responsibility of the wrongdoing state. One would expect that the distinction between obligations whose respect and protection involve the interests of the international community as a whole, and obligations of less important character, and subsequently a distinction between international crimes and simple breaches, would also affect the determination of the subjects which possess the right to invoke the responsibility of the defaulting state and to take action against it. As Mr Ago noted, the content of the obligation breached is

²⁵ Ibid/27/(82).

²⁶ Ibid/26/(80).

important for the determination of the subjects against whom the violation took place since only on this ground a distinction between different kinds of internationally wrongful acts can be expected.²⁷ Therefore, the members of the ILC and the Special Rapporteur were faced with the question as to whether such right was merely recognized to the states directly affected and injured by the infringement, or whether there were cases in which this right should also be recognized to other states as well.²⁸

It was for long the position of international judicial and arbitral bodies that only the directly injured state had a right to bring a claim against another that had acted contrary to its international obligations. This position was upheld in the *South West Africa Case* in which the ICJ did not accept that international law recognized “the equivalent of an ‘*actio popularis*’ or right resident in any member of a community to take legal action in vindication of a public interest”.²⁹ However, only few years later, the ICJ recognized two categories of international obligations in its *Barcelona Traction Case*.³⁰ Mr Ago concluded that with this ruling the Court sought to draw a fundamental distinction between different internationally wrongful acts depending on whether the international community had an interest in the protection of the obligations involved, with varying legal consequences arising as a result. In the Court’s view, there are certain international obligations in the protection of which, by reason of their significance to the international community as a whole, all states have a legal interest. As Mr Ago observed the Court upheld that “the responsibility flowing from the breach of those obligations is entailed not only with regard to the state that has been the direct victim of the breach (e.g. a state which has suffered an act of aggression in its territory); it is also entailed with regard to all the other members of the international community. Every state, even if it is not immediately and directly affected by the breach, should therefore be considered justified in invoking the responsibility of the state committing the internationally wrongful act”.³¹ Nevertheless, the judgment was still very recent, and thus no concrete conclusions could be drawn from it with regard to the development of international law on the matter. It did however set the subject into a new perspective.

As regards the position adopted in state practice, the views can be distinguished on the basis of the period preceding the Second World War during which the prevailing view

²⁷ Ibid/5/(7).

²⁸ Ibid/28/(88).

²⁹ ICJReps/1966/47 in Fifth Report/Ago/1976/28/(89).

³⁰ ICJReps/1970/32-3/(33-34).

³¹ Fifth/Report/Ago/1976/29/(89).

was that the breach of an international obligation, irrespective of its content, established a single regime of responsibility; and the period that followed the Second World War which was signified by a gradual change of the above mentioned position.

The work of the 1930 Codification Conference is a very characteristic reflection of the opinion possessed at the time by states on the matter under consideration. Whilst having accepted that any violation of the obligations concerning the treatment of aliens entailed the international responsibility of the state, there was nothing in the replies of the representatives of the participating states to associate the legal consequences as a result of a wrongful act with the content of the breached obligation.³² Nor did the participating states regard that the content of the obligation could have any significance on the determination of the state with the right to invoke the responsibility of the offender. According to Mr Ago, “even though third States have sometimes asserted their right to intervene to proclaim the consequence of an internationally wrongful act committed against a given state, it cannot be said that the content of the obligation breached was used as a criterion in order to draw an inference with respect to the determination of the active subject of the international responsibility relationship”.³³ Hence, it seems to have been the position of the participating states that any distinction concerning the categories of internationally wrongful acts, the forms of responsibility applicable, and the subjects entitled to respond to a wrongful act, were issues independent from the content of the obligation infringed.

It has to be stressed however that already in the period preceding the Second World War there were signs of change. More particularly, the emergence of the prohibition of aggression as an offence that could not be seen as an offence “like any other”, indicates the belief that certain violations of a more serious character already existed in the international legal order. As it can be seen in the draft Treaty of Mutual Assistance prepared by the League of Nations in 1923, the war of aggression was regarded as an “international crime”. Furthermore, the 1924 Geneva Protocol for the settlement of international disputes refers to war of aggression as a violation of the solidarity of the members of the international community and again as an international crime. Although no mention is made in these documents to the regime of responsibility applicable in the case of a war of aggression, Mr Ago expressed the belief that it would be contradictory

³² Ibid/30/(93).

³³ Ibid/30/(94).

if states had only wished to distinguish crimes from other violations of international law if they did not mean to attach to these more serious offences a heavier regime of responsibility as well.³⁴ Reference is thus made to the fact that the Covenant of the League of Nations provided for a special regime of responsibility in case of breach of the obligation not to resort to a war of aggression, and especially for the imposition of sanctions against the aggressor by all member states.

Nevertheless, the terrible memories of the Second World War made stronger the need to put serious wrongful acts such as aggression, the use of force and other violations of the rules of international humanitarian law in a separate category that would identify them from other internationally wrongful acts.³⁵ Moreover, in the struggle of peoples to independence and decolonisation some new rules of international law evolved, whilst others, already existent, gained new significance. This new tendency in the international legal thought became even more solid especially with the formulation of rules of peremptory character on which the international community attached such significance that no derogation was meant to be permitted. The Special Rapporteur stressed in this regard that “these rules impose on states obligations whose fulfilment represents an increased collective interest on the part of the entire international community. Furthermore, there has gradually arisen a conviction that any breach of the obligations imposed by rules of this kind cannot be regarded and dealt with as a breach “like any other”, that it necessarily represents an internationally wrongful act which is far more serious, an infraction which must be differently described and must therefore be subject to a different regime of responsibility.”³⁶ Likewise, the recognition of the existence of such essential rules for the international community in its entirety could not have left unaffected the determination of the subjects empowered with the right to respond to a violation of international law.³⁷

Despite the general agreement that the breach of particular obligations was of more grave and serious nature, the same could not be said with respect to the type of action, if at all, that could be taken as a response to such violations and the subjects empowered with such right.

³⁴ Ibid/31/(96).

³⁵ Ibid/31/(97).

³⁶ Ibid.

³⁷ Ibid/32/(99) and 33/(100).

With respect to the position taken by the literature on the matter, Mr Ago divided his study in three periods according to which the first period started from the middle of the 19th century until the outbreak of the First World War; the second covered the period from 1915 until 1939, and finally, the third period covered the post-World War II period until the time the fifth report of Mr Ago was submitted to the ILC for consideration.

During the first period, authors writing at the time did not particularly deal with the determination of the legal consequences deriving as a result of the commission of internationally wrongful acts, nor with the problem whether the content of the international obligations could be determinative for distinguishing internationally wrongful acts and the regimes of responsibility applicable as a result. On the contrary, some authors had implicitly ruled out such differentiation by holding that reparation constituted the only legitimate response to the commission of a wrongful act, whatever the content of the obligation at risk. Furthermore, those writers that did distinguish among various forms of reparation such as restitution, redress for moral and material damage, satisfaction or preventative measures for the non-repetition of the breach, did not do so on the basis of the content of the obligation that had been infringed but solely on the ground that the injured state had the right to choose among various forms of reparation. For these authors, whether the injured state applied sanctions or other repressive or coercive measures depended on it (in some cases provided that an unsuccessful demand for reparation was previously made), and not on the content of the obligation breached, so long as the action taken was proportionate to the breach and the lawful aim pursued.³⁸

With the majority of authors rejecting the existence of different categories of wrongful acts and different regimes of responsibility, Bluntschli, a Swiss expert of international law, expressed the opinion that the injured state was entitled either to require the defaulting state whose conduct was contrary to its international obligations to resume its obligations, or to redress the injury caused as a result, or to terminate the treaty whose provisions had not been complied with. By way of exception, Bluntschli noted that if the breach was of even more serious nature affecting the legal domain of another state, or interfering with that state's property, then the latter might be entitled, in addition to the other measures, to even take punitive measures against the offender. In the same context, Bluntschli believed that in such cases of serious breaches which imposed a

³⁸ Ibid/41/(123).

threat to the international community as a whole, not only the injured state but also all the other states were entitled to safeguard and restore the international legal order.³⁹ However, there was a general suspicion towards the acceptance of this position by other authors of international law. We see in this regard that this “lone but highly authoritative voice of Bluntschli” whose ideas a century ago coincide with “the most advanced ideas of the authors of today”⁴⁰ did not have a great impact on the development of legal opinion during the period under consideration. Most of the writers at the time supported the view that international law recognized the right to reaction against the offender only to the directly injured state.

During the second period under consideration, and in particular the period from 1919 until 1939, although again no distinction or differentiation between more internationally wrongful acts or more types of action on the basis of the content of the breached obligation and its importance to the international community was made, there was a tendency towards accepting two kinds of internationally wrongful acts, thus aggression on the one hand and all the other wrongful acts on the other. In this regard, Reitzer was one of the few writers of that period that devoted much of his attention to the relationship between reparation and sanctions. After careful examination of the jurisprudence and state practice Reitzer reached the conclusion that in principle the injured state could resort to sanctions only after it had exhausted prior demand for reparation. By way of exception he recognized that in the case of aggression the victim state was entitled to take immediate steps in self-defence without being required to first seek reparation.

With respect to the subjects entitled to put forward an international claim against a state that has failed to comply with its international obligations, some authors went so far to support that this issue should be dependent upon the content of the said obligation. Hence, Root and Peaslee maintained that international law should make a distinction between breaches that affect merely the injured states, and breaches that affect interests of the international community in its entirety and the punishment of which any state is entitled to seek. However, this was the opinion of what continued to be the minority in the international legal theory. Accordingly, the majority of the writers during the period

³⁹ Ibid/42/(124).

⁴⁰ Bluntschli/1872/259 in *ibid*/41/(124).

between the two World Wars were of the opinion that only the injured state could take action such as reprisals as a response to another internationally wrongful act.⁴¹

Among the majority of opinions which did not believe in the significance of differentiating between two categories of internationally wrongful acts, there was a group of writers who, attaching to the matter under consideration an entirely penal perspective, believed that such a distinction was important in the international legal order. These were the supporters of a theory regarding the criminal responsibility of states. However, Mr Ago pinpointed in this regard that one should not draw a close connection between the theory of state crimes and the existence of two different kinds of internationally wrongful acts as, *inter alia*, there was still dichotomy as to what the “criminal responsibility of States” really meant. Some of the advocates of this theory, namely Pella, Saldana, de Vabres and others, were of the idea that a code listing all the serious breaches of international law and the legal consequences- sanctions attached to them should be adopted, provided that the application of such sanctions would be determined by an international criminal court to be set up for this purpose. It becomes evident from the above that although such views were not generally endorsed, a doctrine supporting the distinction between a category of less serious international violations subject to the traditional regime of responsibility and a category of the most serious, even qualified as criminal violations of international law subject to a much stricter regime of penal sanctions, gradually began to emerge.⁴²

As a concluding remark it can be said that even though the question concerning whether the content of the obligation breached had any bearing in the categorization of internationally wrongful acts and the applicable regimes of responsibility in the period before the Second World War had not been the object of further consideration, it had not been entirely overlooked either.

In the post-World War II era, there was an increased interest of authors with regard to the scope of state responsibility. It is very characteristic that two experts of international law, Lauterpacht and Levin, raised the question as to whether international law should distinguish between two different categories of internationally wrongful acts in view of their gravity. More specifically, according to Lauterpacht “the comprehensive notion of

⁴¹ Fifth/Report/Ago/1976/44/(132).

⁴² Ibid/45/(133).

an international delinquency ranges from ordinary breaches of treaty obligations, involving no more than pecuniary compensation, to violations of international law amounting to a criminal act in the generally accepted meaning of the term".⁴³ He further maintained that the violation of an "ordinary" obligation gave rise to the right to reparation, and only if this was denied the injured state could take enforcement measures against the violator. However, when a rather grave violation was involved then state responsibility should not be confined to the right to seek reparation but it should also extend to the imposition of coercive measures as well, such as the conduct of war, reprisals, or sanctions as those envisaged in Chapter VII of the UN Charter. Levin, on his part, referred to simple breaches of international law and international crimes which turned against the "very foundations and essential principles of the legal order of international society".⁴⁴ Similarly, Jessup, like Root in 1916, raised the question as to whether there was a need to consider violations against the peace and order of the international community as a "violation of the right of every nation" with which all states are regarded to have been injured.⁴⁵ According to this school of thought, a separate category of more severe internationally wrongful acts amounting to crimes existed in the international plane that should accordingly bear more severe legal consequences than any other violation of international law, hence attaching to it a punitive character. Nevertheless, the supporters of this theory again associated the existence of serious offences with the existence of an international criminal court.

Overall, the position taken in the literature in the 1950s seems to little associate the diversity of legal consequences deriving as a result of the commission of an internationally wrongful act with the content of the obligations breached. Nevertheless, and although the authors writing during this period do not generally distinguish between two separate types of internationally wrongful acts, it had become well accepted that a distinction concerning the use of force and other internationally wrongful acts existed. It was thus the position of a number of writers that when it came to aggression all the restrictions regarding retaliation cease to exist, whilst the regime of responsibility applicable becomes even stricter. According to this position, the state victim of aggression is entitled to resort to measures that infringe the rights of the defaulting state even, in exceptional cases, without prior demand for reparation having been made. Such measures could extend in cases of self-defence to the use of force under the conditions

⁴³ Oppenheim/1947/307 in Fifth/Report/Ago/1976/45/(136).

⁴⁴ Levin/1966/105 in Fifth/Report/Ago/1976/46/(136).

⁴⁵ Jessup/1948/11 in Fifth/Report/Ago/1976/46/(136).

already set by the UN Charter. It was also acknowledged by these authors that in cases of aggression, and only in those cases, a third state could assist the victim of aggression, even by resorting to the use of force.

In the years that followed more and more writers started to accept and recognize the concept that not all wrongful acts should be treated in the same way by international law. In a study prepared in 1962 Tunkin arrived at the conclusion that since World War II international law had recognized two categories of violations, each entailing a different regime of responsibility. The first category included offences that constituted a threat to peace, whilst the second concerned all the other violations of international law. Similar ideas were shared by Levin. Of even more interest, the State Institute of Law of the Academy of Sciences of the Soviet Union distinguished between breaches that affected the rights and interests of a particular state, and more serious wrongdoings that constituted “assaults upon the fundamental principles of international relations and thus encroach upon the rights and interests of all states”,⁴⁶ thus maintaining that the content of the wrongful act had a significance not only for the determination of the regime of responsibility applicable, in other words the legal consequences that would derive as a result, but also for determining the subjects entitled to respond to the breach with action.

At the same time, the legal theory in Western countries continued to develop, attaching more severe consequences to the use of force due to its seriousness in contrast to consequences attached to other wrongful acts. In this regard Verzijl distinguished between “delinquencies”, and “international crimes”, in the latter case the offender could also be subjected to sanctions. However, Verzijl used the term “international crimes” as indicative not merely of the crime of aggression but also of other offences such as grave breaches of the laws of war and crimes against humanity. For Schindler, colonization and racial discrimination should be viewed as internationally wrongful acts *erga omnes* justifying even non-forcible third party reprisals, whilst Brownlie characterized as an international crime any breach of the rules of *jus cogens*.

It is evident from the above analysis that “in the international literature of various countries and of various legal systems, ideas have moved substantially ahead. The positions which in older doctrine represented the isolated voices of certain especially forward-looking thinkers have become more and more frequent and increasingly firm,

⁴⁶ Soviet/Law/Institute/1957/420 in Fifth/Report/Ago/1976/48/(140).

to the point that in modern works they represent a solidly established viewpoint and significantly, one which is not contested".⁴⁷ It thus becomes indisputable that by the 1970s a basic unity of opinion had been established in the international legal theory and practice regarding the general awareness that contemporary international law required the distinction between two types of internationally wrongful acts in the light of the content of the obligation breached. Whilst it is stressed accordingly that all international obligations are of significant character, and thus they should all be complied with for the benefit of all the components of the international community, there are certain obligations such as aggression that due to the interests that they protect are recognized as being of a more fundamental character for the fulfilment of the goals of the international community, namely international peace and security. The commission of these acts is no longer confined to the establishment of a bilateral relation between the wrongdoer and the wronged state, but it is also extended to the establishment of a relation that involves and threatens all the members of the international community. For this reason, all states carry an interest for the fulfilment and respect of these rules some of which have already evolved to norms of *jus cogens*, that is norms from which no derogation is allowed. In this regard, Mr Ago observed that the distinction between serious and less serious internationally wrongful acts is comparable in importance to the distinction between derogable and non-derogable norms as provided in article 53 of the 1969 Vienna Convention on the Law of Treaties.⁴⁸ Nevertheless, Mr Ago emphasized that only the commission of wrongdoings of particular gravity should fall within the category of wrongful acts that entail more severe consequences for the perpetrator.

At the drafting of what later on was to be accepted by the ILC as article 19 Mr Ago used the term international crime as opposed to international delicts to indicate wrongs of a more serious character than others. According to the Special Rapporteur, this term had consistently been used in various documents such as the 1923 draft Mutual Assistance Treaty prepared by the League of Nations and the 1924 Geneva Protocol for the Pacific Settlement of International Disputes, and in many acts of the UN General Assembly such as the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States and the 1975 Definition of Aggression. This term had also been used in the literature and the debates of the United Nations.

⁴⁷ Fifth/Report/Ago/1976/50/(142).

⁴⁸ Ibid/53/(151).

With respect to the legal consequences deriving from the breach of an obligation of fundamental character it was noted that states have in particular cases responded to serious infringements threatening international peace and security with the application of coercive measures and sanctions. However, the Special Rapporteur stressed that the determination of the regimes of responsibility that should apply in each particular case should be the subject of examination in another context, and in particular within the ILC's efforts to determine the forms and content of state responsibility.⁴⁹ Furthermore, Mr Ago highlighted that the ILC, in its attempts to distinguish between internationally wrongful acts, should not overlook the fact that law is a field continuously evolving and developing. In this regard, the possibility of the emergence of new rules in the future the violation of which would be equally regarded as grave and serious should not be precluded.

The ILC agreed with the Special Rapporteur that there was a necessity, but also a general agreement in contemporary international legal theory and practice to differentiate between various internationally wrongful acts in accordance with the content of the infringed obligation. For it, the determination of the gravity of the wrongful act and the legal consequences that should attach to it as a result should depend on the significance attached to the fulfilment of certain obligations by the international community. The ILC went even further by accepting that the commission of a wrongful act did not create a relation only between the two parties directly involved, but it could also result, in particular cases, to the establishment of relations as between other subjects of international law as well "if the international obligation breached is one of those linking the state, not to a particular state, but to a group of states or to all members of the international community".⁵⁰

In passing what used to be draft article 19, the ILC seems to have incorporated what was already the tendency in international law to distinguish between a rather limited category comprising of particularly serious wrongs generally identified as international state crimes, and a much broader category covering all the other wrongs of much less serious character despite the fact that, according to the Commission's view there was not "any real consensus of opinion as to what kind of "action" or "measures" may legitimately be taken to deal with the acts referred to, or upon other delicate points of

⁴⁹ Ibid/52/(146).

⁵⁰ ILCreport/1976/76/(4).

law”.⁵¹ In this regard the ILC also stressed that such a differentiation would also be reflected in the determination of the subjects authorized to implement the legal consequences against the defaulting state.⁵²

2.4. Circumstances Precluding the Wrongfulness of the State

Next, the examination turns to the concept of circumstances the existence of which precludes the wrongfulness of the state, such as consent, the legitimate application of sanctions, *force majeure* and fortuitous event, self-defence, and necessity.

In explaining why the term “circumstance precluding wrongfulness” instead of the term “circumstances precluding responsibility” was preferred, Mr Ago pointed out that the true effect of these circumstances was not merely the preclusion of responsibility for the commission of an otherwise wrongful act, but the preclusion of wrongfulness itself.⁵³ Hence, wrongfulness and responsibility are not synonymous as Kelsen used to believe and according to whom each wrongful act always entailed the responsibility of the offender; on the contrary, and according to this assertion if no responsibility was attached to the commission of a certain act, then this act was not wrongful. However, Mr Ago argued that if one was to accept the notion of wrongfulness as meaning the conflict of a certain conduct committed by a state with an obligation imposed upon it by a “primary” rule of international law, and the notion of responsibility as meaning the legal consequences which another, a “secondary” rule of international law attaches to the violation of the “primary” rule, then the term “wrongfulness”, although linked with the notion of “responsibility”, is a notion distinct from it. Accordingly, the presence of these circumstances has an impact on the effect of the international obligation that has been violated with as a result the act to cease to be wrongful “for the good reason that... the state which committed the act was not under any international obligation to conduct itself otherwise”.⁵⁴ Responsibility is therefore precluded because the objective element concerning the breach of an international obligation does no longer exist. Although the Special Rapporteur accepted that it was theoretically possible to preclude responsibility without at the same time precluding the wrongfulness of the act in question, he noted in this regard that it would be contrary to the principle that each

⁵¹ Ibid/108/(29).

⁵² Ibid/97/(7).

⁵³ Eighth/Report/Ago/1979/27-29/(48-52).

⁵⁴ Ibid/30/(55).

wrongful act entails the responsibility of the state to say that the existence of certain circumstances preclude the responsibility but not the wrongfulness of the act.⁵⁵

Emphasis will be further given to the notion of sanctions as one of the circumstances precluding wrongfulness. According to this principle, international responsibility for the commission of an internationally wrongful act does not arise if the breach constitutes a measure admissible in international law as a sanction in response to an international offence committed by another state. The term "sanction" is used here by the Special Rapporteur as meaning the infliction of punishment or the securing of performance of the obligation breached, as a result of the infringement of the subjective rights of another state.⁵⁶

The Special Rapporteur made clear that only legitimate sanctions could be regarded as circumstances precluding wrongfulness, stressing for this purpose that only when certain conditions were met was the wrongfulness of the infringement precluded. Furthermore, Mr Ago stressed that only in specific cases did international law allow the injured state, or even other subjects of international law to resort to action that in itself was a violation of international law.⁵⁷ In this regard, if international law in a particular case entitled the injured state to merely demand reparation against the defaulting state, then the violation of another international obligation in response constituted, or rather remained, an internationally wrongful act. The same held true in those cases where international law required prior demand to make reparation before recourse was made to the imposition of sanctions. Likewise, the fact that a state had suffered a breach of its rights by another state did not invariably or automatically authorize it to breach another international obligation incumbent upon it towards the defaulting state.

In addition, it was pointed out that the application of sanctions as a response to a prior breach in order to preclude the wrongfulness and therefore the responsibility of the responding state should be commensurate to the injury suffered by the initial offence.⁵⁸

In the award given in the *Naulilaa Case*, the Tribunal, before proceeding to establish the lawfulness or wrongfulness of certain acts by the German authorities, justified by the

⁵⁵ Ibid/28/(52)

⁵⁶ Ibid/39/(79).

⁵⁷ Ibid/39/(79).

⁵⁸ Ibid/40/(82).

latter as reprisals to an internationally wrongful act previously committed by Portugal, wished to establish when and in what circumstances reprisals were to be deemed legitimate. According to its ruling, “the latest doctrine, and more particularly German doctrine, defines reprisals in these terms: ‘Reprisals are an act of taking the law into its own hands by the injured state, an act carried out after an unfulfilled demand in response to an act contrary to the law of nations by the offending state. Their effect is to suspend temporarily, in the relations between the two states, the observance of a particular rule of the law of nations. They are limited by the experiences of mankind and the rules of good faith, applicable in the relations between states. They would be illegal if an earlier act, contrary to the law of nations, had not furnished the motive.’”⁵⁹ The Tribunal held that even if Portugal had indeed previously committed a wrongful act, the imposition of reprisals by Germany would again be unlawful since no prior demand for reparation had been made.

So far state practice was concerned at the time under consideration, it had been often, sometimes explicitly and sometimes implicitly, accepted that the legitimate application of sanctions precluded the wrongfulness of the state. When during the works of the 1930 Codification Conference the Preparatory Committee raised the question under what conditions a policy of reprisals would be justified, the Committee automatically recognized the existence of cases in which reprisals could be permitted. It is noteworthy that no Government disputed this point, thus also recognizing that in a number of cases states were free to react by means of conduct that would otherwise be unlawful and entail their international responsibility. In the “Basis of Discussion” drawn by the Committee for the Conference, it was finally adopted that “a state is not responsible for damage caused to a foreigner if it proves that it acted in circumstances justifying the exercise of reprisals against the state to which the foreigner belongs”.⁶⁰ A few decades later, the representative of the Netherlands Government stated in the Sixth Committee of the General Assembly in 1968: “any state, no matter to what region of the world it belongs, may find itself in the position of suffering damage from illegal acts on the part of another state and that such a state, for that reason, would be justified in taking measures of non-violent reprisal”.⁶¹ The preclusion of wrongfulness in the case of legitimate sanctions is also unanimously upheld in the literature, sometimes referring to it as “sanctions”, other times as “reprisals”, and others as “measures of self-protection”.

⁵⁹ RIAA/1949/1025-1026 in Eighth/Report/Ago/1979/41/(86).

⁶⁰ League of Nations/Conference in Eighth/Report/Ago/1979/42/(89).

⁶¹ Swan/1970/171 in Eighth/Report/Ago/1979/43/(90).

It is relevant to add that the emergence of the prohibition of the use of force as one of the most fundamental principles of international law after the end of Second World War, led to a change of the position concerning the legitimacy of armed reprisals, as especially reflected in article 2 (4) of the UN Charter.

A final question considered by Mr Ago concerned what formerly constituted the monopoly of the directly injured state to respond by way of reprisals to the commission of another wrongful act. Attention was thus drawn to obligations *erga omnes*. Mr Ago, aware of the risks behind recognizing a right of third states to resort to sanctions in response to a breach that does not directly affect them, and thus the right to take punitive action against the wrongdoer, expressed the view that the task of determining the existence of a breach of an obligation of fundamental significance for the international community as a whole, and of deciding the measures that should be taken in response, should be vested not to individual states but to international institutions and organizations, such as the United Nations.⁶²

It is significant at this stage to point out that the ILC, in its report to the General Assembly prepared in 1979, having taken into consideration the suggestions of Mr Ago concerning the application of sanctions as a circumstance precluding wrongfulness, replaced the term “sanctions” with that of “countermeasures”.⁶³

In its further consideration of countermeasures whose object was to punish another state or to secure compliance with its obligations, and which, under normal circumstances would be unlawful as infringing the rights of another subject of international law, the ILC highlighted that these were justified only under the conditions imposed by international law.⁶⁴

The ILC further noted that when its report was prepared, there was no expressive affirmation in international practice and jurisprudence of the principle that an injured state could lawfully take an act against the defaulting state in the form of countermeasures, since any discussion on the matter was focused on whether or not the adoption of certain measures should have been contingent on failure of a prior attempt to make reparation, proportionality etc. Nevertheless, the ILC expressed the opinion that

⁶² Eighth/Report/Ago/1979/43-44/(91-92).

⁶³ ILCreport/1979/106/(1).

⁶⁴ Ibid/115-116/(2).

there was an implicit recognition of countermeasures as a circumstance precluding the wrongfulness of the state. Making reference in this context to the Declaration on the Friendly Relations and Co-operation among States adopted by the General Assembly, the ILC concluded that states had implicitly or explicitly recognized the legitimacy of reprisals with the exception of the use of force and provided that certain requirements were met; namely, that a prior demand for reparation has already been made, that the reaction was not disproportionate to the offence, and that no provision existed concerning the peaceful settlement of disputes.⁶⁵

It is finally remarkable that the ILC, in recognizing the right to countermeasures not only for the injured state, limited this power to international organizations and not to third states. More specifically, accepting the special significance of certain obligations to all members of the international community, it noted in this regard that this affirmation “has led the international community to turn towards a system which vests in international institutions other than states exclusive responsibility, first, for determining the existence of a breach of an obligation of basic importance to the international community as a whole, and, thereafter, for deciding what measures are to be taken in response and how they are to be implemented”.⁶⁶

3. The Conclusions of Mr Riphagen on Part Two of the Draft Articles on State responsibility: 1980-1986

3.1. Some Preliminary Remarks

Mr Riphagen examined international responsibility in part two of the draft articles in the light of the new legal consequences arising from the violation of international law, stressing however that the aim was not to draw an exhaustive list of all the legal consequences of every internationally wrongful act. According to him, although there was a general agreement between states on a number of legal consequences of certain types of internationally wrongful acts there still existed a “grey zone” where opinions differed.⁶⁷

⁶⁵ Ibid/118/fn595.

⁶⁶ Ibid/119/(12).

⁶⁷ Third/Report/Riphagen/1982/26/(26).

Whilst it was the main line of Mr Ago and the Commission under part one of the draft articles that the international responsibility of a state arises irrespective of the existence of any injury to the interests protected by the primary rules of international law,⁶⁸ Mr Riphagen was of the view that such injury and the subjects whose interests are affected by the breach could not but be taken into consideration in part two concerning the forms and degrees of international responsibility. In relation to the latter particularly, it was stressed by the Special Rapporteur that the determination of the subject of the primary rule was essential for the determination of which conduct could be demanded by the injured, and possibly third states against the perpetrator of the wrongful act. Similarly, although the origin of the international obligation, whether customary, conventional or other, had no effect on the establishment of state responsibility, it could not be ignored when determining the new legal relationships that derive as a result of an internationally wrongful act.⁶⁹

Mr Riphagen examined legal responsibility in the light of three parameters. Accordingly, the first parameter concerned the content of the new obligations of the author state and its duty to make reparation in its various forms (self-enforcement); the second parameter concerned the new rights of the injured state and the principle of non-recognition and other countermeasures (national enforcement); and the third parameter dealt with the position of third states concerning the unlawful situation created as a result of the wrongful act and their right, or duty, to take a non-neutral position (international enforcement).⁷⁰

It is these parameters that are examined next.

3.2. The Legal Consequences of an Internationally Wrongful Act

3.2.1. The New Obligations of the Defaulting State

Mr Riphagen identified three degrees concerning the new obligations of the author state as a result of the violation of its international obligations, all seen in the context of *restitutio in integrum*: the re-establishment of the right taken away by the wrongful act, although this was often difficult to achieve (*ex nunc*); the payment of damages in the

⁶⁸ Second/Report/Ago/1970/195/(54).

⁶⁹ Preliminary/Report/Riphagen/1980/111/(12); also Third/Report/Riphagen/1982/40/(196).

⁷⁰ Ibid/112/(28).

form of reparation for the injurious consequences caused by the wrongful act (*ex tunc*); and the assurance of non-repetition of the wrongful act in the future (*ex ante*).

Whilst pointing out that there should be quantitative proportionality between the breach and the legal consequences deriving as a result, according to which the more serious the breach the more there existed the need to complete *restitutio in integrum*, Mr Riphagen at the same time posed the question as to whether the subject-matter of the obligation breached had any impact on the determination of the legal consequences and, subsequently, of the new legal relationships. He answered this question in the affirmative confirming that the content of the international obligation may be relevant for the determination of the content of both the new obligations of the guilty state and the rights of the injured state.⁷¹ More specifically, in determining the legal consequences of an international wrong, Mr Riphagen suggested that various factors were needed to be considered such as the subject-matter protected by the primary rule and the seriousness of the breach itself under the particular circumstances of the case. He then went on to note that

Indeed, whatever the quality of the primary rule breached, there should be *restitutio in integrum*. However, the quality of the primary rule may certainly be relevant to the allowable response of the injured State or States in respect of the response; yet even within the context of the first parameter of the legal consequences, there might be a qualitative correlation. Thus it would seem that, in general, the giving of “guarantees” against future breaches (the *ex-ante* aspect) is reserved for cases of violation, through the use of external force or similar means, of fundamental rights of another State, whereas a mere reparation *ex tunc* is required in cases where, within the framework of the exercise of internal jurisdiction of a State, an obligation “concerning the treatment to be accorded to aliens” (art. 22) has been breached.⁷²

Nevertheless, it was stressed in relation to the above that the case-law on this matter did not seem to establish definite rules.

One of the primary obligations of the offending state identified by Mr Riphagen was its duty to cease the violation, regardless of whether such duty came as a result of the continuing effects of the primary legal obligation, or whether it came as a new legal consequence arising as a result of the wrongful act. Next in what the Special Rapporteur described as a *scala* of responses came the duty of the wrongdoer to make reparation in substitute of the primary obligation not performed, thus by paying the injured state a

⁷¹ Ibid/113/(33)

⁷² Ibid/113/(34).

sum of money corresponding to the value of the loss suffered and not repaired. The author state also had a duty to restore the situation which would have existed had the breach not been committed, in other words to make *restitutio in integrum stricto sensu* including the adoption of retroactive measures, and finally, to give satisfaction in the form of apologies, a formal re-confirmation of the obligation breached, or a declaration that measures would be taken in order to prevent future similar breaches.

With regard to the legal regime applicable when an international crime in the sense of article 19 of the draft articles was committed, it was noted that although again here the perpetrator had a duty to cease the criminal conduct, the response was quite distinctive from the response applicable when an international delict was involved.⁷³ With specific reference to the violation of the principle of non-interference in another state's affairs and aggression, the Special Rapporteur highlighted that the legal consequences of the former could not be as severe as in the case of aggression which entailed not merely the duty of the aggressor to restore completely the *status quo ante*, including the wiping out of all the consequences of the wrongful act and the providing of guarantees for non-repetition, but also the right to individual or collective self-defence.

According to Mr Riphagen article 19 was a reflection of the position in international law, as already recognized by the ILC, that the subject-matter of the international obligation had an impact on the regime of responsibility.⁷⁴ For the conclusion that an international crime had been committed two factors were relevant: the obligation should be of essential importance (the recognition of which should precede its infringement), and the breach should be serious.⁷⁵ The concept of international crime implied that the wrongful act could not be made good by any substitute performance (first parameter), and that it caused injury to all states (second parameter) in deviation from the traditional approach of bilateralism in international affairs. Furthermore, it implied the third parameter of legal consequences, thus a form of international enforcement.

Yet, in order to accept the notion of state crimes it was important for Mr Riphagen to identify its specific legal consequences and its means of implementation by the international community which should be the main body to determine the legal consequences of an international crime and the procedures with which such breach

⁷³ Second/Report/Riphagen/1981/92/(101).

⁷⁴ Ibid/92/(102).

⁷⁵ Ibid/92/(103).

could be established. For this purpose, he suggested an amendment of article 19 since it failed to make clear how and when a recognition of an act as an international crime by the international community as a whole took place, nor did it specify the special legal consequences of such a crime.⁷⁶

3.2.2. The Injured State and Its Rights

Before determining the legal consequences of an internationally wrongful act Mr Riphagen considered that it was imperative to first identify the parties towards which the obligation established by the primary rule was owed and whose interests were to be protected under the law on state responsibility. Nevertheless, to do that it would be necessary to examine both the content of the primary legal relationship, in other words the rights and the duties infringed, and of the new legal relationships. It was submitted in this regard that whilst every state may have an interest in the compliance with the international obligations of another state, it should by no means be concluded that every state is authorized to demand the performance of such obligations, or to take countermeasures. As Mr Riphagen noted, this was in accordance with the principle of non-interference in the domestic affairs of another state.⁷⁷

In most cases of a violation of international law it is not difficult to identify the state entitled to claim reparation, invoke reciprocity, or take reprisals against the wrongdoer. Problems however do arise in cases of violation of a primary rule that protects extra-state interests, and in cases where the secondary rule authorizes, or even obliges, other states to actively or passively participate in the enforcement of the primary rule. As noted, both these cases have an exceptional character⁷⁸ and can only arise under the UN Charter.⁷⁹ Accordingly, an injured state is the state whose right under a customary rule of international law has been infringed; the state party to a treaty if it is established that the obligation in question was stipulated in its favour; or the state party to a dispute if the breach is a breach of an obligation under a judicial decision or other binding decision in a dispute settlement process.

⁷⁶ Third/Report/Riphagen/1982/48.

⁷⁷ Fourth/Report/Riphagen/1983/21/(113).

⁷⁸ Ibid/21/(114).

⁷⁹ Ibid/21-22/(115).

Moreover, in determining the subjects entitled to invoke the responsibility of the defaulting state the origin of the international obligation breached is not without significance. With this under consideration, an obligation that has been established through a treaty will be owed only to the states parties to that particular treaty and therefore no third state will be entitled under international law to invoke the responsibility of the state that fails to meet its obligations under the treaty in question. However, it is often the case that not all the state parties to a treaty will be directly affected by a breach. In this regard the Special Rapporteur concluded that article 60 of the 1969 VCLT itself draws a distinctive line and thus differentiates between a party specially affected by the breach and any other party to the treaty.⁸⁰

Mr Riphagen concluded that the crucial point to be considered with respect to determining the legal consequences of a wrongful act was the distinction between a state directly affected by a particular violation and other states, whether parties to a multilateral treaty or not. In this regard, “Within a *scala* of legal consequences, the new legal relationship created by the wrongful act of a State is primarily one between the guilty State and the State (or States) whose material interests are directly affected by that wrongful act.”⁸¹

It is not therefore sufficient for a state, in the context of a treaty and for the exercise of the rights under the second parameter, to merely be a party to a multilateral treaty. It is common in international law that many multilateral treaties, like customary rules, establish many distinctive bilateral legal relationships. In this way the multilateral treaty is further divided into multiple bilateral relationships and the rights and obligations deriving from such treaties cannot be transferred or exercised by the other states, members to the same treaty. Having said that, there is nothing to prevent the parties to a multilateral treaty from creating a system of solidarity as between all the other parties when a state violates its obligations under the particular treaty. Although traditional international law has been hesitant in recognizing rights to third states, contemporary international law “seems to admit increasingly a ‘constructive injury’ to a state, either as a result of its participation in multilateral rule-making, or as a result of the recognition of extra-state interests being protected by the primary rule of international law. In both cases the primary rule of international law itself has to create the constructive injury,

⁸⁰ Preliminary/Report/Riphagen/1980/114-115/(40).

⁸¹ Ibid/115/(42).

either explicitly or implicitly.”⁸² For Mr Riphagen, a constructive injury may derive from the object and purpose of the primary rule. He thus remarked that:

94....Actually, the introduction of extra-State interests as the object of protection by rules of international law tends towards the recognition of an *actio popularis* of every State having participated in the creation of such extra-State interest, the other possibilities of enforcement being either only self-enforcement, or enforcement by the subject to which this extra-State interest is allocated for this purpose.

95. The existence of a “derived” or a “constructive” injury does not necessarily mean that the injured State is entitled to take all the measures of the second parameter catalogue. In particular, self-defence, self-help and countermeasures outside the field of the relationship involved in the breach are probably not allowed (at least not without a collective decision to this effect). In other words, there may be a correlation between the degree of involvement in the injury and the degree of second parameter measure allowed.⁸³

Consequently, the extent to which a state with a “derived”, “constructive”, or “extra-State” injury is entitled to national enforcement within the second parameter or to self-enforcement by the author state is a question to be determined by the primary rule which not only is decisive of the international obligation, but also of the right it intends to protect.⁸⁴ The Special Rapporteur continued stressing that:

Being a party to a primary legal relationship, being a “party” to the breach of an international obligation, and having a *persona standi* for the purpose of activating an international procedure of remedy are different stages, the first not necessarily entailing the second, let alone the third. Consequently, while the possibility of a purely factual situation, where one act of a State causes injury to more than one other States, has always been recognized, traditional international law has been hesitant to admit “derived”, “constructive” or “extra-State” injury.⁸⁵

The Special Rapporteur then turned his attention to the new rights of the injured state established as legal consequences of a wrongful act, highlighting in this regard the significance of the right, or even duty, of non-recognition of the “fruit” of the unlawfulness. However, it was noted that the exercise of this right was subject to specific restrictions according to which no wrongful act could justify non-compliance with the rules of diplomatic protection, the rules concerning the protection of

⁸² Third/Report/Riphagen/1982/36-37/(92).

⁸³ Ibid/37/(94-95).

⁸⁴ Ibid/38/(96).

⁸⁵ Ibid/38/(97).

fundamental human rights, or other rules from which international law permits no derogation, thus implicitly making reference to norms of peremptory character.⁸⁶

Mr Riphagen also referred to the entitlement under article 60 of the 1969 VCLT of a state party to a bilateral treaty to suspend or terminate in whole or in part the treaty in question where a material breach has occurred. However, it should be stressed here that the law of treaties and the law on state responsibility are two distinct spheres of international law which must not be confused. Whilst the one constitutes the general law applicable in treaties, the other is applicable in all violations of international law, without totally being excluded from the former. The relationship between the law of treaties and the law of state responsibility is thoroughly examined in Chapter 3.

The right of the injured state not to fulfil its obligations towards the defaulting state is not restricted to obligations with the same object and purpose as the primary obligation breached, although proportionality should be relevant in this case.⁸⁷

With respect to the right of an injured state to resort to countermeasures Mr Riphagen made clear that this power was not unlimited. In this connection a distinction was made between countermeasures aiming at restoring the balance in the positions of the state parties involved in the dispute, a balance that was disturbed with the wrongful act (reciprocity), and countermeasures aimed at making the author state comply with its new obligations (reprisals).⁸⁸ It was noted accordingly that “indeed, the justification for the “weaker” countermeasure by way of reprisal is connected with the intention and effect of the internationally wrongful act to which it is a response.”⁸⁹

In reciprocal measures the notions of proportionality and interim protection are inherent in them. Nevertheless, it was accepted that the reciprocal suspension of obligations with peremptory character should not be permitted. Furthermore, reciprocity is limited in its effects to the wrongdoing state.⁹⁰ By contrast, when reprisals are undertaken, the content of the response is not reciprocal to the content of the primary obligation. In other words, “there is no *legal* connection between the obligation breached by the author State and the obligation whose performance is suspended by the injured State”. With regard to

⁸⁶ Preliminary/Report/Riphagen/1980/116-17/(51).

⁸⁷ Ibid/119/(61).

⁸⁸ Sixth/Report/Riphagen/1985/10/(2).

⁸⁹ Ibid/10/(3).

⁹⁰ Ibid/11/(6).

proportionality, Mr Riphagen noted that the effects of the response should not be disproportionate to the seriousness of the breach. Since the reprisal is an intentional failure to comply with an international obligation, its justification should be similarly based on the intention and the effects, in other words the seriousness, of the initial infringement.⁹¹ And added that “a measure of reprisal, even if not manifestly disproportional, remains by its very purpose at least ‘a wager on the wisdom...of the other Party’, a unilateral act directed ultimately at the ‘enforcement’ of the primary relationship. From this point of view, the existence and availability of other means to ensure the performance of obligations is clearly relevant.”⁹² Therefore a precondition to the application of reprisals is the exhaustion of international procedures for the peaceful settlement of the dispute where such a procedure is of compulsory character. In these cases other means of enforcement including reprisals are precluded. However, this precondition does not come without exceptions. First, such procedures may require the cooperation of all the parties to the dispute, in which case the adoption of measures with the purpose of securing this cooperation are permitted. Secondly, the third body may have limited powers in relation to the specific dispute both in relation to finding of fact and law and the adoption of effective interim measures of protection. Finally, there may be no compliance with the interim measures ordered by the third party.

In the context of suspension of the performance either by way of reciprocity or by way of reprisals of obligations that under a multilateral treaty create extra-state interests it was noted that such a suspension would unavoidably affect parties other than the wrongdoer. In this regard, a rule prohibiting the unilateral suspension by the injured state of the performance of its obligations towards other states appears to exist. However, even in cases where the multilateral treaty creates collective interests not all the states members to the treaty will be equally affected by the violation. A collective decision about the interest to be served by the countermeasure as opposed to the effects on the interests of the individual states parties must be taken, especially if the treaty itself provides for this procedure of collective decision.⁹³

⁹¹ Ibid/11/(1,2).

⁹² Ibid/11/(1).

⁹³ Ibid/12/(5).

3.2.3. The Position of Third States in respect to Internationally Wrongful Acts

According to Mr Riphagen, whilst international law established primarily relations of a bilateral nature, one could identify three exceptions to the rule. More specifically, whenever there exists more than one directly injured state (although here one may wonder about the “exceptional” character of this category); whenever the obligation breached derives from a multilateral treaty; and finally, whenever the infringed obligation protects a “fundamental interest which is not solely an interest of an individual State”.⁹⁴ The latter involved the commission of acts that fell within the scope of article 19 which outlined different legal consequences in the event of the commission of an international crime. As Mr Riphagen remarked the distinction between international delicts and international crimes would be of little significance if it did not imply different legal consequences. As provided in the draft article 14, an international crime entailed all the legal consequences of an internationally wrongful act and, *additionally*, such rights and obligations deriving from its nature as criminal and accepted by the international community. According to him, these additional consequences might concern a new collective right of every other state to require the author state to comply with its normal secondary obligations; additional secondary obligations for the author state going beyond the “undoing” of its acts qualified as an international crime (in which case they could only be determined by the international community as a whole if and when it recognized some wrongful acts as constituting international crimes); new obligations between the other states not to recognize or support the results of such an international crime (principle of solidarity in which case solidarity and the mechanism of its implementation may be determined by the international community as a whole.)

Nevertheless it was pointed out that the legal consequences in such exceptionally serious violations were not identical in every case as this would be in conflict with the principle of proportionality. Moreover, whilst the response of any state might be proportionate, the same response by several states would not be.

With respect to the right of third states to take countermeasures it was pointed out that where a material breach of a multilateral treaty occurs, then only collective and unanimous action by the parties to the treaty was permitted for its suspension or

⁹⁴ Preliminary/Report/Riphagen/1980/119/(62).

termination. This question was addressed in a different context in the ICJ's advisory opinion concerning South Africa's continued presence in Namibia where the Court had to determine the legal consequences for third states of a UN resolution passed on the matter declaring such presence as illegal. Thus, in this case there already existed a collective decision in response to South Africa's wrongful act. As the SC had already determined that the situation created was illegal under its powers under Chapter VII of the UN Charter, the Court found that it did not have to examine what the legal situation would be if no such resolution had been passed. In this way the Court assimilated the SC's resolution, leaving to the latter the authority to determine the existence and the content of the new legal relationships between South Africa and other states.⁹⁵ It was accordingly concluded by Mr Riphagen that any action against South Africa required a collective response through the UN mechanism since even the cases of individual action recognized in the particular case by the Court were accepted on the basis of the resolution "as responses already indicated by a collective decision."⁹⁶

It has thus been argued that any response by third states to an internationally wrongful act must be taken in the light of a collective decision, although some expressed the view that no such requirement existed in international law. Apart from the fact that in the *Namibia Case* there was no injured state, the Court there dealt only with mandatory responses, as a duty of a third state not to comply with its international obligations towards the guilty state it could not easily be established under international law. As the Special Rapporteur pointed out:

At most one could require a State which is not an injured State to refrain from giving support *a posteriori* to the wrongful act, and this requirement might even prevail over obligations of the third State towards the guilty State.⁹⁷

3.2.4. A Duty Upon Third States?

Converse to the question of the existence of a "right" of third states to take action in response to a wrongful act committed by another state, lies the question of the existence of a duty upon third states to maintain a non-neutral position. According to Mr Riphagen, such a duty "could only be justified by the necessity of ensuring the

⁹⁵ ICJReps/1971/16 in Preliminary/Report/Riphagen/1980/121/(70).

⁹⁶ Preliminary/Report/Riphagen/1980/121/(70).

⁹⁷ Ibid/121/(71).

“credibility” of a primary rule itself, regardless of the relationship between the guilty State and the injured State involved in the breach of that primary rule.”⁹⁸ In its Advisory Opinion in the *Namibia Case*, the ICJ held that there was an *erga omnes* duty not to recognize a situation in violation of international law.⁹⁹

Whereas such a duty of third states to act (or refrain from otherwise lawful acts) did not seem to be precluded by a rule of international law, especially in the cases of international crimes and regardless of whether the infringement amounted to a threat to peace and security or not, Mr Riphagen noted that such a duty should be the result of a collective decision subject to the rule of proportionality.¹⁰⁰ It was only reasonable to assume that if such a duty is imposed upon third states, then an identical duty must also exist towards the state injured by the wrongful act, thus denying it of its *normal faculty* to waive its right to response. This position was in accordance with article 29 of the ILC draft articles on state responsibility concerning the exception of consent as a reason precluding wrongfulness whenever *jus cogens* norms were involved.

It was further noted in this regard that a duty upon all states to cooperate in order to compel the offender to stop its criminal conduct, to refrain from support *a posteriori* of the wrongful act itself, or to support other states in taking countermeasures should be recognized.

3.3. Secondary Rules in the Context of Various Categories of Internationally Wrongful Acts

The point was often made that although the commission of an internationally wrongful act entails legal consequences for the perpetrator, similar to any domestic legal order, there is a fundamental structural difference between domestic and international law. More specifically, and despite the development of international law towards recognition on the one hand of entities other than states which possess interests protected by international law and which sometimes can even be seen as actors on the international plane, and of rules such as the general principles of law and *jus cogens* norms similar to those existing under domestic law on the other, international law is still based on the sovereign equality of states. As noted, “those developments do not destroy the original

⁹⁸ Ibid/122/(74).

⁹⁹ ICJReps/1971/16/(126) in Preliminary/Report/Riphagen/1980/122/(74).

¹⁰⁰ Preliminary/Report/Riphagen/1980/122/(74).

basis of international law, and the new entities and concepts remain in a way something like a *corpus alienum*, requiring a mutual adaptation in respect of the principle of sovereign equality of States".¹⁰¹ This should be interpreted as meaning that unlike the position in domestic law where one party, the state, is in a superior position from its subjects, the same relationship of superiority is not existent in the international arena. It was therefore stressed that the distinction valid in internal law between "norms" and "sanctions" and "authority" and "subjects" cannot be transplanted to international law without elaboration. Similarly, the distinction made between primary rules, secondary rules or rules concerning the international responsibility of states, and implementation rules, should not be used as destroying the essential unity of the structure of international law. On the contrary, the manner in which the primary rules are established and their different functions cannot, according to Mr. Riphagen, but influence the various contents of state responsibility and its implementation. Finally, the lack of enforcement mechanisms in international law makes it even more necessary to define the legal regime applicable in cases of violation of the rules of international law, including certain restrictions that would restrain states from arbitrarily exercising their powers against smaller and weaker states.

One of the issues examined by Mr Riphagen was the determination of secondary rules on the basis of various categories of internationally wrongful acts. He referred in this regard to the writings of some authors, including Graefrath and Steiniger, who identified three categories of internationally wrongful acts: aggression and threat to the peace by forceful maintenance of a racial or a colonial regime; other violations of sovereignty; and violations of other conventional or customary law obligations.¹⁰²

In contrast, other publicists referred to another category of internationally wrongful acts, that of international crimes with an *erga omnes* character. According to these authors the commission of an international crime established the duty upon states not to support the act *ex post* either by recognizing its result as legal or by rendering aid or assistance in maintaining such a result; the duty to support the measures taken by the states specially affected by the breach; and the duty to participate in collective action for the protection of fundamental interests of the international community as a whole. However, it was pointed out that not all international crimes bore the same legal

¹⁰¹ Second/Report/Riphagen/1981/82/(29).

¹⁰² Graefrath-Steiniger/1973/10/(48).

consequences in each particular case although nothing could preclude the establishment of a “minimum common element” of legal consequences applicable to all international crimes. As noted, the legal consequences of aggression for example were determined in the context of the UN Charter, especially in relation to the right of individual or collective self-defence. Mr Riphagen however opposed the suggestion made by some that the ILC should include an article on the legal consequences to be derived as a consequence of aggression as such an act justified any demand and any countermeasure provided that it complied with the rules of quantitative proportionality, *jus cogens*, and the UN Charter.¹⁰³

Nevertheless, it should be noted that the *erga omnes* character of international crimes related to international peace and security could not award all the other states with the same rights and duties. Wondering whether and to what extent the Commission should try to determine the legal consequences of other international crimes Mr Riphagen was faced with a lack of state consensus concerning not whether a conduct constituted an international crime, but the punishment that derives as a result. As he observed:

Indeed, in fields of “fundamental interests of the international community”, such as “the safeguarding and preservation of the human environment” or “safeguarding the human being”, or, for that matter, “safeguarding the right of self-determination of peoples”, the progressive development of international law has brought about primary rules, and even tertiary rules, at least some machinery of implementation; but as to special secondary rules, different from those applying to internationally wrongful acts in general, there is little evidence of generally accepted legal consequences of serious breaches...Nevertheless, as previously indicated, there are elements of special legal consequences common to all international crimes.¹⁰⁴

One such element applicable to all international crimes constituted according to Mr Riphagen the *erga omnes* character of the obligation infringed according to which every other state possessed the right to require from the author state the self-enforcement of the obligation breached (reparation *ex nunc*, *ex tunc* and *ex ante*.) Furthermore it was submitted that when an international crime was committed then the organized international community, i.e. the UN, had jurisdiction over the situation, and at the same time the principle of non-intervention in the domestic affairs of a state became ineffective. Nevertheless, Mr Riphagen stressed that the author state should not be deprived of its fundamental rights under international law and the violation of which

¹⁰³ Fourth/Report/Riphagen/1983/11/(55).

¹⁰⁴ Ibid/11/(58).

would itself constitute an international crime.¹⁰⁵ Another common element identified for all international crimes was the fact that they established new legal relationships between all the states other than the author state, and, in addition to the duty not to provide support *ex post facto* to the crime, they created as a legal consequence duties of solidarity between all other states. However, there was less certainty as to the duty of other states to support legitimate countermeasures. As suggested, for such a duty to exist some form of international decision-making machinery should exist such as the United Nations.¹⁰⁶ As known, the UN is empowered to take specific countermeasures against a state that with its actions threatens or breaches international peace and security (although the SC has shown in the era after the end of Cold War willingness to widen the meaning of what constitutes threat or breach to international peace and security), which may even go beyond measures prohibited by other rules of international law. As noted, the SC can even impose the duty upon all states to support and even to participate in collective measures. Such duties should prevail over duties deriving from other rules of international law.¹⁰⁷

4. The Conclusions of Mr Arangio-Ruiz: 1988-1996

4.1. Substantive and Instrumental Consequences of an Internationally Wrongful Act

There was a common consensus that the codification of the law on state responsibility was central for the compliance of states with their international obligations and the reinforcement of the binding character of the international legal order. At the same time, there was a strong belief among states that the distinction made by article 19 between international delicts and international crimes, and the categorization of responsibility on the basis of the importance of the infringed right, the subjects entitled to respond with sanctions and the scope and kind of sanctions, strengthened the effectiveness of responsibility.¹⁰⁸

In this context, Mr Arangio-Ruiz initiated his work on the codification of the law on state responsibility by examining two sets of legal consequences that could apply in both delicts and crimes. On the one hand there were the rights and duties of states in

¹⁰⁵ Ibid/12/(61).

¹⁰⁶ Ibid/12/(62).

¹⁰⁷ Ibid/12/(63).

¹⁰⁸ ILCreport/1988/105.

relation to the various forms of reparation and the cessation of the wrongful act, and on the other there were the rights, or *facultes*, of the injured states to resort to measures that aimed either at securing reparation and cessation, or at inflicting punishment, or both. Such measures, even when of a punitive form, were described as “essentially instrumental” compared to the various forms of reparation (and cessation) that performed a merely substantive role. However, such measures should be “dressed” with certain conditions of lawfulness, “including such *onera* as may be incumbent upon the injured State or States with regard to representations, intimations or *summations*, which, except in cases and circumstances to be determined, should precede resort to measures”.¹⁰⁹

Mr Arangio-Ruiz studied extensively the form and scope of the substantive consequences of internationally wrongful acts, and in particular cessation, restitution in kind and satisfaction. It is not however within the scope of the present examination to analyze further these legal consequences. It suffices only to mention that Mr Arangio-Ruiz was of the view that satisfaction could have a punitive character despite the fact that there was a growing concern that this would be in conflict with the composition or structure of the society of states. This can be rested on two grounds. Firstly because punishment or penalty could be conceived only as against human beings; and secondly, that the infliction of such punishment or penalty presupposed the existence of “institutions impersonating, as in national societies, the whole community, no such institutions being available or likely to come into being soon-if ever- in the ‘society of States’”.¹¹⁰ Mr Arangio-Ruiz disagreed with this position, defending the existence of satisfaction (in its punitive form) and pointing out that it was due to the lack of such mechanisms of prosecuting, trying and punishing criminal offences that made it necessary to have these remedies in an attempt to fill the legal loophole of international legal community. Yet, he made a distinction between satisfaction and other measures, such as sanctions. Whilst the latter consisted of action imposed by the injured state, satisfaction consisted of specific conduct taken by the wrongdoing state, and in that sense satisfaction did not pose a threat on the principle of sovereign equality of states.¹¹¹

With respect to the instrumental consequences and in particular countermeasures, it is observed that the lack of an adequate institutional framework becomes even more

¹⁰⁹ Preliminary/Report/Arangio-Ruiz/1988/9/(14).

¹¹⁰ Lauterpacht/1938/350 in Second/Report/Arangio-Ruiz/1989/41/(141).

¹¹¹ Second/Report/Arangio-Ruiz/1989/41-2/(144).

apparent and compelling in this particular area which exposes small and weak states to abuses by powerful states. It was therefore essential for the Commission, in its codification of the law on state responsibility, to “devise ways and means which, by emphasizing the best of *lex lata* or careful progressive development, could reduce the impact of the great inequality revealed among States in the exercise of their faculte (and possibly obligation) to apply counter-measures, which is such a major cause of concern.”¹¹²

The use of the term “countermeasures” was preferred in contemporary legal thought and in the work of the Commission from that of “sanctions” which were reserved, according to the latter, to indicate measures adopted by an international body.¹¹³

4.2. Conditions and Functions of Countermeasures

The acceptance of countermeasures in the law of state responsibility was accompanied by certain concerns and considerable reservations. In what was described by the ILC as the most controversial aspect of state responsibility,¹¹⁴ countermeasures were dealt with in Chapter III of the draft articles provisionally adopted in first reading in 1996. According to the general commentary, countermeasures were justified in response to a previous violation of the rights of the injured state and may be necessary in order to ensure the compliance of the wrongdoing state. The ILC recognized that countermeasures did not constitute a “wholly satisfactory remedy” but rather a “rudimentary” system, firstly because the judgment for their justification is formed by the very same state relying upon them (unilateral assessment of both whether there has been an infringement and whether the reaction is lawful), and secondly because of the actual inequality of states in respect of military and economic strength.¹¹⁵ There were some states which for the reasons mentioned above disfavoured the inclusion of countermeasures in the draft articles and that argued that to rely on the principle of proportionality as a way of limiting any possible excessiveness of such measures would not be of much assistance as the exact content of the principle was not yet universally agreed and determined. However, the ILC decided to include countermeasures in the draft articles as it found that there existed enough evidence in customary law that

¹¹² Third/Report/Arangio-Ruiz/1991/7-8/(4).

¹¹³ Ibid/10/(15).

¹¹⁴ ILCreport/1996/153/(1)

¹¹⁵ Ibid/153/(1)

countermeasures are permitted as a lawful response to an unlawful conduct, emphasizing at the same time that the restrictions and limitations for resorting to such measures should not be ignored.¹¹⁶ Countermeasures, “a reflection of the imperfect structure of the international community”,¹¹⁷ were also supported by many other member states which asserted that “in any society a certain degree of coercion had to be tolerated, provided it did not go beyond certain limits” and that “at the present stage they were the only means whereby international law could be implemented when an international obligation was violated”.¹¹⁸ It was also the position that countermeasures should serve only for the cessation of the wrongful act and not as a means of punishment since the international community was comprised of states that were legally equal between them.

The recognition that countermeasures could turn into a powerful weapon in the hands of states was the driving force behind the urge to impose the strictest conditions in the use of such measures. It was imperative that such measures were subjected to restrictions and limitations so as to safeguard that they would only be used whenever necessary in response to another infringement. Draft article 47 provided that countermeasures entitled the injured state “not to comply with one or more of its obligations towards the wrongdoing state”, in order to achieve the permissible functions and aims of such measures, in particular cessation or reparation. Anything exceeding these functions would be unlawful, particularly the infliction of punishment upon the wrongdoer.¹¹⁹ The ILC wished to ensure that countermeasures would not be used easily. For this reason it required that before resorting to countermeasures there should be failure of the wrongdoer to comply with its obligations under draft articles 41 to 46 concerning cessation, reparation, restitution in kind, compensation, safeguards for non repetition and satisfaction. The other restrictions provided for constituted the duty of the injured state to negotiate (with the exception of cases where urgent action was needed for the protection of the injured state’s rights) and to submit the dispute before any dispute settlement procedure existing between the parties; that its action was not out of proportion to the degree of gravity of the internationally wrongful act and the effects on the injured state; and that the measures were not in violation of the prohibition of the use or threat of force, did not constitute extreme economic and political coercion against

¹¹⁶ Ibid/153-4/(2)

¹¹⁷ ILCReport/1992/19/(122).

¹¹⁸ Ibid/20-21/(131).

¹¹⁹ ILCReport/1996/153.

the territorial integrity or political independence of the wrongdoer, did not infringe diplomatic immunities and basic human rights, and finally did not violate peremptory norms.¹²⁰ At the same time, it was stressed that countermeasures needed to be necessary to induce the wrongdoing state to comply with its obligations. This prerequisite of necessity was interpreted as meaning first that the injured state should only resort to countermeasures if other means failed or proved ineffective, and secondly that countermeasures must be used reasonably, in good faith and at the injured state's own risk. Effectively, the injured state was empowered to judge, from its dialogue with the defaulting state, whether the necessity for countermeasures had arisen. It was noted accordingly in this regard that, "The necessity of countermeasures diminishes in inverse proportion to the achievement of their legitimate aims."¹²¹ The burden to establish the necessity of countermeasures therefore laid upon the injured state.

There was also consideration of the view advanced by some writers that not all the injured states were entitled to unilaterally resort to countermeasures, fearing that a general *faculte* to this end would pose a threat to the certainty in the enforcement of the law and would lead to reactions unjustified by the aim of achieving the compliance of the wrongdoer. Mr Arangio-Ruiz, whilst acknowledging the dangers that unilateral resort to countermeasures could envisage, noted that refusing such right amounted to denying *erga omnes* obligations from any binding effect, the violation of which would bear no consequences and no regime of liability for the wrongdoer. He went on by saying that

The only real peculiarities of the situations determined by the presence of a plurality of injured States, that is to say, by the fact that the infringed rule is an *erga plurimos* or *erga omnes* rule- is that the rights and *facultes* of the various injured States must be determined *in concreto* and implemented with a view to the pursuit of the totally or partially *common* legal interest infringed by the breach.¹²²

The Special Rapporteur emphasized that resort to countermeasures precluded the use of force, whilst it demanded respect for human rights and the inviolability of diplomatic immunities, and compliance with imperative rules and *erga omnes* obligations. In relation to *jus cogens* norms Gaja remarked that, "it would be illogical...at the same time [to] admit that the breach of an obligation imposed by a peremptory norm is justified only because another State had previously violated an international obligation.

¹²⁰ Ibid/156.

¹²¹ Ibid/157/(6).

¹²² Fourth/Report/Arangio-Ruiz/1992/46-47/(143).

The same applies when the previous violation also concerns an obligation imposed by a peremptory norm; the very existence of such a category of norms implies that there is a general interest in international society that they should be respected”.¹²³ With respect to *erga omnes* obligations Lattanzi pointed out that “...there can be no doubt that the lawfulness of a reprisal consisting in a violation of *erga omnes* rules is excluded precisely by the fact that the violation of an obligation to the detriment of one State in such a case simultaneously represents a violation of the same obligation to the detriment of all those to whom the rule applies. It would be inadmissible for the sanction imposed on one State to constitute the violation of an obligation towards another State”.¹²⁴ The same position was taken again by Gaja who stressed that “...one of the cases in which international law cannot allow countermeasures...is when the obligation which is violated operates in specific cases towards all other States: the rights of innocent States would then necessarily be infringed”.¹²⁵

4.3. The Injured State

Looking next at the question of which states are entitled or even obliged to react to a wrongful act, Mr Arangio-Ruiz noted that the involvement of injured states would vary in accordance with the nature and extent of the injury suffered.¹²⁶ Various positions have occasionally been held with specific attention to the distinction between “directly” and “indirectly” injured states, specially affected, or even third states. This matter increased in significance, especially after the introduction of draft article 19 concerning international crimes and of the notion of obligations *erga omnes*. However, the legal differentiation of the position of states could also be found in relation to what was still at the time considered as an international delict, and in particular in the context of multilateral treaties such as those giving rise to international or integral rights and obligations, like for instance peace, disarmament or environmental treaties.

The Special Rapporteur noted that the concept of “third” states was misleading, whilst reference to non-directly affected or injured states was inaccurate and vague.¹²⁷ According to him, an injured state was not merely the one that has suffered an unjust physical damage. It was rather the state whose right has been violated; this infringement

¹²³ Gaja/1982/297 in Third/Report/Arangio-Ruiz/1991/35/(119).

¹²⁴ Lattanzi/1989 in Third/Report/Arangio-Ruiz/1991/35/(121).

¹²⁵ Third/Report/Arangio-Ruiz/1991/35/(121).

¹²⁶ Ibid/26/(89).

¹²⁷ Fourth/Report/Arangio-Ruiz/1992/43/(127).

itself constituted the injury of the state in question and that was in conformity with the definition of an internationally wrongful act which requires that an international obligation is equivalent to an international right. The attention is then drawn to the distinction made between the traditional view of international law and contemporary legal trends. According to the former, international relations are structured in such a manner that their violation affects only one or few other states, even in the case of multilateral treaties which seem to rather establish multi-bilateral legal relationships. On the other hand, the practice and literature of international law indicate the existence of rules that simply “do not fit the pattern of bilateralism described above. These are the rules which, in the pursuit of ‘general’ or ‘collective’ interests, create obligations, compliance with which is in the legally protected interest and, in that sense, a legal right of all the States to which the rule applies”.¹²⁸ As Spinedi commented:

These rules impose on every State obligations towards all the other States in each of which the corresponding subjective right is vested. A breach of these obligations simultaneously injures the subjective rights of all the States bound by the rule, whether or not they have been especially affected-apart, of course, from the subjective right of the State that committed the breach. The term “*erga omnes* obligation” is generally used to denote the obligations in question.¹²⁹

One of the questions examined by the Special Rapporteur was whether the position of all the injured states under an *erga omnes* rule was the same, and if not in what sense it differed. As pointed out, whilst there might be no difference in the fact that all states are injured, there could be difference as to the way that each state has been injured. For instance, if a coastal state closes a canal which although within its jurisdiction is connecting two parts of the high seas, then all the states possess a general entitlement under international law to transit. However, not all the states will be affected in the same way. More precisely, states whose ships have been prevented to cross the canal and have suffered a material damage will be affected in a different way from the states which have a general right to innocent passage. For this reason Mr Arangio-Ruiz concluded that, “The only reasonable starting-point for the substantive as well as the instrumental consequences of a violation of *erga omnes* obligations- and the consequences of any other kind of international bilateral or multilateral obligation- thus

¹²⁸ Ibid/44/(131).

¹²⁹ Translated from French. Spinedi/1991 in Fourth/Report/Arangio-Ruiz/1992/44/(131).

appears to be the characterization of each injured State's position according to the nature and the degree of the injury sustained".¹³⁰

Under the 1996 draft articles the notion of the injured state was widely defined, so that to include all other states in the case of an international crime.

4.4. The Notion of State Crimes

Although the notion of state crimes was introduced in the ILC draft articles on state responsibility in 1976 with the provisional adoption of article 19, it was not until 1996 that the substantive consequences of state "crimes" were actually formulated.

During the discussion of the 7th report prepared by Mr Arangio-Ruiz some member states expressed the view that there could be no clear distinction between crimes and delicts on the basis of their gravity as this would require an examination of the primary rule itself, something that could not fall within the ambit of examination of the secondary rules. Others stressed that the term "crime" bore punitive connotations with it and as such it should be precluded, something that the ILC did not accept.¹³¹ Some members observed that a state could not be punished, like individuals could, and some others expressed concerns that the victims of such punishment would be the nationals belonging to the "criminal" state. Others expressed their concern that such determination would empower strong states to resort to countermeasures, entailing much risk for abuse. Other states took the position that the individual accountability should be strengthened instead. With respect to the fact that a crime constituted a breach of an *erga omnes* obligation and that consequently all states were regarded as injured states as actually suggested by Mr Arangio-Ruiz, some states noted that not all states could have the same, substantive and instrumental entitlements as a result of the commission of a state crime. The point was also made that the "universalization" of the notion of the injured state entailed the risk of multiple claims with a threat for escalation of the conflict.¹³² The discussion also brought into light the question as to who was entitled to determine that a wrongful act had been committed, with some members suggesting that such an authority should be placed upon a third-party settlement

¹³⁰ Fourth/Report/Arangio-Ruiz/1992/46/(138).

¹³¹ ILCreport/1995/104-05/(258).

¹³² Ibid/110/(274)

procedure so that powerful states would not abuse such powers born from countermeasures.¹³³

As noted by Mr Arangio-Ruiz the nature of a wrongful act as a crime would reasonably aggravate the substantive and instrumental legal consequences to arise for the defaulting state, among which the recognition of a right to all states to resort to countermeasures.¹³⁴ In the Draft Articles adopted in first reading in 1996 the ILC incorporated special consequences to derive from the commission of a state crime, and more specifically the removal of the specific restrictions concerning the obligation of the wrongdoing state to make restitution in kind and to satisfaction. In particular, the ILC removed the restriction provided under Article 43 of its Draft Articles according to which the defaulting state would not be obliged to make restitution if this placed upon it a great burden disproportionate to the benefit restitution would bring to the injured state. It was the ILC's position that a state having committed a crime should not be able to benefit from the fruits of its wrongful conduct.¹³⁵ Moreover, the loosening of the specific restriction was not contrary to the requirement of proportionality as the restoration of the previous situation in the case of a crime could rarely be disproportionate. Similarly, the ILC decided to remove the restriction which prohibited, in international delicts, restitution which could seriously jeopardize the political independence or economic stability of the wrongdoer. With respect to the requirement under Article 45 that satisfaction does not impair the dignity of the defaulting state, the ILC noted that by committing the crime the state concerned "had itself forfeited its dignity".¹³⁶ Despite this, the ILC considered it necessary that the requirement that the claim for damages was proportionate to the gravity of the crime should remain. As for the other legal consequences provided under Articles 41 to 45, and more specifically the duty for cessation of the wrongful act, reparation, restitution in kind, compensation, and satisfaction, these were equally applicable in international delicts and international crime. One can see from these provisions that the legal consequences were almost identical irrespective of the nature of the violation, whilst states, described under the current Final Articles on State Responsibility as "states other than the injured", had in the case of a crime the same powers as those states directly injured, with no attempt of differentiation. At the same time however, with draft article 53 the ILC imposed certain

¹³³ ILCreport/1992/25/(168).

¹³⁴ Seventh/Report/Arangio-Ruiz/1995/83/(62).

¹³⁵ ILCreport/1996/167-8/(3).

¹³⁶ Ibid/168/(6).

obligations on all states as a result of a wrongful act that amounted to crime and in particular an obligation not to recognize as lawful the situation created as a result of the crime, not to render any aid or assistance to the defaulting state and to cooperate with other states to eliminate the consequences of the crime.

5. Conclusion

The main purpose of this chapter was to provide a comprehensive analysis of the ILC's work on the codification of the law on state responsibility in view of the great impact that this work has had and will have in the future development of international law. Unfortunately, one of the most interesting and intriguing features of this work has been the realization that not all internationally wrongful acts have the same legal effects and that as opposed to simple breaches, there are others which cannot leave unaffected the international community in its entirety. The attempts to establish a regime of responsibility for these acts, which would most possibly differ from the one applicable in the event of violation of "ordinary" obligations, has definitely not been without problems which mainly had their epicentre in the different perceptions expressed by states as to the very nature of the international community, and the role of state sovereignty. This can also be revealed from the hesitation expressed by states and commentators to accept notions such as peremptory norms and obligations *erga omnes* in the first place, further elaborated in the following chapter. As already discussed earlier, the notion of state crimes was not welcomed by states because it was viewed as taking away something from the principle of sovereign equality of states. Fears that states would attempt to inflict their will through the adoption of punitive measures lead the ILC to suggest the abandonment of this proposition, an issue specifically examined in the next chapter. At the same time it became clear that the categorization of internationally wrongful acts into "delicts" and "crimes", or into serious breaches and ordinary or simple violations could not but influence the spectrum of states entitled to invoke the international responsibility of the wrongdoer. After having elaborated the ILC's conclusions on these matters as they gradually evolved and flourished over time, the attention is next turned to the development and significance of the notions of *jus cogens* norms and obligations *erga omnes* in contemporary international law in general and in the law on state responsibility in particular. It will also be seen how these concepts have influenced the debate on the legal consequences to derive as a result of

the commission of a wrongful act of this nature. These are now reflected in the final articles on state responsibility adopted in 2001.

CHAPTER 2

The International Community, *Jus Cogens* Norms and Obligations *Erga Omnes*

1. Introduction

At the time the ILC was considering the question of categorization of internationally wrongful acts into serious and less serious and their legal consequences on the basis of the nature of the rights protected by the infringed rule as discussed in chapter one, there was a certain degree of unease in legal doctrine in accepting these “superior” norms whose exact scope and content remained disputed, and which arguably contravened the nature and function of international law. Not that long ago for instance Professor Weil was warning emphatically against an international law that was moving towards a “relative normativity” and away from the traditional principles on which it was structured. With modern international law having developed through the decentralized system of state entities that emerged from the Peace Treaty of Westphalia 1648 and which resulted in the collapse of the hierarchical structure of international society, the emphasis was placed on the peaceful relations and the common interests of states, equals among equals and sovereigns among sovereigns.¹³⁷ Professor Weil was of the view that the essence of this Westphalian system and modern international law remained unchanged. He argued in this regard that modern international law remained a legal order deeply rooted on the principle of sovereign equality and the consent of states.¹³⁸ For this reason he described the distinction made between *jus cogens* and ordinary norms, state crimes and delicts, as “a key that will not fit the lock it will have to open”.¹³⁹ The intrusion, he said, of ideology in the neutrality of international law, where all states are equal and therefore none could impose its own values upon the others, of ill-defined notions over clearly established norms, and the weakening of the consensual character of the international legal order “might well destabilize the whole international normative system and turn it into an instrument that can no longer serve its

¹³⁷ Okafor/Obasi/2003/22-3.

¹³⁸ Weil/1983/419.

¹³⁹ Ibid/442.

purpose”.¹⁴⁰ It was therefore imperative, for international law to fulfil its normative functions, to consist of norms of “good quality”.¹⁴¹ Professor Weil warned against the adoption of notions which lacked definition, such as the notion of the “international community of states as a whole”, stressing at the same time that only if the international society fundamentally changed the structures on which it was built would these ideas work.

However, legal developments have now paved the way to two clearly distinguishable perceptions of international law identified in the literature as traditional or “classic” international law and contemporary international law (although one could preferably speak about existing international law and progressive developments). It is to these developments that this chapter turns its attention, particularly in view of the undisputable predominance of notions such as *jus cogens* norms and obligations *erga omnes* in the theory and practice of contemporary international law.

2. The Transition from Bilateralism to the “International Community as a Whole”

2.1. A Bilateralist Approach

Traditional international law as most recently referred to in legal writings is built upon the notion of bilateralism and establishes a bipartite relation of multiple rights and obligations that constitute a “minimal law” and are reciprocal in character.¹⁴² Within this framework, one state is the carrier of the right and the other the carrier of the duty, thus establishing legal relations among states identical in kind to those established under civil law. Bilateralism is built upon a strong perception of state sovereignty and the prohibition of non-interference in the domestic affairs of another state. States are legally bound only because they had themselves given their consent to restrict certain of their sovereign powers, usually because they have come to realize that it is on their own benefit to do so. This position was upheld by the PCIJ which pointed out that “The rules of law binding upon States...emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.”¹⁴³ This position is co-related with the *pacta tertiis* rule according to which no state can be

¹⁴⁰ Ibid/423.

¹⁴¹ Ibid/413.

¹⁴² Allott/1990/324 in Simma/1994/229.

¹⁴³ *Lotus*/WCR//1927-32/Vol.II/35.

bound by a treaty which it has not signed and ratified. On the same footing, under this perception of international law no state can be bound by a rule the development of which it has opposed. In this bilateral relationship, and while traditional international law provides for certain dispute settlement mechanisms based on the consent of all parties involved, in case of an infringement, it is solely upon the carrier of the right to pursue the fulfilment of what has been refused to it and to resort to coercive measures which for long took the form of armed force, or even to unilaterally denounce its claims.¹⁴⁴ This was a very well established principle of international law that had consistently been upheld by the ICJ, with particular emphasis made in its Opinion concerning the *Reparation for Injuries Case* where it concluded that “only the party to whom an international obligation is due can bring a claim in respect of its breach”.¹⁴⁵

Bilateralism could not leave unaffected the sphere of “sanctions”. For many, in the absence of a hierarchical order which was precluded by the nature of international law as a legal order of co-ordination rather than subordination, and in the light of the principle that all states were equal actors in international affairs, “sanctions” themselves found no place.¹⁴⁶

Despite the fact that under bilateralism states are protected (at least in theory) from unlawful interference and there is clear identification of the injured states entitled to seek redress, it leaves enforcement on the state whose rights have been infringed. Given the factual inequality of states, bilateralism weakens the position of already weak and small states which are unable to take action against the wrongdoer, no matter how serious the violation and how fundamental the right at stake.¹⁴⁷ Furthermore, it ignores the need for certain common values essential for the very existence of mankind and which have to be protected even if no specific state is directly targeted by their violation. Accordingly, bilateralism cannot explain current legal trends such as the fact that there may be cases where the action of one state may affect the interests of all other states and that there are certain issues that are the concern of all states, for example, human rights and environmental considerations, or the legal status of Antarctica or the legal status of the sea-bed which extends beyond the jurisdiction of any state. With respect to human rights and the protection of the environment it has been noted that they

¹⁴⁴ Tomuschat/1993/353-4.

¹⁴⁵ ICJReps/1949/181-2.

¹⁴⁶ Delbruck/1992/88-90.

¹⁴⁷ Simma/1994/232-3.

“are typically the subject matter of multilateral treaties which define mutually accepted uniform standards. Their conclusion as instruments of codification or progressive development of international law weighs against a bilateral perspective which signifies a reciprocal exchange of commitments.”¹⁴⁸ Bilateralism cannot give answers to the increasing need to protect certain principles, thus expanding the sphere of interested actors in the international legal arena. Mosler observed in this regard that:

International law cannot be defined solely in terms of bilateral or multilateral relations between subjects which possess legal capacity. The collection of subjects participating in the international legal order constitutes a community living according to common rules of conduct.¹⁴⁹

2.2. Community Interests in Contemporary International Law

Whilst the traditional pattern of international law is what still significantly describes the international relations of states today, one can say with confidence that contemporary international law has also evolved to something more than just being “minimal law” in certain areas, expanding the competences of the organized community which ceases to be just an abstract idea on the one hand, and limiting the sovereign powers of the states on the other. Contemporary international law promotes the notion of community interest to the extent that “absolute sovereign freedom to accept or dismiss a legal rule simply appears anachronistic in the present time”.¹⁵⁰ It has also been realized that a consensual perception of international law could not address contemporary concerns which required an international public order with which all states would have to strictly comply.¹⁵¹ In his *Anarchical Society*, Bull argues that the international society is not structured exclusively on realist or moralist/idealist theories. He rather makes the point that the international society bears characteristics of both. Therefore, while it consists of sovereign states seeking to gain power, these very states recognize the significance of peaceful cooperation and coexistence with other states. This is what is purported with the formulation of international organizations and common rules because a common interest consists the Gordian knot that binds all states together.¹⁵² In present day, the outlawing of the use of force and the protection of certain fundamental principles become the concern of all: their violation is to affect all states, and therefore, all states

¹⁴⁸ Chinkin/1993/3.

¹⁴⁹ Mosler/1984/309-12 in Chinkin/1993/5.

¹⁵⁰ Tomuschat/1993/213.

¹⁵¹ Kirchner/2004/51.

¹⁵² Bull/1995.

have an interest in their performance. This has increased the need of having a strong organised international community and solidarity among states, the latter being described by Professor MacDonald as:

An agreement among formal equals that will all refrain from actions that would significantly interfere with the realization of common goals and fundamental interests. Solidarity requires an understanding that every member of the community must consciously and constantly conceive of its own interests as being inextricable from the interests of the whole. No State may choose to use its power to undertake actions that might threaten the integrity of the community.¹⁵³

In 1937 Verdross wrote that the international community consists of higher interests that restrict both the sovereignty and freedom of states, “for it is the quintessence of norms of this character that they prescribe a certain, positive or negative behaviour unconditionally; norms of this character, therefore, cannot be derogated from by the will of the contracting parties”.¹⁵⁴

It accordingly became common ground, especially in the post-World War II era, that the sovereignty of states does not have any longer the absolute and exclusive character that it possessed in the past and which unfolded in two ways: first, as an absolute freedom concerning the domestic affairs of the state, and secondly as an unrestricted power to enforce international law when a breach against it had occurred. With the current growing interdependence of states, sovereignty, despite the fact that it still possesses a prominent role in contemporary international law, is not conceived as an absolute instrument of strength and inviolability in the hands of dictators or human rights violators.¹⁵⁵ At the same time, and as a result of immense progress in the international legal thought concerning the protection of international peace and security, states recognized that it was in their benefit to avail themselves of certain international rules in the light of the realization that war and conflict could not be factors of stability and development. Hence, a new conception of the role of states in the international plane had gradually begun to unfold on the basis of the necessity for the co-operation and peaceful co-existence of the various components of the international community. The appearance of the “international community” as a legal concept was about to change the international legal balance in that a state which violated fundamental principles of

¹⁵³ Macdonald/1993/293 in Simma/1994/238.

¹⁵⁴ Verdross/1937/571-2 in Jorgensen/2000/86.

¹⁵⁵ VonGeusau/2002/619.

international law would now be faced with the international community as a whole.¹⁵⁶ The reference to this concept, although not completely unknown before, flourished ever since the adoption of article 53 of the 1969 Vienna Convention on the Law of Treaties on *jus cogens* norms. As such qualify norms which are “accepted and recognized by the international community of States as a whole” and “from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.¹⁵⁷

Not long after the adoption of article 53 the International Court of Justice itself pronounced in the *Barcelona Traction Case*¹⁵⁸ that there needed to be a distinction between obligations which derived from the law of diplomatic immunities on the one hand, and obligations owed to the international community as a whole on the other. Although the Court did not say what action could specifically be taken in response to the violation of the latter obligations, it did recognize a legal interest to all states in their protection. The significance of this ruling lies not only in the fact that the international community is authorized to attend an *erga omnes* character to certain obligations, but also upon the fact that obligations of this category are owed to and enforced on its behalf.¹⁵⁹

The concept of the “international community” has often been cited as evidence to the evolution of international law. Judge Bedjaoui, moving away from the ruling in the *Lotus Case* according to which states have such freedom of action as long as it is not prohibited by a rule of international law, commented that:

[i]t scarcely needs to be said that the face of contemporary international society is markedly altered....Witness the proliferation of international organizations, the gradual substitution of an international law of co-operation for the traditional international law of co-existence, the emergence of the concept of ‘international community’....The resolutely positivist, voluntarist approach of international law still current at the beginning of the [twentieth] century....has been replaced by an objective

¹⁵⁶ Although the term “international community” is being frequently used in various contexts, it does not always have a normative character. Greig/2002/563.

¹⁵⁷ The linkage between *jus cogens* norms and the international community was made upon a proposal submitted by the Governments of Greece, Finland and Spain. Rozakis in particular spoke of a “confrontation between...growing social concerns and the...perseverance of States in their sovereign rights”. The inclusion of the notion of peremptory norms revealed “that the international community is rapidly heading towards some more advanced forms of organization under the rule of law and justice”. Rozakis/1976/197 in Greig/2002/537.

¹⁵⁸ ICJReps/1970/32-3/(33-34).

¹⁵⁹ Greig/2002/547.

conception of international law, a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of States organised as a community.¹⁶⁰

A reflection of the growing view that international law has not remained static constitutes the Dissenting Opinion of Judge Shahabudeen in the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*.¹⁶¹ Rejecting the *Lotus* ruling he pointed out that the lack of a rule, conventional or customary, to prohibit the use of nuclear weapons could not infer that the use of such weapons were lawful. Rather, it was imperative to look at more general principles, and he suggested that “in a case of this kind, the action of a State is unlawful unless it is authorized under international law”.¹⁶² Judge Shahabudeen identified as the crucial question in the case whether during the commencement of the nuclear age there existed, or did not, a rule prohibiting or allowing the use of nuclear weapons. If one could ascertain either answer, then it would be possible to find what the current legal position is with respect to the legality of such weapons. According to Judge Shahabudeen since the appearance of nuclear weapons there has been no crystallized *opinio juris* towards the direction of outlawing what was previously allowed, or vice versa, permitting what was previously unlawful. In determining therefore whether the use of so strong weapons that could signal the end of mankind was allowed, the Judge suggested looking at the “juridical foundations” on which a legal system, here the international legal system, is structured. He pointed in this regard to Ibn Kaldun according to whom “laws have their reason in their purposes they are to serve”, namely the preservation of civilization. As characteristically highlighted, “injustice invites the destruction of civilization with the necessary consequence that the species will be destroyed”.¹⁶³ This seems to reflect an earlier distinction between two kinds of international law and in particular between the necessary law of nations embodying the law of nature (*jus strictum*) and the law created by agreement and custom. According to Vattel, “Since therefore the necessary Law of Nations consists in the application of the law of nature to states – which law is immutable as being founded on the nature of things, and particularly on the nature of man – it follows, that the necessary Law of Nations is immutable. Whence as this Law is immutable, and the obligations that arise from it necessary and indispensable, nations can neither make any changes in it by their conventions, dispense with it in their own

¹⁶⁰ Bedjaoui/*Nuclear/Weapons/Legality*/1996.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Kaldun/1981/40 in Shahabudeen/*Nuclear/Weapons/Legality*/1996.

conduct, nor reciprocally release each other from the observance of it".¹⁶⁴ The same conclusion was reached by Mosler more than one century later who emphasized that, "The law cannot recognize any act either of one member or of several members in concert, as being legally valid if it is directed against the very foundation of law".¹⁶⁵

Judge Shahabudeen concluded accordingly that since "the preservation of the human species and of civilization constitutes the ultimate purpose of a legal system", the immense, "clear and palpable" risks for the very survival and existence of the international community that can arise from the use of nuclear weapons, make their use unacceptable and "repugnant to the conscience of the community."¹⁶⁶ Most significantly, support of the position that what is not prohibited is permitted, he said, would remind the advice given by Persian judges to King Cambyses when asked if he could marry his sister. In answering the question posed by the King the judges said "that though they could discover no law which allowed brother to marry sister, there was undoubtedly a law which permitted the King of Persia to do what he pleased."¹⁶⁷ Similarly, to say that the threat or use of nuclear weapons is permitted under international law, "would mean that, while the Court could discover no law allowing a State to put the planet to death, there is undoubtedly a law which permits the State to accomplish the same result through an exercise of its sovereign powers".¹⁶⁸ But even if no prohibition of nuclear weapons is found, the Judge was of the view that the co-existence of states in the international legal system restricts the freedom of action of each other state. These restrictions define the very notion of sovereignty of states which he described as an "objective structural framework" which "shuts out the right of a State to embark on a course of action which would dismantle the basis of the framework by putting an end to civilization and annihilating mankind".¹⁶⁹

According to Judge Shahabudeen the conclusions to be derived from the *Lotus Case* were improper for another reason as well. More specifically, that case did not concern the possibility of the entire destruction of mankind and that since that ruling there have been significant legal developments in contemporary international legal community

¹⁶⁴ Vattel/1834/lviii in Jorgensen/2000/86.

¹⁶⁵ Mosler/1980/18 in Frowein/1994/364.

¹⁶⁶ Shahabudeen/ICJReps/1996/386.

¹⁶⁷ Herodotus/1959/187 in Shahabudeen/*Nuclear/Weapons/Legality*/ICJReps/1996/392/fn6.

¹⁶⁸ Shahabudeen/*Nuclear/Weapons/Legality*/ICJReps/1996/392/fn6.

¹⁶⁹ Ibid.

reflected first, in the prohibition of the use of force and in the promotion of a “universal international community”. Both, it seems, at the expense of state sovereignty.¹⁷⁰

The acknowledgement of the existence of community interests, as revealed also from the work of the ILC on the codification of state responsibility, signalled the initiation of a long debate regarding the categorization of various internationally wrongful acts on the basis of their seriousness and also the interests they affect on the one hand, and of differentiated legal consequences on the other. The discussion of community interests could not but influence the determination of the actors affected by a certain infringement of obligations establishing community interests, and their entitlements arising therefrom, with special attention given to whether or not they possess a right to resort to countermeasures.

3. Moving towards *Jus Cogens* Norms and Obligations *Erga Omnes*

3.1. *Jus Cogens* Norms

Despite the wide acceptance in contemporary international law of the notion of *jus cogens* norms there still exists much ambiguity with respect to its scope and its nature. Similarly, the introduction of the notion of *erga omnes* obligations and international crimes have not been without problems either. It is argued in this regard that “international law scholarship lacks a coherent understanding of hierarchy and, in essence, nothing has been changed since Prosper Weil argued in his famous 1982 article that such a hierarchy would hinder the functioning of international law in its main role, namely to ensure coexistence and a common aim in a fundamentally pluralistic society”.¹⁷¹

At the same time it needs to be stressed that despite the similarities between *jus cogens* norms and *erga omnes* obligations in that they both protect common state interests and as a result they often overlap, they are not identical. Whilst *jus cogens* norms establish obligations *erga omnes* the same does not apply with respect to *erga omnes* obligations which most of the time do not possess a peremptory character.¹⁷²

¹⁷⁰ Ibid.

¹⁷¹ Koji/2001/918.

¹⁷² Jorgensen/2000/97.

The inclusion in article 53 of the 1969 VCLT of the notion of norms of *jus cogens*, apart from the barrage of arguments and counter-arguments that has caused as to the acceptability of the notion in the first place, has contributed significantly to the shift of the discussion from a bilateral, exclusively consensual basis of traditional international law, to a multilateral structure of contemporary international law according to which there exist certain common values the protection of which is cherished as fundamental for the survival of the international legal order. For Professor Tomuschat, "it would be wrong to assume that States as a mere juxtaposition of individual units constitute the international community. Rather, the concept denotes an overarching system which embodies a common interest of all States and, indirectly, of mankind."¹⁷³ This may somehow also be revealed by the gradually evolved practice of the SC which has directed its resolutions for arms and economic embargoes not only to those states members to the UN, but also to all states whenever it has felt that there has been a breach or a threat to international peace and security.¹⁷⁴ Nevertheless, this can hardly find justification under the conventional and customary rules on the Law of Treaties regarding the imposition of rights or obligations to third states. Having said that it is also important to stress that the UN, and in particular the SC, does not possess in the international arena the role of the law enforcer. Rather, its powers are limited to the safeguarding of international peace and security, even though a broad interpretation to this end has been attempted since the beginning of the 1990s. Moreover, the SC remains a political body where states' own interests still bear gravity in the decision-making process.

Although the VCLT does not provide a definition of peremptory norms, something that may entail the risk of abuse, it incorporates three distinctive elements that may be used by way of interpretation. More specifically article 53 pinpoints that under general international law a peremptory norm is one accepted and recognised as such by the international community of states as a whole, that allows for no derogation, and that it can be modified only by a subsequent norm of the same character. It is noted in this regard that these characteristics differentiate *jus cogens* norms from other non-derogable rights which however do not have a peremptory character. Yet, the decisive requirement is the recognition and acceptance of a norm as *jus cogens* by the international community of states as a whole. It has been argued that the latter requirement is

¹⁷³ Tomuschat/1993/227.

¹⁷⁴ SC/Res./660/1990, SC/Res/670/1990, SC/Res/713/199), SC/Res/757/1992. For an analysis see Tomuschat/1993/252-5.

indicative that consent is also essential with respect to peremptory norms and it takes two forms: first, consent about the character of a norm under general international law, and secondly, consent as to its non-derogable nature.¹⁷⁵

With respect to the requirement that a peremptory norm is recognised by the international community “as a whole” it has been noted that this does not presuppose unanimity. Roberto Ago suggested that such a norm should be recognised by the “basic components” of the international community such as Western and Eastern countries, equally developed and developing, but this position has been criticised due to the continuous evolution of the international community. As noted by the Chairman of the Drafting Committee, “[t]he Drafting Committee had wished to stress that there was no question of requiring a rule to be accepted and recognised as peremptory by all States. It would be enough if a very large majority did so; that would mean that if one State in isolation refused to accept the peremptory character of the rule, or if that State was supported by a very small number of States, the acceptance and recognition of the peremptory character of the rule by the international community as a whole would not be affected.”¹⁷⁶ Not only a hierarchy of norms now seems to make its appearance also in the international legal order, but states will still be bound by such norms even if they have persistently opposed them. If this position is taken to be true, it then seems that the notion of *jus cogens* norms has deprived traditional international law one of its most characteristic features: the understanding that international law was structured merely upon the consent of states.

Verhoeven however takes the view that no rule can be considered as having a peremptory character unless states are in agreement. Whilst international legal theory and practice reveals very few, exceptional examples of *jus cogens* norms, the significance of the notion should not be underestimated. As noted, “the scarcity of examples merely reflects the still rudimentary organization of a ‘community’ which is no longer a ‘family’ (of nations) but which has not yet developed into a society.”¹⁷⁷

Moreover, the reference to obligations “owed to the international community as a whole” should not be construed to imply that the international community is a legal person. Rather, it is an abstract concept since even until the present day where states

¹⁷⁵ Koji/2001/928-9.

¹⁷⁶ Yaseen/1968/472/(12) in Greig/2002/534-5.

¹⁷⁷ Verhoeven/1998/196.

have conferred large powers on the UN as a body to observe international peace and security with the capability of resorting to the use of force, states remain the main actors in international affairs and international law-making. Professor Crawford in particular, responding to suggestions made by some states during the second reading of the draft articles on state responsibility adopted by the ILC in 1996 that reference to international community as a whole should read as “international community of States as a whole”, noted that this was not necessary mainly because it was well-established that states continued to have central role in international decision making, but also because apart from states, the international community now includes other entities in addition to states such as the European Union and other international organizations.¹⁷⁸

Although the ICJ has been reluctant in applying this notion (international community as a whole) in practice, it can be revealed that there are certain community interests the fate of which is not any longer left to the will of individual states. Their violation is a violation towards all. As noted, there are at least some obligations that “are universal in scope, and cannot be reduced to bundles of bilateral interstate relations”.¹⁷⁹ Professor Koji stressed accordingly that because *jus cogens* norms must be recognized as such not only by a specific group of states, even if it is the majority, but by all the essential components of the international community, the substance of the norm has a significant role to play. Consequently, “*Jus cogens* must include common elements among major different (legal) cultures.”¹⁸⁰ What is suggested here for the identification of peremptory norms from other norms is a double criterion according to which due regard is given to the content of the norm but also to the subjects to which the norm relates.

Article 53 also provides that a treaty in breach of a *jus cogens* norm will be null and void. Nevertheless, during the debates for the codification of the Law of Treaties it was commented that what makes a norm of peremptory character is not merely that it is recognised as such by all states but also the nature of the interests at stake which touch the morals and the international legal order.¹⁸¹ However, not all rules of international law are of such character but on the contrary only those that protect fundamental interests of the international community are considered as such. Furthermore, many industrialized states had made clear that they would not ratify the convention unless it

¹⁷⁸ Crawford-Peel-Olleson/2001/973. Also Fourth/Report/Crawford/2001/(37).

¹⁷⁹ Crawford/2000/17.

¹⁸⁰ Koji/2001/929.

¹⁸¹ Third/Report/Fitzmaurice/1958/41/(76). Also UNCLT/1969/472/(12).

provided for adequate and compulsory procedures whenever the parties in a dispute regarding a specific treaty could not themselves settle the matter. On the other hand socialist and third world countries opposed this idea. As a compromise the ILC adopted article 66 which provides that whenever a dispute regarding a peremptory norm arises under article 53 then it must be submitted to the ICJ unless the parties agree to resort to arbitration. This means that a state which is not a party to the VCLT cannot be forced to accept the jurisdiction of the Court, as article 66 does not seem to reflect a customary rule of international law. However, these states are still bound by the *jus cogens* norm as reflecting customary international law. It needs to be noted that some states after the conclusion of the VCLT expressed specific reservations regarding article 66. Despite the fact that especially for the industrialized states the inclusion of article 66 was a precondition for accepting those provisions of Part V which were expressive of progressive development, according to one view such reservations could not be regarded as invalid as they did not oppose the object and the purpose of the Convention.¹⁸² In such an event, states opposing reservations regarding article 66 are entitled to oppose the force of the convention between themselves and the states that have expressed reservation to this provision. Yet, this does not affect the applicability of peremptory norms which are accepted to have a customary character.¹⁸³

A further question that emerges from the adoption of article 53 is whether states persistently objecting to *jus cogens* norms are still bound by them. This issue gains particular significance in the context of customary rules. In this respect Professor Surwonders

Should one then consider that the formation of a rule of *jus cogens* is identical to that of a customary rule and that *jus cogens* is a strengthened form of custom, a higher derivation of custom, or is there an autonomous, original mode of formation, which perhaps does not form part of practice?¹⁸⁴

As Shelton very pointedly observed, "The urgent need to act [...] fundamentally challenges the consensual framework of the international system by seeking to impose on dissenting States obligations, that the 'international community' deems fundamental."¹⁸⁵ It is well-established that a state may not be bound by a customary rule if three stringent criteria are met: (a) the rights and interests the objector wants to

¹⁸² Verhoeven/1998/197-8,202.

¹⁸³ Ibid/202.

¹⁸⁴ Sur/1988/128 in Simma/1994/291.

¹⁸⁵ Shelton/2003/145-6 in Kirchner/2004/51-2.

preserve are wider than those provided by the newly formulated customary rule; (b) the objector must oppose the rule from its very genesis, and (c) its opposition must be unambiguous, express and open. Nevertheless, if one accepts that international law has moved away from the structures of mere bilateralism or state consensus, then the binding effect of *jus cogens* norms even upon states not in agreement is the best proof for the existence of community interests in the international legal order.

Some states have felt that the inclusion of this provision would threaten the stability of treaty relations,¹⁸⁶ whilst at the same time the attribution to the ICJ of jurisdiction to resolve issues regarding the interpretation or application of the Convention would make states that already had difficulties more hesitant to accept the jurisdiction of the Court. Similarly, acceptance of the concept of *jus cogens* norms had implications also in relation to whether states, other than the contracting parties to a treaty in breach of a *jus cogens* norm, would be entitled to invoke the invalidity and nullity of the said treaty. However, the VCLT in article 65 seems to indicate that the invalidity of a treaty may only be invoked by a state party to it, thus making the two positions difficult to reconcile.¹⁸⁷

Whilst article 53 is unequivocal about the legal consequences to derive from a treaty that is found to be in violation of a peremptory norm and sets out the invalidity of the treaty in its entirety, there is nothing specifically mentioned about the status of a treaty that only indirectly contributes to the breach of a *jus cogens* norm and the legal consequences to derive therefrom. In fact, contemporary international law finds no examples of treaties under which two or more states agree to commit genocide or torture. Quite the contrary, in most cases treaties seem, as Professor Crawford put it, “innocent” in their purpose. Nevertheless, it often happens that compliance with the terms of a particular treaty indirectly assists in the infringement of a peremptory norm. A question that needs to be addressed as a consequence is whether a state party to a certain treaty may be entitled to either suspend or terminate the said treaty, or refuse its performance under the law on state responsibility by way of countermeasures. As it will analytically be discussed in the following chapter, article 60 of the 1969 VCLT only

¹⁸⁶ France is among those states that have not ratified the 1969 VCLT. France’s opposition is not against the notion of *jus cogens* in general, on the contrary it supports such notion with respect to certain human values accepted by all states. However, a state that supports nuclear testing itself, France was afraid that accepting the notion would have an impact on the stability and security of the law of treaties, but also to state sovereignty. UNCLT/1969/FirstSession/309-310; UNCLT/1969/Second Session/93-5.

¹⁸⁷ Gaja/1981/281,283.

permits the suspension or termination of a treaty in case of a material breach of the terms of that specific treaty. Any events occurring outside the framework of the treaty are not relevant and thus leave unaffected the obligations of the concerned parties. As for the non-performance of this treaty by way of countermeasures it is already pointed out that current international law does not accommodate a right to third, not injured states to resort to countermeasures. One therefore is left wondering as to the remedies available under international law regarding a treaty that assists in the commission of a violation of a *jus cogens* norm, given the fact that in this case it is not the treaty itself which violates the norm, but rather the performance of the treaty. This can be illustrated by an example. Two states conclude a treaty for the sale of weapons and military material. The treaty, on its face, suffers of no wrong. If, however, one of the parties is involved in a genocidal plan to exterminate a specific ethnic group living on its territory, the question arises as to whether the other state will still be obliged to conform with its treaty undertakings. Professor Crawford says in relation to this:

If a peremptory norm invalidates an inconsistent treaty, how can the obligation to perform the treaty stand against the breach of such a norm? No doubt the link between performance of the treaty obligation and breach of the peremptory norm would have to be clear and direct. But in such cases, the temporary suspension of the obligation to perform surely follows from the peremptory character of the norm that would otherwise be violated.¹⁸⁸

Yet, Professor Crawford is of the view that in these cases of indirect conflict with a peremptory norm there is no need for the total invalidation of the treaty in question. Furthermore, in his opinion a norm having a *jus cogens* character should prevail over all other international obligations which do not have the same normative effect. Therefore:

in such cases the State concerned would not have the choice whether or not to comply: if there is inconsistency in the circumstances, the peremptory norm must prevail. On the other hand, the invalidation of a treaty which does not in terms conflict with any peremptory norm, but whose observance in a given case might happen to do so, seems both unnecessary and disproportionate. In such cases, the treaty obligation is, properly speaking, inoperative and the peremptory norm prevails. But if the treaty can in future have applications not inconsistent with the peremptory norm, why should it be invalidated by such an occasional conflict?¹⁸⁹

¹⁸⁸ Second/Report/Crawford/1999/39/(311).

¹⁸⁹ Ibid/38/(306).

It seems further to be the position of Professor Crawford that the obligations deriving from a *jus cogens* norm are to be found in the “system of international law”, but he did press for an inclusion of a provision on precluding the wrongfulness of an act if this act is required by a *jus cogens* norm.¹⁹⁰ Indeed, the notion of *jus cogens* norms would diminish in significance if it at least did not have this effect of entitling the non-observance of a certain treaty obligation which assists in the commission of a *jus cogens* violation.

Along the same lines Professor Fitzmaurice points out that:

A treaty obligation the observance of which is incompatible with a new rule or prohibition of international law in the nature of *jus cogens* will justify (and require) non-observance of any treaty obligation involving such incompatibility.¹⁹¹

Although there can be no doubt about the soundness of the above arguments, it is imperative that the legal basis of such “non-performance” of treaties indirectly assisting in the commission of a violation of a *jus cogens* is clarified. In other words, will the authority for the non-performance of these treaty obligations find justification in article 53, or will it have to rely on something else, such as the law on state responsibility? It is already stressed that article 53 is characterized by two things: first, it has the effect to *invalidate* the treaty which by *itself* violates a peremptory rule; and secondly, that the matter falls within the compulsory jurisdiction of the ICJ. Thus, by inference, any question concerning the non-performance of a certain treaty which by itself does not violate a *jus cogens* norm must lie within the law on state responsibility and not within article 53. One could therefore make the argument that the right of non-performance under these circumstances relies either on article 41 (2) of the ILC articles according to which no state “shall” render aid or assistance to the commission of a *jus cogens* norm, or on the assumption that it may resort to countermeasures even if it is a state other than the injured. It is suggested that the difficulty with the first approach is that it lacks mechanisms to monitor possible abuses identical to those provided under the VCLT in the event that a treaty violates such a norm. The second approach also creates difficulties due to the controversy regarding the permissibility of countermeasures by states other than the injured. As it can be understood, this issue has deeper implications: were the measures taken by states, such as the US against South Africa for instance, an

¹⁹⁰ Ibid/40/(314).

¹⁹¹ Fourth/Report/Fitzmaurice/1959/46 in *ibid*/38/(308).

example of third state countermeasures, or were they justified as legal consequences that derive from the notion of *jus cogens* norms?

In any event, in order to justify the non-performance of a treaty under these conditions it will be imperative to show the existence of a direct link between the observance of the treaty and the commission of an act which is in violation of peremptory norms. On this reasoning it could be argued that the use of nuclear weapons would be directly and clearly contributing to the violation of *jus cogens* norms since some of the rules of international humanitarian law have been enforced with such status.

Finally, although a treaty is null and void when in breach of a peremptory norm, there is not much said about the legal consequences of a customary rule in violation of a *jus cogens* norm. However, it would be safe to conclude that such a rule will become ineffective and inoperative in the same way as in the case of treaties.

The recognition of *jus cogens* norms as part of international law prepared the ground for the appearance of another notion, not less controversial, that of international state crimes, as thoroughly explored within the work of the ILC on its codification of the Law on State responsibility. The realization that not all violations had the same output and the need to attach a more grave nature to some of them due to the fundamental character of the rights protected under certain international rules, was the driving force for the introduction of the concept of state crimes in the international legal debate. The serious implications arising from the incorporation of the concept in international law, with the possibility of some states being faced with punitive measures, forced many states to look at the notion with a great amount of suspicion and disbelief. The legal consequences to derive from such violations and the states entitled to take action were among the most significant concerns that attracted legal attention, aggravated by the lack of a centralized enforcement mechanism in international law. This notion is further discussed in section 4.1. of this chapter.

3.2. Obligations *Erga Omnes*

A major turning point from bilateral and reciprocal obligations to obligations established for the protection of the common good was achieved with the inclusion by the ICJ of specific reference to the notion of *erga omnes* obligations in its *Barcelona*

Traction ruling. It has to be stressed however that this concept was not previously unknown in international jurisprudence. An examination of the findings of both the PCIJ and of the ICJ suggest that long before the *Barcelona Traction Case* international law recognised that something more than mere individual state interests exist in the international legal order. But the development of obligations with a different until then content does not cease there. Already in 1957 Schwarzenberger had made reference to *erga omnes* when commenting on the legal effects of treaties for third states.¹⁹² More significantly, the concept appears in the debate for the drafting of article 62 of the Vienna Convention on the Law of Treaties concerning Treaties that Give Rise to Rights and Obligations of Third States during which Manfred Lachs, later Judge of the ICJ and the *Barcelona Traction Case* itself, suggested that a distinction should be drawn between such treaties and “treaties establishing objective regimes and obligations *erga omnes*”.¹⁹³ Furthermore, Judge Jessup, a few years before the ruling in the *Barcelona Traction* case, observed that states may possess a general interest in the protection of values and benefits common to the international community.¹⁹⁴

Yet, the *Barcelona Traction Case* constituted the first case to confirm the existence of obligations *erga omnes*, yet which also acknowledged the emergence of a hierarchy of international human rights norms.¹⁹⁵

3.2.1. The Barcelona Traction Case

Nothing in the *Barcelona Traction Case* was so widely discussed as the reference made by the ICJ to the concept of obligations *erga omnes*. Whilst the Court has often been criticised for introducing a notion whose necessity was not required by either the legal issues or the facts of the case,¹⁹⁶ its pivotal contribution to the establishment of this idea as a general principle of international law is now generally acknowledged.

The *Barcelona Traction* case concerned a complaint filed by Belgium on behalf of several Belgian citizens who had been shareholders to the Barcelona Traction company, a company registered in Canada, for damages they suffered at the hands of the Spanish

¹⁹² Schwarzenberger/1957/459.

¹⁹³ YILC/1964/83/(29) in Ragazzi/1997/8.

¹⁹⁴ Jessup/South/West/Africa/ICJReps/1966/373.

¹⁹⁵ Koji/2001/931.

¹⁹⁶ Weiler-Cassese-Spinedi/1989/243 in Ragazzi/1997/5.

authorities. Spain based its argument on the ground that the claim was of bilateral nature involving Canada and Spain, thus precluding Belgium from any right of action on behalf of Canada or the company itself. The Court's dictum on *erga omnes* was "provoked" by Spain's reference to the possibility of invocation of state responsibility by any state for the commission of an international crime, although finally rejecting that this was the case in the present circumstances. The judgment identified two main features of the notion of *erga omnes*: universality in that *erga omnes* obligations bind all states without exception, and solidarity in that every state has a legal interest in their protection.¹⁹⁷ It is suggested that the judgment adopts a two-way approach according to which the international community recognises certain obligations, although few in number, the compliance with and respect for which is the concern of the entire international community of states. Yet, it is left to individual states to put into operation any enforcement mechanisms due to the lack of enforcement mechanisms by the community itself.¹⁹⁸

According to the famous dictum of the Court:

An essential distinction should be drawn between obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection.¹⁹⁹

The dictum in the *Barcelona Traction* case came only four years after the ruling of the same Court in the *South West Africa Case*. In that case, as will be discussed below, the Court rejected the existence of an *actio popularis* in international law according to which every state would possess a right to bring a claim for violations of international law irrespective of whether there had been a violation of an individual interest.²⁰⁰ As already seen, the possibility of third state measures for the infringement of an international obligation is a notion unknown to traditional international law as no state can act as a "world policeman". The only state entitled to take action against another state is the one that has suffered a wrong, to whom the obligation was owed and whose rights have been disregarded. Thus, any state claiming to be injured needs to establish

¹⁹⁷ Ragazzi/1997/17.

¹⁹⁸ Tomuschat/1993/231. It has been noted that there was also disagreement among states regarding the existence of the international community itself, what that represented, which states, and what powers did that community have in the safeguarding of the international legal order.

¹⁹⁹ ICJReps/1970/32.

²⁰⁰ ICJ/1966.

the existence of a subjective legal interest. Whilst the Court distanced itself from an absolute application of bilateralism in the *Barcelona Traction* case, recognizing that all states have legal standing to seek compliance whenever the most fundamental interests of the international legal order are at stake, it went on to add in paragraph 91:

With regard more particularly to human rights, to which reference had already been made in paragraph 34 of this Judgement, it should be noted that these also include protection against denial of justice. However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality.²⁰¹

It has been suggested that with this passage the Court negatively filtered the *erga omnes* invocation of human rights abuses by imposing an unwanted restriction upon states. If one thinks that in most cases human rights violations occur by the state of nationality of the victim, to demand that states respect the nationality rule would be tantamount to expecting the violator to protect its own victims. Frowein interpreted the Court's approach by noting that:

Although the relationship between this paragraph and the one on obligations *erga omnes* is not absolutely clear, it would not seem to be correct to interpret the latter as foreclosing the possibility for States to act on the basis of obligations *erga omnes*. This seems to be confirmed by the difference of formulation the Court uses as far as human rights are concerned. While the Court explains in the first part that the 'basic rights of the human person' form part of those norms which create obligations *erga omnes*, it refers to the wider spectrum of "human rights" in the latter part.²⁰²

The same position is adopted by Professor Koji who identifies two factors creating *erga omnes* obligations: rights which are incorporated in general international law and "international instruments of a universal or quasi-universal character", the latter of which is absent with respect to rights referred to under paragraph 91.²⁰³

De Hoogh attempted to explain this admittedly confusing ruling by observing that the "legal interest" is not automatically associated with *locus standi* or the right to resort to countermeasures. On the contrary, there also has to be a right of protection conferred upon the state taking action.²⁰⁴ Following a similar line of reasoning Bruno Simma is of

²⁰¹ ICJReps/1970/47/(91).

²⁰² Frowein/1994/345,406.

²⁰³ Koji/2001/932.

²⁰⁴ deHoogh/1996/25-28.

the view that “although the terms ‘legal interest’ and capacity of action (*‘qualite pour agir’*) are identical, specific international agreements may channel such *‘qualite pour agir’* into appropriate procedures, thereby excluding the possibility of recourse to the classical means of self-help under general international law to a certain extent, that is, as far as these agreements can be considered self-contained”.²⁰⁵ He further illustrates his point with an example. In particular, when a violation of human rights has occurred this usually affects not directly the state but various groups or individuals. However, even in these instances, the implementation of this obligation is to be performed by the state bound by it. Simma thus seems to suggest that the *erga omnes* character of an obligation is not precluded even in the case where states have agreed for specific requirements to be fulfilled regarding their implementation. This position, concerning the right of third states to invoke the liability of the defaulting state by means of judicial remedies finds its justification in the consensual character of the international judicial machinery that has not been defeated even with the emergence of such norms and obligations such as those qualified as *jus cogens* and *erga omnes*. It can therefore be concluded that third states do not possess an unlimited right to invoke all the remedies recognized to an injured state. This is particularly true with respect to the capacity to bring a case before the ICJ.²⁰⁶ It is noted in this regard, that the ICJ, when called to determine a specific dispute between certain parties, must do so weighing its jurisdictional powers on the one hand, and the interests of international community on the other.²⁰⁷ As noted, the Court needs to find a balance between preventing parties making claims before it that would endanger third states’ interests, and not allowing third states to prevent the Court from adjudicating issues submitted before it with the consent of the parties before it.²⁰⁸

It is stressed that despite the ambiguity which arises due to the lack of certain legal consequences derived from the violation of obligations *erga omnes*, either by way of proceedings before an international court or tribunal, or even by way of countermeasures, the significance of the *Barcelona Traction Case* as setting a hierarchy of norms in international human rights should not be undermined.²⁰⁹

²⁰⁵ Simma/1994/296.

²⁰⁶ Charney/1989/90-1.

²⁰⁷ Chinkin/1993/149.

²⁰⁸ Ibid/202.

²⁰⁹ Koji/2001/933.

3.2.2. Legal Standing before International Courts for Violations *Erga Omnes*

Apart from the fact that international law lacks compulsory enforcement mechanisms unless where expressly provided (and therefore the existence of such mechanisms is conditioned upon the initial agreement of states), it also lacks compulsory judicial jurisdiction for the resolution of disputes arising from the interpretation and implementation of international rules. Consequently, the ICJ does not have jurisdiction to look into a case without the consent of all parties concerned, echoing the PCIJ which had earlier defined a dispute as a disagreement between two states on issues of law, fact, legal views or interests, thus associating proceedings before it with bilateralism.²¹⁰ Due to the fact that not all states are always willing to subject a certain dispute to the jurisdiction of the ICJ, the ICJ often finds it difficult to look into the substance of the questions submitted before it and is hence unable to adjudicate on significant issues of international law. Moreover, a dispute may often involve a wider number of subjects who may be affected in numerous different ways, either directly and indirectly, and in moral, economic, legal, ideological or other terms.²¹¹ The matter is of particular interest when considering violations of obligations for which all states are deemed to possess an interest in their protection.

Issues related to the notion of obligations *erga omnes* came to the attention of the ICJ some years even before its famous ruling in the *Barcelona Traction Case*, although the actual context of the concept and the legal consequences connected to it remain somehow vague and ambiguous to this day. When the UK, France, Italy and Japan initiated proceedings against Germany as “interested” Powers for the violation of the Treaty of Versailles and in particular of its obligation to allow free and open access to the Kiel Canal to the vessels of all nations at peace with Germany, the PCIJ accepted their claim on the basis that they all possessed “a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possessed fleets and merchant vessels flying their respective flags”.²¹² The violation took place when Germany denied access to the Canal to a British vessel chartered by a French company that was carrying military material to Poland, who at the time was at war with Russia. Germany justified its action on the argument that allowing access to the vessel would put its neutrality at

²¹⁰ *Mavromattis/PCIJ/A/1924/11* in Chinkin/1993/15.

²¹¹ Chinkin/1993/16,18.

²¹² *Wimbledon/PCIJ/1923/20* in Ragazzi/1997/25.

risk. While one should bear in mind that these states were in any case entitled to raise a claim on the basis of express treaty provisions rather than *erga omnes* claims that “a legal interest is deemed to be vested in all States by operation of general international law”²¹³, the decision does not lack in significance. The Court, in examining Germany’s entitlement to deny access to the Canal, determined that with the Treaty of Versailles the parties wished to establish an “international regime” that would benefit all nations.²¹⁴

A similar question regarding the notion of “permanent international interests” was raised in the case of the Aaland Islands. The Aaland Islands were offered by Sweden to Finland, then still part of Russia, in 1809, but when Russia was defeated in the Crimean war, it concluded an agreement with France and Great Britain to demilitarise the Islands. This agreement was annexed to the General Peace Treaty signed by Austria, France, Great Britain, Turkey, Russia, Sardinia and Prussia. When Finland later gained its independence in 1917 a dispute broke out between Finland and Sweden concerning *inter alia* the duty for the demilitarisation of the Islands. Whilst Sweden had not been party to the demilitarisation Agreements, the Committee appointed by the Council of the League of Nations to examine the dispute concluded that “The Powers have, on many occasions since 1815, and especially at the conclusion of peace treaties, tried to create true objective law, a real political status the effects of which are felt outside the immediate circle of contracting parties.”²¹⁵

Furthermore, the Agreements did not establish reciprocal rights, but on the contrary the provisions relating to the prohibition of fortification were:

laid down in European interests. They constituted a special international status relating to military considerations, for the Aaland Islands. It follows that until these provisions are duly replaced by others, every State interested has the right to insist upon compliance with them. It also follows that any State in possession of the Islands must conform to the obligations, binding upon it, arising out of the system of demilitarisation established by these provisions.²¹⁶

²¹³ Ragazzi/1997/25.

²¹⁴ *Wimbledon*/PCIJ/A/1923/28 in Ragazzi/1997/26.

²¹⁵ *Aaland/Islands/Question/1920/17* in Ragazzi/1997/32.

²¹⁶ *Ibid.*

However, the duty for demilitarisation had not been set for the benefit of all states indistinctly, but only for those states directly affected by the demilitarisation.

One of the main issues considered by the ICJ in the dispute between the UK and Albania after the explosion within the Albanian territorial waters of mines resulting in the loss of life and damage to British warships, was whether Albania bore responsibility for the explosions. It was accepted by all the parties to the dispute that the principles endorsed in the Hague Convention No VIII of 18 October 1907 relating to the laying of mines, applicable in time of war, reflected principles that constituted a “minimum international standard binding at all times on civilised States”.²¹⁷ As a corollary to it, there was a duty to any state laying mines to give notification to international shipping. Therefore, the disagreement between the two parties was not one of law but rather one of fact: Albania claimed that it was not aware of the mines. The Court concluded that Albania must have been aware of the mines whilst stressing that the duty of notification established general and well-recognized principles. More specifically, it constituted:

elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.²¹⁸

When Albania refused to comply with the ruling of the ICJ in the *Corfu Channel Case*, and to compensate the UK for damages it incurred as a result of the explosion of the mines, a Tripartite Commission established after the end of Second World War and consisting of France, the UK and the US decided to grant Albanian gold seized by them to the UK. Italy initiated proceedings before the ICJ against France, the US and the UK claiming compensation for the expropriation of the Albanian National Bank which according to it had been built mainly with the use of Italian capital. The Court however declined to examine the case as it would inevitably not only affect Albania’s legal interests but would constitute the very subject-matter of the proceedings in Albania’s absence with legally binding implications upon that state.²¹⁹ It is noteworthy to mention that had the gold been Albania’s, the action of the US and France, as third states, to seize it could arguably be justified as a lawful countermeasure in response to Albania’s

²¹⁷ *Corfu/Channel/ICJReps/1949/22*.

²¹⁸ *Ibid/1949/22*.

²¹⁹ *Monetary/Gold/ICJReps/1954/32* in Schulte/1999/538.

failure to comply with the earlier ruling of the ICJ. Charney suggests in this regard that there is a universal right to assist in the compliance with the judgments of the ICJ.²²⁰

In the case brought by Nicaragua against the US the ICJ refused to reject the case brought before it as inadmissible upon the contention of “indispensable third rights” despite the fact that the Court did not deny that the judgment would affect a third state, namely El Salvador. The Court attempted to distinguish this case from the *Monetary Gold* case in that, in the latter case, Albania possessed a proprietary interest in the subject matter of the dispute. Therefore, the Court refused to indiscriminately dismiss a case that involved the rights and legal interests of a third state unless these formed the subject-matter of the case.²²¹ It has been argued however that the Court’s differentiated approach in the *Monetary Gold* case on the one hand and in the *Nicaragua* case on the other may be explained on the basis of the greater protection afforded at the time to proprietary rights as opposed to sovereignty and self-defence.²²²

In the *Nauru Case* concerning compensation claimed by Nauru against Australia for damages that the latter allegedly caused during mining activities when it was an administering power, the Court dismissed Australia’s argument that the ruling of the Court would unavoidably have an impact on the UK and New Zealand which were not parties to the proceedings but had joint authority with Australia to administer Nauru under the Trusteeship Agreement for the Territory of Nauru. The Court differentiated this case from the *Monetary Gold Case* mentioned above on the ground that Australia’s responsibility was independent from any responsibility of the UK and New Zealand.²²³

In 1963 an *erga omnes* claim was raised regarding certain provisions of the Trusteeship Agreement for Cameroon established for the purpose of protecting the common interests of UN member states. It was therefore asked from the Court to say whether each member state possessed a right to action. No answer was given to this crucial question as the Court dismissed the action on other grounds.²²⁴

²²⁰ Charney/1989/67.

²²¹ *Nicaragua/Case/ICJReps/1984/431/(88)*.

²²² Chinkin/1993/202.

²²³ *Nauru/ICJReps/1992/261-2*.

²²⁴ *Northern/Cameroons/ICJReps/1963*.

In the *South West Africa Case* which concerned a Mandate concluded in 1920 to protect the common interests of the former member states of the League of Nations, the ICJ gave rather contradictory rulings. In its ruling concerning the preliminary objections the Court acknowledged that “the members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members”,²²⁵ and that the only route for the protection of the rights of the people protected under the sacred trust was resort to the Court initiated by any member of the League, as neither the Council nor the League were entitled to appear before the Court. Although the Court avoided any direct reference to the notion of *erga omnes* obligations, it pointed out that the injured entity consisted of people who needed to turn to the organized international community for the achievement of the goals of the trust and that there existed “‘a sacred trust of civilisation’ laid upon the League as an organized international community and upon its Members”.²²⁶ Nevertheless, the Court dismissed the case at the second phase on the ground that Ethiopia and Liberia lacked a legal right or interest in the issue before the Court.²²⁷ More specifically, the Court, examining whether the Mandate created obligations towards other states members to the League of Nations individually, held that “the mandatories were to be the agents of the League and not of each and every member of it individually” and that the members were not considered as being directly concerned with the mandates.²²⁸ The Court even stated that the fact that it was recognized that the Mandatory was a “sacred trust of civilization” did not strengthen it with a legal effect. As noted, “In order to generate legal rights and obligations, it must be given juridical expression and be clothed in legal form. The moral ideal must not be confused with the legal rules intended to give it effect. The principle of the “sacred trust” had no residual juridical content which could, so far as any particular mandate is concerned, operate *per se* to give rise to legal rights and obligations outside the system as a whole.”²²⁹

However, in 1971, one year after its ruling in the *Barcelona Traction Case* and a few years after its ruling in *South West Africa Case*, the Court was asked to give its Opinion regarding the legal consequences of the continuing presence of South Africa in South

²²⁵ ICJReps/1962/343 in Annacker/1994/133.

²²⁶ ICJReps/1962/329.

²²⁷ ICJReps/1966.

²²⁸ Ibid.

²²⁹ Ibid.

West Africa despite a SC resolution in 1970 terminating the mandate. The ICJ held that (a) member states were bound not to recognise the lawfulness of South Africa's administration of South West Africa, and (b) non-member states should assist the UN in its action relating to South West Africa, finding the termination of the mandate as being an obligation *erga omnes*. However, the Court avoids to explain on what grounds a SC resolution was binding even upon non-member states to the United Nations, thus having an *erga omnes* effect. Different interpretations have been attempted, including the view that the obligations of all states in this particular case derived from an obligation *erga omnes* not to recognise a *jus cogens* breach. However, this solution is not satisfactory as the ICJ made no reference to the concept of *jus cogens* norms.

In the *East Timor Case*, Portugal initiated proceedings before the ICJ against Australia arguing that the treaty concluded by the latter with Indonesia concerning the exploitation of the natural sources of East Timor, violated both the right of East Timorese to self-determination and the subjective right of Portugal as the administering power of East Timor. Furthermore, Portugal complained that Australia's actions constituted an infringement of SC resolutions 384 and 389 with which all states were called upon to respect the territorial integrity of East Timor and the right of East Timorese to self-determination, and which called upon Indonesia to withdraw its troops from the territory of East Timor.²³⁰ As a consequence, Australia incurred international responsibility both towards the East Timorese people but also towards Portugal as well. The ICJ, whilst recognising the right of East Timorese to self-determination as having an *erga omnes* character, refused to examine the merits of the case ruling that this would unavoidably require it to adjudicate on the lawfulness of the actions of Indonesia, a state that was not a party to the proceedings. More specifically, the Court drew a distinction between the *erga omnes* character of a norm and the issue of consent to the jurisdiction of the Court.²³¹

Despite the fact that it was not the position of the Court that a third state was not entitled to invoke a violation of an *erga omnes* obligation but solely the fact that its ruling would have an impact on a third state that had not consented to its jurisdiction, its judgement was widely criticised as preventing the enforcement of such obligations and as insisting upon a bilateral approach to the proceedings. It has been argued that since

²³⁰ ICJReps/1995/96/(14-15).

²³¹ Ibid/102/(29).

erga omnes obligations by their very nature involve many states, bear legal consequences extending beyond a strict bilateral relationship and are owed to the international community as a whole, each state *ut singuli* possesses a legal interest in their observance but also, especially in the case of violations of *jus cogens* norms, a duty to do so.²³² Nevertheless, Bruno Simma is of the view that the ruling of the ICJ in the *East Timor Case*, although not adding anything to the concept of obligations *erga omnes*, does not pose a threat to it either. The Court, having accepted that the right to self-determination is an obligation *erga omnes*, retained the doctrine of the “indispensable third party” established in the *Monetary Gold Case* concluding that it could not adjudicate a matter in the absence of a state that would be directly affected by such ruling.²³³

One may observe from the above that the Court has based its conclusions on whether the defendant’s responsibility could be founded exclusively on its own obligations. As noted, only if a finding relating to the legal interests of a third state was necessary for the determination of the responsibility of the defendant, such a third state will be regarded an indispensable state and thus preclude the examination of the case by the international court. Thus, where the legality of the action of a third state is inseparable from the legality of the action of the defendant the Court will decline to examine the claim before it.²³⁴ A very interesting point that arises however is what would the position of the ICJ be in the *East Timor Case* had Indonesia accepted the jurisdiction of the Court. Would the ICJ be willing to look into the legal issues arising from Portugal’s application, or would it be unable to find that Portugal possessed a legal standing to bring this case before it? Another interesting point raised is what the decision of the Court would be if Portugal had argued that the treaty concluded between Australia and Indonesia itself was a violation, either directly or indirectly, of a peremptory norm, namely the right of the East Timorese to self-determination? Would Portugal be entitled to invoke the invalidity of the treaty or Australia’s responsibility before the ICJ? This issue is further examined below. It suffices to mention here that Portugal would not be able to claim the invalidity of a treaty to which it is not a party, whilst it seems to be the position of the ICJ that since this issue would require determination of the lawfulness of the action of a state not party to its proceedings, it would be prevented from ruling against Australia.

²³² Schulte/1999/537.

²³³ Simma/1994/298.

²³⁴ Schulte/1999/542.

As characteristically pointed out concerning initiation of legal proceedings before the ICJ:

The existence of an obligation owed to the international community as a whole does not, *ipso facto*, confer on all states the title to initiate litigation for its vindication in case of breach. Nor does the existence of that obligation suspend the operation of rules governing the exercise of the Court's jurisdiction- such as the Monetary Gold doctrine- in cases where a specific jurisdictional title exists. Whether a requisite and effective jurisdictional link exists depends on the circumstances of the case.....Accordingly, if the jurisdictional link in issue is wide enough, an interested state could bring an action seeking a declaratory [emphasis added] judgment that another state was in breach of a peremptory obligation arising under general international law. For instance, if both states had deposited unrestricted declarations under article 36 (2) of the Statute, an action would surely be competent to determine 'the existence of any fact which, if established, would constitute a breach of an international obligation' (subparagraph c). Even such a factual contest, as to whether or not a delict had actually been committed, would be sufficient to fulfil the requirement that a dispute exists between the parties which is necessary to seize the Court. As the Court reaffirmed in the East Timor case, 'a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties'.²³⁵

Erga omnes concerns were also raised in the proceedings initiated by New Zealand and Australia against France's atmospheric nuclear tests conducted in the South Pacific between 1966 and 1972.²³⁶ However, the ICJ did not examine the jurisdiction or the merits of the case on the ground that the two countries did not seek a declaration on the illegality of nuclear tests under international law, but merely the cessation of the French nuclear tests in the South Pacific. In this regard, the Court reached the conclusion that certain statements of the French government amounted to a unilateral undertaking of ceasing further nuclear tests. In this way the Court avoided adjudicating on a central issue regarding the legality or illegality of nuclear tests.

In other decisions the Court chose a more careful approach with respect to *erga omnes* considerations. Furthermore, in the *Tehran Hostages Case*, although the Court highlighted the imperative character of the norms envisaged in the Vienna Convention on the Diplomatic and Consular Relations for the international community as a whole, it hesitated to say anything that would be in conflict with the traditional bilateral approach of international law, consequently restricting the dispute as being between the US as the

²³⁵ Scobbie/2002/1218-9.

²³⁶ *Nuclear/Tests/ICJReps/1974/20*.

injured party and Iran as the defaulting state.²³⁷ Also, in the *Nicaragua Case*, the Court refused to accept that the prohibition of non-intervention had an *erga omnes* character, thus concluding that the US, as a third party, had no right to use force in response to armed intervention in another state. In particular the Court concluded that “[the acts of which Nicaragua is accused] could not justify countermeasures taken by a third State, the United States, and particularly could not justify intervention involving the use of force”.²³⁸

By contrast, the case-law of the European Court of Human Rights reveals that for the initiation of proceedings before it, it is not a prerequisite that a state is directly injured by a violation of a right under the scope of the European Convention on Human Rights. An example of this kind constitutes the inter-state application brought against the dictatorship in Greece by Denmark, Netherlands, Norway and Sweden in 1967. The states above relied on their legal interest in seeing compliance by Greece with the international agreement to which they were parties.

3.2.3. The Scope and Content of Obligations *Erga Omnes*

The notion of *erga omnes* obligations is frequently confused with the notion of *jus cogens* norms. However, whilst the two notions have many things in common in that they both intend to protect interests and values common to all states, and they both derive from the need to safeguard certain rules of international law that are not at the disposal of any state, they differ in one significant aspect: a *jus cogens* rule always creates obligations *erga omnes* whereas an *erga omnes* obligation does not always have peremptory character. In this regard, and whilst a *jus cogens* norm establishes an obligation of observance derogation from which is prohibited unless so provided by a rule having the same normative effect, *erga omnes* obligations do not have such a strong, compulsory effect. However since the latter create obligations that are owed to the international community as a whole and accordingly to all states, derogating from such norms is made very difficult. More specifically, in attempting to understand what *erga omnes* rules stand for and what is the practical significance for the holders of the equivalent right of qualifying an obligation as such the role of consent is another significant concern that comes into play. Accordingly, if one accepts that *erga omnes*

²³⁷ ICJReps/1980/41,44.

²³⁸ *Nicaragua/Case/ICJReps/1986/127* in Annacker/1994/134.

rules establish obligations empowering all states without exception with a legal interest in their performance, it remains to examine what will happen in the event that two or more states decide, with a specific agreement, to derogate from such rules. There is no doubt that since the obligation is owed to all states, such an agreement would unavoidably affect the interests of all the other members of the international community that were not included in the pact. It thus seems to be the position that a violation of an *erga omnes* obligation with the consent of some only states is not permitted. Consequently, only with the consent of all states to which the obligation is owed will any state be entitled to derogate from such obligations, otherwise their violation will constitute an internationally wrongful act empowering a state to invoke the responsibility of the wrongdoer. If however, there can be no derogation from an *erga omnes* obligation, the legal effect is identical with that concerning *jus cogens* norms, which brings us to the question as to how these two notions differ. As Professor Crawford observes:

From the Court's reference to the international community as a whole [ICJ in the Barcelona Traction case], and from the character of the examples it gave, one can infer that the core cases *erga omnes* are those non-derogable obligations of a general character which arise either directly under general international law or under generally accepted multilateral treaties (e.g in the field of human rights). They are thus virtually coextensive with peremptory obligations (arising under norms of *jus cogens*). For if a particular obligation can be set aside or displaced as between two States, it is hard to see how that obligation is owed to the international community as a whole.²³⁹

For example when Russia invaded Afghanistan claiming that it had the consent of the Afghan government, the General Assembly, in a resolution adopted in 1980, declared that the sovereignty, territorial integrity and political independence of states constituted a fundamental principle entailed in the UN Charter, which permitted no violation "on any pretext".²⁴⁰ This was justified on the ground that an obligation falling under this category is owed towards all states as members of the international community as a whole, and therefore its violation is the concern of all unless all states had consented to it. As Professor Gaja remarks:

The fact that an act is considered to be wrongful also in the relations between the injuring State and the State specifically injured has little practical meaning so long as the latter State does not put forward any

²³⁹ Third/Report/Crawford/2000/49/(106)(a).

²⁴⁰ Keating/1980/30229,30236.

claim. In order to give the provision in the draft articles a greater significance one would also have to assume that no waiver to such a claim is admissible.²⁴¹

Nevertheless, the issue of invocation or preclusion of responsibility in the case of consent with respect to *erga omnes* obligations remains unresolved even within the context of the 2001 Articles on State responsibility and in particular within article 20.

At the same time a reasonable question that derives from the notion of obligations *erga omnes* concerns the effect of objection by some members of the international community to the creation of an *erga omnes* obligation. One could argue that once an obligation has gained an *erga omnes* character no state will be able to derogate from it unless under the conditions described above. Therefore, in this instance, the answer should be looked for at the moment of the creation of an obligation. In other words, one could presume that if a state objects to the creation of an obligation as having an *erga omnes* character, then this rule would never acquire that status. One realizes the dangers but also the unsatisfactory conclusions of such an approach. No rule would ever be considered as such since it is almost definitely impossible to have absolute unanimity by all the components of the international community. Quite the contrary, one would be able to argue that the development of *erga omnes* obligations results from the fact that the international community deviates from the traditional consensual structure it has until very recently known. The ICJ, in its *Barcelona Traction* ruling, and on other occasions, has failed to elaborate on this and a number of other crucial questions concerning the nature of *erga omnes* obligations and their normative effect, and on the requirements necessary for the correct determination that an obligation is owed to the international community as a whole.

In distinguishing between the two notions, *jus cogens* norms and obligations *erga omnes*, Gaja refers to international rules the violation of which affects only the state or states upon which a specific right is vested by the infringed rule and which are entitled to just reparation, countermeasures and any other action permitted by international law on the one hand; and those which create obligations owed to all states irrespective of a direct legal interest on their part such as those entailed in human rights treaties, the violation of which constitutes an infringement of the rights of all other parties. The significance of this distinction lays on the fact that derogation from obligations falling

²⁴¹ Gaja/1981/296.

under the first category is permitted (provided that there is no other interested state) whilst the same does not apply for obligations owed to the international community as a whole. In this regard, Gaja differentiates the legal consequences to derive from the violation of *jus cogens* norms and obligations *erga omnes* and goes on to specify that not:

all the norms imposing obligations towards States irrespective of the existence of a direct interest on their part are peremptory norms. The implementation of any treaty derogating from such norms is wrongful, but the conclusion of the treaty is not necessarily so. Any action with regard to the validity or legality of the treaty is a preventive measure which protects the respect of the obligation, but such an action cannot be taken to be required by any norm imposing an obligation of the type now being considered.²⁴²

Similarly the ILC, examining the differences between these two notions, stressed that:

There is at least a difference in emphasis. While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance—i.e. in terms of the present articles, in being entitled to invoke the responsibility of any State in breach.²⁴³

Although *jus cogens* and *erga omnes* overlap, the former entail “elements of international public policy” and for this reason they cannot be derogated from.²⁴⁴ It is stressed however that it should not be concluded that whenever a rule permits for no exceptions it is of a *jus cogens* character.

With respect to the invocation of the nullity of a treaty in conflict with a *jus cogens* norm it is the position, also reflected in article 65 of the 1969 VCLT, that only a party to such treaty is entitled to invoke its default and claim that the treaty is without legal effect. It is noted in this regard that third states, while not entitled to invoke the nullity of the treaty or even make a declaration to this effect, may have other means of pressure outside the scope of the VCLT against the implementation of the treaty. The entitlement to use such other means will derive from the *erga omnes* character of the obligation incorporated in the infringed *jus cogens* norm. To this end, the concept of *erga omnes*

²⁴² Ibid/281.

²⁴³ ILCreport/2001/281/(7) in Scobbie/2002/1212.

²⁴⁴ Scobbie/2002/1210.

obligations becomes a shield for the protection of fundamental principles entailed in the *jus cogens* norms.²⁴⁵

Concerning counter-claims brought before the ICJ it has been stressed that a state cannot evade its responsibility and cannot justify its own violations of an *erga omnes* obligation on the ground that it responded to a previous wrongful act by another state.²⁴⁶ The issue was raised for the first time in the case brought by Bosnia-Herzegovina against Yugoslavia for breaches of the Convention on the Prevention and Punishment of the Crime of Genocide. Yugoslavia submitted a counter-claim concerning violations of the Convention allegedly committed by Bosnia-Herzegovina. It was argued that the *travaux préparatoires* of the Rules of Procedure of the PCIJ reveal a narrow meaning to counter-claims within which the rejection of the initial claim is requested in addition to other remedies. It operates as a defence to the claim and it is so closely related to that claim that it cannot be ignored. From the jurisprudence of both the PCIJ and the ICJ one can see that these courts, in their interpretation of counter-claims, have held that their purpose was, if proven genuine, to rebut the initial claim.²⁴⁷

4. The position of the ILC on *Jus Cogens* and *Erga Omnes* and the 2001 Articles on State responsibility

4.1. State Crimes and Serious Breaches of Peremptory Norms

When Professor Crawford was appointed as Special Rapporteur for the second reading of the draft articles on state responsibility, he favoured the retaining of the distinction between primary and secondary norms of international law and placed particular emphasis on the latter, as codification of the primary rules would be very difficult to achieve due to the innumerable treaty and customary international obligations.²⁴⁸ He further acknowledged that in view of some limited normative hierarchy apparent in international law, there exist various forms and degrees of state responsibility in view of both the significance of the rules imposing obligations upon states and the seriousness of the violation of such rules and that such a distinction should also be reflected in the final articles on state responsibility. One of the most contentious areas which faced

²⁴⁵ Ragazzi/1997/206.

²⁴⁶ Pegna/Lopes/1998/724.

²⁴⁷ For a case review *ibid*/727-8.

²⁴⁸ First/Report/Crawford/1998/(15).

Professor Crawford was faced with the inclusion of draft article 19 recognising state crimes. Professor Crawford acknowledged that there existed a deep division among states as to the inclusion of the notion of state crimes in article 19, which as it stood made no reference to any specific characteristics which would clearly distinguish delicts from crimes, for instance a special system of enforcement or substantive consequences. Moreover, article 19 did not specifically define which acts constituted a crime, but merely that a crime “may result” from violations of the obligations referred to under paragraph 3, namely: obligations essential for the maintenance of international peace and security; self-determination of people; widespread violations of obligations essential for the protection of the human being; and the preservation of the human environment. At the same time, the determination of whether the commission of a crime finally occurred was dependent upon “the rules of international law in force”.²⁴⁹ Likewise, Professor Crawford noted that the definition of crime as reflected in that article provided for an additional element of gravity which was not always existent in the elements of specifically defined internationally wrongful acts. For example, the reference to *widespread* violations of obligations essential for the protection of human beings added an additional element that did not exist in the definition of genocide. It is not widespread genocide that it is prohibited but genocide. Another criticism of the notion related to the legal consequences deriving from the commission of a crime, which did not appear in the draft to be distinguishable from the consequences deriving as a result of a delict. Furthermore, under draft article 40, following the commission of a crime all other states were considered as injured states, and as such are entitled to seek reparation and to resort to countermeasures. Professor Crawford was also critical of the decision to remove the restrictions placed on the exercise of restitution or satisfaction whenever a crime was involved. Nor did the draft articles provide for any special procedure for determining whether a crime had been committed or what consequences should arise, such proposals having been rejected by the ILC in 1995 and 1996.²⁵⁰ The Special Rapporteur concluded that there existed no judicial practice supporting the existence of a distinction between state crimes and delicts, despite the recognition that international law consists of different norms which go beyond a strict bilateral relationship and which have different hierarchy.²⁵¹ He commented that reference to a “criminal” element could prove misleading. Taking all of the above into consideration,

²⁴⁹ First/Report/Addendum/Crawford/1998/(49).

²⁵⁰ Ibid/(51).

²⁵¹ Ibid/(71).

the Special Rapporteur suggested the deletion of article 19, but without prejudice to the future development of international law on the matter.

Instead, Professor Crawford supported the inclusion of a provision on serious breaches of peremptory norms, such as aggression, genocide, apartheid and denial of self-determination, since they “shock the conscience of mankind”.²⁵² However, this proposal also met with the negative reaction of some states which viewed the proposal as a remnant of the notion of state crimes.²⁵³ It is noteworthy that nowhere in the articles does the ILC attempt to give a definition for *jus cogens*, relying instead upon article 53 of the VCLT. This has provoked the view that “the 1969 text defines peremptory norms only in terms of their consequences in matters of treaty law, which is not very rational from the standpoint of the law of international responsibility: that amounts to saying that when a rule renders a conflicting treaty invalid, its breach entails particular consequences in matters of responsibility; this is a not very useful combination of two quite distinct branches of law”.²⁵⁴

Chapter III of part two of the articles concluded in 2001, and more particularly articles 40 and 41, provide for specific consequences arising from serious violations of obligations under peremptory norms. It needs to be stressed that not all the breaches of *jus cogens* entail aggravated legal consequences but only those that are of a serious nature; in other words those which constitute gross or systematic infringement of such norms. However, in this author’s opinion, reference to an additional element, that of the seriousness of the violation of such norms, imposes an unnecessary legal constraint. One would think that the violation of *jus cogens* norms, irrespective of their intensity, would suffice to be serious enough. It may thus be suggested that genocide of a certain amount of people is not serious enough. Who determines the seriousness and using which criteria? Despite this, with the introduction of article 40 emphasis was placed not only on the fact that certain norms are given priority over others, but also on the fact that all states have a legal interest in their preservation. It is imperative, if the distinction between serious and less serious violations of international law is to be meaningful, to attach additional consequences to these violations for which all states are entitled to invoke the responsibility of the wrongdoing state. In this context, article 41 sets out the specific consequences arising as a result of a serious violation of a peremptory norm,

²⁵² Fourth/Report/Crawford/2001/(47).

²⁵³ Ibid/(43).

²⁵⁴ Pellet/2001/64.

and in particular establishes a duty on states to cooperate to bring to an end the wrongful act by lawful means, not to recognize as lawful the situation which will result from the violation, and not to render aid or assistance to the wrongdoing state.²⁵⁵ These consequences are additional to the consequences deriving from article 48 concerning violations of *jus cogens* norms that cannot be qualified as serious, and obligations established for the collective good either of a group of states or the international community as a whole. Commenting on the distinct legal consequences Professor Crawford stressed that these should not have a punitive character but merely reflect the gravity of the breach as there was a strong position that international law did not permit for such punitive element in the law on state responsibility.²⁵⁶ Nevertheless, and as will be discussed below, article 54 of the 2001 Articles regarding the right of a state other than the injured to invoke the responsibility of another state avoids the use of the term “countermeasures”. Instead, it gives emphasis on “lawful measures”, a terminology that has sparked divergent interpretations as to its exact meaning and scope, whilst at the same time not ruling out future developments in this respect (paragraph 3).²⁵⁷ In its commentary on article 54, the ILC notes that countermeasures by states other than the injured state were still very much disputed whilst state practice was “embryonic”.²⁵⁸ The action of these states than the injured was rather confined to securing the cessation of the breach and reparation on behalf of the injured state or the beneficiaries by other means permissible under international law. It was therefore feared that codifying and establishing such a right would open Pandora’s box, such that powerful states could behave in an arbitrary way as the law’s executors and enforcers.

It should be noted that this omission does not appear to reflect the personal view of Professor Crawford, who in fact proposed the inclusion of countermeasures in protection of general interests in two situations: whenever a state was invited to resort to such countermeasures by the state directly injured on the basis and scope of the given consent, and, in the absence of an injured state, whenever an obligation owed to the international community was infringed.²⁵⁹ None of these suggestions however were in the end adopted. Despite this, one can see from the final articles and especially from the commentaries to articles 22 and 54 that the issue was not intended to be conclusively settled. In particular, the commentary to article 22 provides that:

²⁵⁵ ILCreport/2001/277.

²⁵⁶ Fourth/Report/Crawford/2001/(45).

²⁵⁷ Pellet/2001/79.

²⁵⁸ Crawford/2003/305.

²⁵⁹ Third/Report/Crawford/2000/(413).

Article 54 leaves open the question whether any State may take measures to ensure compliance with certain international obligations in the general interest as distinct from its own individual interest as an injured State. While Article 22 does not cover measures taken in such a case to the extent that these do not qualify as countermeasures, neither does it exclude that possibility.²⁶⁰

Furthermore, article 41 (3) on the consequences to derive as a result of serious breaches of peremptory norms provides that it is without prejudice to other consequences which may be entailed under international law, suggesting that “international law allows the possibility for (‘non-injured’) states to take countermeasures of general interest following breach by any state whatever of an obligation arising under a norm of *jus cogens*.”²⁶¹ Although it is possible to interpret this provision as suggesting that there may be other consequences envisaged under international law in response to serious violations of peremptory norms, this is subject to the condition that countermeasures in the general interest in particular are recognized under international law. Moreover, Professor Alland is of the view that the final articles, and in particular article 54 on “lawful measures”, do not reconcile with the “saving” remarks concerning countermeasures of general interest, made regarding articles 22 and 41 (3). As he points out it is quite remarkable why such countermeasures for serious violations of peremptory norms were left “outside”, if international law recognizes the existence of such a right. Furthermore, he stresses that article 22 can by no means be reconciled with article 54: the former article clearly states that it concerns “wrongful acts” of a state, whilst the latter speaks about “lawful” measures. According to his interpretation, this is a fundamental difference between acts of retortion and countermeasures,²⁶² and that concomitantly, there are substantial reasons to believe that the ILC has precluded, at least for the time being, the concept of countermeasures by states other than the injured. As he points out with its decision not to include a principle allowing countermeasures for the most serious violations of international law, the ILC gave preference to “the absence of any consequences for the most serious wrongful acts” as against the admittedly “subjectivism of a decentralized response in defence of general interests”, should institutional action fail.²⁶³ Yet, one could argue that Professor Alland’s interpretation does not agree neither with the intention of the ILC, nor with the final articles and their commentary. Accordingly, one could also interpret article 54 as a

²⁶⁰ ILC report/2001/183/(b).

²⁶¹ Alland/2002/1232.

²⁶² Ibid/1233.

²⁶³ Ibid/1239.

provision that does not, for the time being, incorporate a right to third state countermeasures but which does not preclude it either should such a norm permissive of third state countermeasures evolve in the future (an interpretation in accordance with the commentary of article 22 quoted above). It is also suggested that a countermeasure that fulfils the predefined conditions of legality does not constitute an unlawful, but rather a lawful measure itself, an interpretation that would enable third state countermeasures to fall within the scope of article 54 in the future.

4.2. The Injured State and States Other than the Injured

Many states endorsed the recommendation of Professor Crawford for a distinction between “injured” and “other” states, in deviation from the position previously reflected in the draft articles adopted in first reading. Looking at the question as to which state is entitled to invoke the responsibility of another state as an injured state, the ILC noted in its commentary to article 42 of the final articles that as such a state is one whose individual right has been impaired, or which has been particularly affected by the infringement. It is important to point out that article 42 was drafted on the model of article 60 of the 1969 VCLT, although the two should not be confused. Firstly, because article 60 applies only in relation to treaties, whilst article 42 concerns any violation of international law. Secondly, because article 60 concerns material breach as a ground for the suspension or termination of a treaty whilst article 42 is concerned with the invocation of responsibility, irrespective of the gravity of the violation.²⁶⁴ Accordingly, an injured state is the state to which a right is individually owed, or whenever the violation of a collective obligation to which it is a party specially affects it, and finally whenever the violation of a collective obligation to which it is a party radically changes the position of all other states with respect to the further performance of that obligation. The latter concerns integral or inter-dependent obligations.

Article 42 (a) deals with obligations arising in the context of a bilateral, delictual relationship between the state to which an obligation is owed and the state which carries the duty not to violate the obligation in question, irrespective of whether such an obligation requires a certain act or an omission. This form of relationship is a central characteristic of traditional international law: any third state is precluded from bringing a claim in case of violation of obligations of this nature. Although this is still the case to

²⁶⁴ ILCreport/2001/296.

a great extent, contemporary international law has moved towards the recognition of certain international rules the respect of which lies within the interest of all states, even in the cases where there also exists a strictly speaking bilateral relationship. As a consequence, the circle of the subjects entitled to invoke the responsibility of a defaulting state has expanded significantly. To this extent, it is pointed out that in order to escape from conception of international law merely as the basis of many bilateral relationships among states, it is also necessary to identify the various subjects of international relations, and their role in each case. In other words, in the cases of those principles and values that affect the international community as a whole, not all states are affected in the same way. Whilst one state may be specifically and materially injured, others may have suffered nothing more than a “moral” damage. In the latter case their interest comes as a result of the fact that an obligation owed to a group of states established for the collective interest (*erga omnes partes*) or an obligation owed to the international community as a whole (*erga omnes*) has been violated. As Professor Crawford notes:

We cannot make progress in developing the idea of a public international law (rather than a private spectre of international law), unless we distinguish between the primary beneficiaries, the right holders, and those states with a legal interest in compliance.²⁶⁵

This position is now reflected in articles 42 and 48 of the 2001 articles on state responsibility. Whilst under article 42 the injured state possesses a right to invoke another state’s responsibility (defining as injured state only the one affected in its subjective rights either because the infringed obligation is owed to it, or because it belongs to a group of states to which the obligation is owed, and either that state is specially affected by its infringement, or the infringement is of such character as to radically change the position of all states to which the obligation is owed), in the case of article 48 the state only has a “legal interest” in compliance without necessarily having to prove that the obligation is individually owed to it or that it is specially affected by the violation.²⁶⁶ The difference in position has legal significance as only the injured state is entitled to all the remedies provided under the law on state responsibility: on the contrary, non-directly injured states enjoy only limited rights in relation to action they may be entitled to against the wrongdoing state.²⁶⁷ Although it is accepted that there are

²⁶⁵ Crawford/2000/17 in Scobbie/2002/1205.

²⁶⁶ Scobbie/2002/1207.

²⁶⁷ Sicilianos makes the point that article 48 could be interpreted as allowing the gravest of measures such as the resort to “lawful measures” (see article 54 of the 2001 Articles on State responsibility) equivalent

certain obligations the significance of which concerns a wider spectrum of states, be it a group of states or the international community as a whole, the damage suffered by each state is not always the same. It will vary according to whether the rule involved an obligation owed to a state individually or as a member of a wider group of states. In the former case the injury caused is of a more “direct” nature, whilst in the latter case, although the legal interest is never disputed, the injury only comes as a result of a rule established for the general good. Terms like “directly” and “non-directly injured”, and “third states” have been frequently used in the literature and the work of the ILC to indicate those states whose legal interest is established not in the context of a bilateral relationship but in the spectrum of a multilateral relationship born either within general international law or the law of treaties. The ILC in its 2001 Articles chose, in an attempt to dissolve the possibility of any misconceptions as to the meaning of such phraseology, to refer to “States other than the injured State”.

Article 42 (b) is more controversial as it deals with those cases of international conventional rules that create rights and obligations that are “indivisible for all states party to the treaty”.²⁶⁸ Under these circumstances, each state member to the treaty bears the duty to fulfil its obligation towards each other state also party to the agreement. The violation of the obligation by one state either specially affects or radically changes the position of all other states parties. The latter obligations are integral or interdependent in nature, the performance of which is a pre-condition for the fulfilment of the objectives set by the treaty. As it has been very characteristically pointed out, the notion of integral or interdependent obligations envisaged in the draft articles should be construed narrowly so as to cover “obligations which operate in an all-or-nothing fashion, such that each state’s continued performance of the obligation is in effect conditioned upon its performance by each other part”.²⁶⁹ Article 60 of the VCLT which deals with these cases provides that any state party is entitled to invoke the material breach and to suspend the treaty in question, thus threatening the treaty structure in its entirety. An example of obligations of this kind is a disarmament treaty. Here, each state undertakes the obligation to reduce its military capability on the assumption that the other states members to the agreement will do the same. Breach of such an obligation would destabilize the balance aimed to be established by the treaty and would result in the

for many as another term, although carefully selected by the ILC, for countermeasures, even for minor violations of *erga omnes* obligations. Sicilianos/2002/1141.

²⁶⁸ Weiss/2002/801.

²⁶⁹ Crawford-Peel-Olleson/2001/974.

radical change of position of every other state part to the treaty. However, human rights treaties are not interdependent. On the contrary, "human rights obligations are incremental, and human rights treaties do not operate in an all-or-nothing way".²⁷⁰ As a consequence, a state cannot rely on the infringement committed by another state to avoid the implementation of its own obligations regarding the protection of human rights.

On the other hand, article 48 reflects the position that there are certain international obligations, either deriving from customary or conventional rules, owed to the international community as a whole (genocide is an often cited example) as proclaimed in the obiter dictum of the ICJ in the *Barcelona Traction Case*, or to a group of states established for the protection of a collective interest (this includes regional agreements on security, protection of human rights within a specific region, or regional systems established for the protection of the environment). The latter provision incorporates obligations *erga omnes partes*, thus obligations created for the protection of a common interest, such as those relating to the protection of the environment, the security of a system, human rights or the protection of certain peoples. Obligations falling under this category differ from obligations the violation of which radically changes the position of every state in the treaty in that they "tend to promote extra-state interests, are not of a synallagmatic nature and fall outside the interplay of reciprocity. A breach of human rights by state A, however serious it may be, in no way changes the position of other states regarding compliance with their own obligations in the same area."²⁷¹

Of course, as already pointed out earlier, not all human rights are of such significance so as to establish a legal interest to the international community as a whole.

Under article 48 states are affected by a certain infringement not based on their individual capacity but rather because they are members of a group or the international community to which the obligation is owed. In the first case, two requirements must be met, in particular that the state is a member of that group and that the obligation aims to protect a collective interest. The second category concerns obligations owed to the international community as a whole and no further requirements need to be satisfied. This provision concerns not merely the violation of *jus cogens* norms but also the

²⁷⁰ Ibid/974.

²⁷¹ Sicilianos/2002/1135.

violation of *erga omnes* obligations. The ILC avoided to use the term “legal interests” as appears in the *Barcelona Traction Case* since this would leave no room for distinction between the injured states under article 42, and states other than the injured under article 48.²⁷²

Once the criteria of article 48 are fulfilled, the state invoking the responsibility of the wrongdoing state may do so not only by demanding cessation of the internationally wrongful act but also by demanding reparation “in the interest of the injured State or of the beneficiaries of the obligation breached”. This is another indication of moving away from the traditional perception of international law as found expression in bilateralism. In relation to this it has been argued that to allow a third state not individually affected by a breach of this kind to claim reparation when the injured state itself has waived its right to do so is without precedence in international law.²⁷³

Article 48 reveals the intention of the drafters to expressly deviate from the ruling of the ICJ in the *South West Africa Case*. As already noted, in that case the Court refused to examine the claims brought by Liberia and Ethiopia against South Africa on the ground that they lacked a special material interest regarding South Africa’s practices over South West Africa in violation of the Mandate. Furthermore, the Court rejected that there existed an *actio popularis* in international law or a right of any member of the international community to take legal action whenever an issue of public interest was at stake.²⁷⁴

4.3. The Legal Position of States in the Context of Multilateral Treaties

It has been mentioned earlier that one of the most distinguishing characteristics of bilateralism is that no rights or obligations can be imposed upon a state without its consent. This principle, otherwise known as *pacta tertiis* finds expression in article 34 of the VCLT 1969. Despite the fact that this article does not permit for any exceptions, being in this sense termed in an absolute and inflexible way, it has been argued that the recognition of *jus cogens* norms and the compulsory jurisdiction of the ICJ regarding the conflict of a specific treaty with such norms, have paved the way to exceptions.²⁷⁵

²⁷² ILCreport/2001/319/(2).

²⁷³ Scobbie/2002/1214.

²⁷⁴ ICJReps/1966/47/(88). Also Weiss/2002/804.

²⁷⁵ Chinkin/1993/135.

Upon realization that international peace and security, respect for human rights and the protection of the environment could not be achieved in a bilateral context, states have increasingly engaged in the conclusion of multilateral treaties that now form a large part of international law. Many of these treaties have been accepted by the majority of states, representing and safeguarding in this manner the general interests of the international community as a whole.

Nevertheless, there are certain difficulties arising from multilateral treaties such as the identification of the injured party and, consequently, of the party entitled to bring a claim for reparation or to resort to countermeasures. The difficulty becomes apparent with respect to obligations that do not have a strict bilateral character. Obligations arising from multilateral treaties can be distinguished as either bilateral or integral in nature. While not the only distinction of obligations that can be identified, this is the most important.

One of the main characteristics of bilateral obligations established by a multilateral treaty is that, despite the plurality of states parties to the treaty and the fact that they are all bound by the same rules, the treaty creates a bundle of obligations of a bilateral character, with one state party being the carrier of the obligation set by the treaty, and the other the carrier of the right. It is also noteworthy that such bilateral relationships are not necessarily established as between all the parties. An example of a multilateral treaty establishing rights and obligations between two states is the Vienna Convention on Diplomatic and Consular Relations: once a state accepts to have a foreign diplomatic mission within its territory, it is bound to provide the mission all the rights and protections provided under the Convention. Thus, only towards the state with which it has established diplomatic relations and with which it has exchanged diplomatic missions does the state have the obligations under the Convention. Yet, the ICJ in the *Tehran Case* drew attention to the fact that violation of the obligations under diplomatic immunities law could be detrimental for the “security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected”.²⁷⁶ However, one should not presume

²⁷⁶ ICJReps/1980/43 in Chinkin/1993/137.

by this that any member of the international community would be able to bring a claim against Iran for the violation of its obligations under the law of diplomatic immunities towards the US.

The Convention on the Law of the Sea offers another example of a multilateral treaty establishing multiple bilateral obligations.²⁷⁷ The violation of a bilateral obligation contained in a multilateral treaty necessarily has a bilateral character itself, meaning that the dispute arises between the two parties actually involved, with the one being the author state and the other the injured state. All the other parties to the treaty are not affected and thus they are third states to the dispute. As a consequence, if a violation of the Convention on the Law of the Sea occurs concerning the right to innocent passage, only the coastal state may bring a claim against the flag state.

With respect to integral obligations born in the context of multilateral treaties, these are owed to all the parties: the fulfilment and performance towards one state, is fulfilment and performance towards all. Similarly, violation of such obligations affects all the member states although perhaps in different ways. Examples of treaties establishing integral obligations can be found in human rights instruments, treaties on disarmament or on the protection of the environment. Their purpose is to protect a common good shared by all the parties. As a result of a violation of an integral obligation a collective interest suffers. In these cases, the ILC has recognized that each state is an injured party, and for this reason entitled to claim reparation, to seek safeguards of non-repetition, to cease the wrongful act, to restore the *status quo ante* where this is possible, or even to resort to countermeasures.

4.4. Circumstances Precluding Wrongfulness and the Right to Resort to Countermeasures

Professor Crawford, like his predecessors, recognized that the existence of certain circumstances precluded the responsibility of a state, thus rendering, for as long as they persist, the international obligation inoperative.²⁷⁸ Accordingly, the legal obligation affected does not cease to exist, like it does in the case of termination of a treaty, nor does it cease to have legal effect, even temporarily, as is the case in the suspension of a

²⁷⁷ Sachariew/1988/277.

²⁷⁸ Second/Report/Crawford/1999/6/(221).

treaty. Although this will be the subject of further examination in Chapter Three regarding self-contained regimes, it suffices to refer here to the words of Fitzmaurice according to whom:

Some of the grounds justifying non-performance of a particular treaty obligation are identical with some of those causing or justifying the *termination* of a treaty. Yet.... the two subjects are quite distinct, if only because in the case of termination...the treaty ends altogether, while in the other [case].... it does not in general do so, and (if a paradox is permissible) the non-performance is not only justified, but 'looks towards' a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present...²⁷⁹

This principle was affirmed in the *Rainbow Warrior Arbitration* and in the *Gabcikovo-Nagymaros Cases* where a distinction was made between the law of treaties on the basis of which the force of treaty should be assessed on the one hand, and the law on state responsibility on the basis of which the legal consequences and any circumstances precluding wrongfulness should be assessed on the other.

Particular emphasis was placed on the notion of countermeasures which now appears in Chapter II part three of the final articles. They constitute, according to the ILC, the main characteristic of the decentralized character of the international community and they aim to restore the legal relationship between the injured state and the wrongdoer. It is stressed that they refer to non-armed action and that they must be resorted to only in exceptional situations. They must be distinguished from acts of retortion which although unfriendly, are not otherwise unlawful (unlike countermeasures). In relation to the latter, Professor Crawford took the view that whilst it is possible to have non-performance of a synallagmatic obligation by way of countermeasures, reciprocity has a more limited application than countermeasures, it is not subject to the same limitations and it constitutes a specific response to a particular breach. At the same time, reciprocity differs from the suspension of a treaty in that it refers to the same or similar obligation which has been infringed and not to the entire treaty like suspension does, and it comes as a result not merely of a material breach but in fact, as a result of any breach of any rule of international law.²⁸⁰ It has been concluded by the ILC that countermeasures may be reciprocal, but are not necessarily confined to reciprocal measures.²⁸¹

²⁷⁹ Fourth/Report/Fitzmaurice/1959/41 in *ibid*/7/(224).

²⁸⁰ Second/Report/Addendum/Crawford/1999/13/(383).

²⁸¹ ILCreport/2001/326/(5).

The ILC stressed that countermeasures are instrumental in character and that they come as part of the implementation of state responsibility rules for the purpose of inducing the wrongdoing state to comply with its obligations.²⁸² Their purpose is limited to inducing the wrongdoing state to cease its unlawful conduct and to offer reparation to the injured state and for as long as the wrongdoing state is not complying with its obligations. Therefore they should not be viewed as punitive measures. Countermeasures must not violate obligations towards third, innocent parties and they are not unlimited in scope. Rather, they have to comply with the requirement of proportionality and they must be reversible in their effects. Likewise, certain obligations, because of their nature, do not allow their non-performance by way of countermeasures.

One of the most disputed aspects of the law on countermeasures was, and still remains, the entitlement of third states to resort to countermeasures. The examination of the position of Mr Arangio-Ruiz on the matter revealed that countermeasures were open to effectively all states, if an international crime had been committed. Yet, the ILC and Professor Crawford, wary of the implications that the recognition of such a general right could have in the preservation of the international legal order, decided not to include such a right with respect to states other than the injured. The justification given was that such right was not supported by state practice which was sparse. Although this issue is thoroughly examined in the fourth chapter, it is necessary to outline the main issues of concern. Whilst one cannot ignore the driving force behind the ILC's and especially Professor Crawford's decision not to include a general right to countermeasures for the time being, namely the worry that countermeasures can be used and abused by powerful states at the expense of the sovereign rights of other states, a worry deeply shared by this author, one can also not overlook the fact that international community itself has progressed. It no longer consists of an abstract idea, but rather is a real community, with real actors, and structured on real legal principles commonly shared by states. No matter how strong the idea of state sovereignty remains in international legal reality, there has been an undisputable force according to which certain values must be respected by all, even by states that have opposed their development. As already seen, this is reflected in the notion of *jus cogens* norms. In view of the immobility and inflexibility of law enforcement in the international legal order as revealed from the primarily political role of the SC and also from the unfair power balance within the SC, which often fails to stand up and meet its aspirations, it is imperative that the international community finds

²⁸² ILC report/2001/325-6/(3).

effective mechanisms to fight international injustices which “shock the conscience of mankind”. It is not possible in today’s world to stay impassive, but also legally incapable, when genocide or torture is committed. If the international community is currently unable to agree upon the existence of central mechanisms entitled for the implementation and respect of international law, it is suggested, although still with a great amount of hesitation, that this gap could be filled with the recognition of an entitlement to third states to take countermeasures. Nevertheless, the recognition of such a right should only come with the most stringent conditions so as to ensure that countermeasures are not turned into a powerful weapon to the detriment of international law and subject to manipulation by the existing superpowers. The issue of proportionality therefore merits separately examination in the last chapter.

4.5. Nationality of Claims, Obligations *Erga Omnes* and Peremptory Norms

At the same time of widespread acceptance and recognition of the *erga omnes* character of at least the most “basic” fundamental human rights, article 44 (a) of the final articles introduces a specific admissibility requirement for the invocation of state responsibility, thought by some to stand against the very notion of *erga omnes* obligations and *jus cogens* norms. More specifically article 44 (a) provides that the responsibility of the state cannot be invoked unless in agreement with *any applicable rule* regarding the nationality of claims. This provision has been viewed by some commentators as being in conflict with articles 42 and 48 by making it impossible for a state whose nationals are not the victims of a certain violation to act. It was also illustrated in the debates of Draft Article 1 on Diplomatic Protection that “Under international law, obligations concerning human rights were typically obligations *erga omnes*. Any State could request cessation of the breach, whether the persons affected were its own nationals, nationals of the wrongdoing State, or nationals of a third State. Thus, any requirement of nationality of claims appeared to be out of place when human rights were invoked”.²⁸³

Whilst the ILC has commented on article 44 that the question of the nationality of claims will be dealt with within the framework of the ILC’s work on diplomatic protection, it has been characteristically pointed out that the latter is in apparent conflict

²⁸³ First/Report/Dugard/2000 and Addendum/2000/145/(422) in Scobbie/2002/1216.

with the provisions on state responsibility.²⁸⁴ This is due to the fact that diplomatic protection requires a link between the national whose rights have been infringed and the state exercising protection on their behalf, despite the ILC's conclusion that "diplomatic protection [is] not separate from State responsibility; a State acting on behalf of one of its nationals [is] nonetheless invoking State responsibility".²⁸⁵

Notwithstanding the Commentary to Draft Article 1 on Diplomatic Protection, it needs to be pointed out that article 44 (a) is subject only to those cases where the requirement of nationality of claims is applicable, and therefore not all cases of invocation of state responsibility will raise such questions. For example, when the UK complained to the US government regarding the treatment of prisoners at Guantanamo Bay, Cuba, being held in legal limbo since 2001, it put forward the following legal argument: while it pointed out that it was entitled to make representations to the US government concerning violations of the ICCPR taking place against its own nationals, it could not do the same with respect to violations against individuals who although they were British residents they did not possess the British nationality.

5. Conclusion

Having examined in the first chapter how the work of the ILC concerning the legal consequences to derive from the commission of an internationally wrongful act has progressed, and how different regimes of responsibility may be applicable in accordance with the nature of the infringed obligations, this chapter focused on the emergence of peremptory norms, obligations *erga omnes* and community interests in the theory and practice of international law. The development of these concepts was however met with scepticism as they were regarded by some states and commentators as a tool restrictive of the sovereign powers of states, and as being irreconcilable with the "traditional" function of international law which is the co-existence of equal state sovereigns without the consent of which no norm can evolve. The recognition of these notions raises significant questions with respect to the nature of international law as they seem to go beyond merely establishing bilateral relations between states. Accordingly, if international law is construed as a minimal legal system consisting of powerful sovereigns which are restrained only to the extent they have accepted, then these norms

²⁸⁴ Scobbie/2002/1201.

²⁸⁵ ILCreport/2000/86/(286).



have no place in such a system. If on the contrary international law is construed to be structured on the basis of also collective interests not only owed to, but also binding all states and from which no derogation is permitted, then international law seems to resemble a constitutional or quasi-constitutional legal order.

Yet, the examination of these notions is also deemed necessary for the comprehension of the emergence of another concept, that of countermeasures taken by states other than the injured and which lies at the heart of this research. The recognition of certain norms which due to the nature of the rights they protect are fundamental for the protection of collective interests, has unavoidably raised questions regarding their implementation in the international legal order in the event of their violation. Therefore, a look into the content and scope of *jus cogens* norms and obligations *erga omnes*, as these are elaborated in the literature, state practice but more specifically the jurisprudence of the PCIJ and the ICJ, may reveal the justifiability behind the development of the notion of third-state countermeasures. Nevertheless, and as it can be seen from the findings of the second chapter, the understanding that a specific norm has a peremptory character or that it establishes obligations *erga omnes* does not automatically establish a right to countermeasures by any state, nor a right to bring the case before international judicial bodies.

It was accordingly shown in this chapter that international law consists of norms the violation of which does not affect all states in the same way, nor does it entail the same legal consequences as it can be reflected from the final articles on the law on state responsibility. Having therefore examined the significance of *jus cogens* norms and obligations *erga omnes* in international law, the attention is next turned to the impact that specific legal norms may have on the law on state responsibility and the right to resort to countermeasures by way of not performing obligations arising from specific legal regimes, in response to violations of *jus cogens* norms and obligations *erga omnes*.

CHAPTER 3

Self-contained Regimes, State Responsibility and the Fragmentation of International Law

1. Introduction

The incorporation of community interests in the main body of international law, as elaborated in chapters one and two, has not prevented states from still possessing a pivotal role in the formulation of international norms. This principle finds its roots on the principle of sovereign equality of states which constitutes one of the most fundamental structures of the international legal order and according to which all states are able to establish international rules by conferring upon each other rights and obligations that possess equal legal value. As has been characteristically noted in this regard, "International law is a law of cooperation, not subordination. Its creation depends essentially on the consent of states, be it explicit or only implicit. The lack of consent by a given state generally means that it cannot be held subject to the rule in question (*pacta tertiis nec nocent nec prosunt*). As a result, since each state is largely its own lawmaker, the legal relationship between states varies enormously depending on the states concerned."²⁸⁶

What is more, states are entitled to enter into specific agreements in deviation from the general rules of international law, such as the law on state responsibility or the law on treaties, and which although may reinforce and strengthen the rights of states, they may often create a legal regime that essentially affords states weaker protection. It is therefore well established in international law that even though such agreements may not infringe *jus cogens* norms (or other international obligations unless expressly permitted by such agreements or other rules of international law), the *lex specialis* will prevail over the *lex generalis*. This is a reflection of the uniqueness and particularity of the international legal order which differs significantly from national legal systems where contracts between individuals are concluded within the general framework of law and yet cannot deviate from it. Consequently, and whilst individuals may enter into

²⁸⁶ Pauwelyn/2001/536.

private agreements, they may do so only by giving due regard to the general rules of the legal system within which they are operating, such as for instance the rule of good faith or the rule of judicial protection by access to courts in the event of a dispute.

The scope of examination of the present chapter is focused on the relationship between *lex specialis* and *lex generalis* regimes, and particularly on the position of self-contained regimes within the general system of international law viewed from two different perspectives. First, whether such self-contained regimes preclude totally or partially the application of the general rules on state responsibility for the violation of their rules, thus permitting only the remedies expressly provided for by such regimes. Secondly, whether a violation of a rule of general international law, for example a violation of a *jus cogens* norm or an obligation *erga omnes*, may justify countermeasures with the suspension or termination of obligations established within such specific regimes. This gains particular significance in the context of the World Trade Organization due to the rapidly and widely increasing trade areas covered by its Agreements, thus leaving little space for the application of countermeasures under general international law.

However, before looking in depth into the question of the relationship between specific and general legal regimes it is necessary to examine the interaction, if any, between the law on state responsibility on the one hand and the law on treaties on the other as both constituting *lex generalis*.

2. The Relationship Between the Law of Treaties and the Law of State Responsibility

The relationship between the law of treaties and the law of state responsibility was thoroughly studied in the dispute that broke out between Hungary and Czechoslovakia in the *Gabcikovo-Nagymaros Case*.²⁸⁷ This case is of great significance because the ICJ had the opportunity to adjudicate on three major, but different in nature and scope, branches of international law, in particular the law on state responsibility, the law on treaties and the law on the protection of the environment, and on a number of significant issues arising from them.²⁸⁸ The focus will be limited to the findings of the Court

²⁸⁷ *Gabcikovo/Nagymaros/ICJReps/1997*.

²⁸⁸ Wellens/1998/766.

concerning the relationship between the law of treaties and the law of state responsibility, with brief reference to the facts of the case under consideration.

On 16 September 1977 Hungary and Czechoslovakia entered into an agreement for the construction and operation of a system of barrage and locks on that part of the Danube shared by them as an international river and boundary.²⁸⁹ The project provided for the construction and installation of two hydroelectric power plants on the Hungarian Nagymaros sector on the one hand and on the Czechoslovakian Gabčíkovo sector on the other, and consisted of a large indivisible complex of installations and structures that had to be implemented in an integrated and joint manner. In view of increasing environmental concerns at a domestic level, the Hungarian Government decided in May 1989 to suspend and finally abandon the works at the Nagymaros sector, and those works at Gabčíkovo attributed to it, notwithstanding that, by that time the works at Gabčíkovo had to a great extent been completed, whereas the works at Nagymaros had hardly begun.²⁹⁰

Czechoslovakia reacted strongly to Hungary's decision and called for it to immediately resume its obligations under the 1977 Treaty. A marathon of negotiations between the two parties to discover a solution ended in deadlock, leading Czechoslovakia to proceed with the search for alternative ways to achieve the unilateral implementation of the 1977 Treaty provisions, more specifically, the adoption in 1991 of an alternative project known as "the provisional solution", or otherwise, Variant C. This latter plan provided for the diversion of the Danube river within Czechoslovakia's boundaries without Hungary's consent. As a result, and before Czechoslovakia proceeded with the actual operation of Variant C, in 1992 Hungary announced the termination of the 1977 Treaty existing between the two countries. Czechoslovakia then intensified its efforts for the damming of the Danube, a work that was finally completed a few months after Hungary's denunciation of the Treaty, and which resulted in a significant reduction in the water flow and in the downstream waters of the river²⁹¹.

Notwithstanding the fact that both Hungary and Czechoslovakia were not legally bound by the provisions of the 1969 VCLT at the time they signed the 1977 Treaty, it is

²⁸⁹ Treaty Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks of 16 September 1977.

²⁹⁰ Reichert/Facilides/1998/838-39.

²⁹¹ Ibid/839-40.

common ground today that certain provisions of the Convention, and especially the rules relating to the termination and suspension of treaties as are expressed in articles 60-62 of the Convention, reflect and codify existing rules of customary international law. As such, and noting that the 1977 Treaty lacked any provision concerning the termination, denunciation or withdrawal from the treaty, the Court held that the conduct of the two parties should be evaluated under the scope of articles 60-62 of the VCLT and insofar as these articles were expressive of customary rules on the one hand, and under the law of state responsibility on the other.

Having determined that Hungary's unwillingness to comply with some of its treaty obligations unavoidably rendered the accomplishment of the project impossible,²⁹² the Court examined Hungary's submission that reasons of ecological necessity had forced it to initially suspend and abandon certain works of the Gabčíkovo-Nagymaros Project and finally terminate its treaty with Czechoslovakia. In this regard, the Court held that this ground should be viewed under the scope of the law of state responsibility according to which necessity, if proven as existent, would preclude the responsibility of the defaulting state on the international plane. Nevertheless, since this ground was invoked in an attempt to justify the suspension and termination of a certain treaty, reference to the law of treaties was unavoidable.

Concerned about a possible misconception between the two branches of international law when evaluating the legality of the suspension or termination of a treaty as in the present case, the Court wished to draw a distinguishing line between the law of treaties and the law on state responsibility. In this respect, the Court noted that whilst the law of treaties determines, *inter alia*, whether a treaty is in force and the grounds on which a treaty may lawfully and validly be suspended or terminated, the law of state responsibility evaluates the extent to which the suspension or termination of an international agreement in violation of the law of treaties gives rise to the responsibility of the state concerned, and determines the legal consequences of the unlawful and invalid suspension or termination of the treaty,²⁹³ provided that the states have not agreed otherwise. In other words, "while once conduct incompatible with the law of treaties has been established, potential ensuing responsibility should be assessed

²⁹² *Gabčíkovo/Nagymaros/ICJRep./1997/(48)*.

²⁹³ *Ibid/(47)*.

according to the law on state responsibility”.²⁹⁴ As the Court held, this position seems to also be compatible with article 73 of the 1969 VCLT according to which “the provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States”. While the 1969 VCLT is concerned with the genesis of a treaty obligation, its very existence, content and its subjects, it does not provide rules concerning compliance with it. Rather, the issue of conformity with customary or conventional rules is covered by the general rules on state responsibility. As Mr Crawford concludes the ILC articles on state responsibility provide “the general secondary law of international obligations, in the same way that the Vienna Convention provides the general secondary law of treaties.”²⁹⁵

Against this background and with respect to Hungary’s claim for the existence of environmental necessity, the Court highlighted that necessity, falling within the scope of state responsibility, could not validly be invoked as a reason for the suspension or termination of the 1977 Treaty. In this regard, the Court stressed that a treaty may only be terminated or suspended for one of the reasons referred to in articles 60-62 mentioned above, namely for material breach, impossibility of performance or fundamental change of circumstances.²⁹⁶ According to the Court, these articles provide an exhaustive list of the circumstances under which a treaty may be lawfully terminated or suspended. Thus, the Court was concerned that possible acceptance of additional grounds for the lawful suspension and termination of treaties other than those already provided would put at risk “the security of treaty regimes”.²⁹⁷ Consequently, Hungary could not invoke necessity as a ground for the termination or even suspension of the 1977 Treaty, and as a result, this ground was dismissed. As pointed out, a justified invocation of a state of necessity could be used as a ground for precluding the wrongfulness of a state for the temporary non-performance of its treaty obligations and for as long as the state of necessity existed, but it could not be used as a ground for the unilateral suspension or termination of the treaty. Accordingly, the only effect that necessity may have is that it makes the treaty ineffective and “dormant, but - unless the parties by mutual agreement terminate the Treaty- it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives”.²⁹⁸

²⁹⁴ Wellens/1998/768.

²⁹⁵ Crawford/2000.

²⁹⁶ *Gabcikovo/Nagymaros/ICJReps/1997/(47)*.

²⁹⁷ Evans/1998/692.

²⁹⁸ *Gabcikovo/Nagymaros/ICJReps/1997/(101)*.

Accordingly, although non-performance of a treaty obligation may *look like* suspension, it is not.

What the Court actually held in relation to Hungary's invocation of necessity was that this ground could not justify a lawful suspension or termination of the treaty due to the limited grounds recognised in international law for this purpose. However, if Hungary proved that indeed such a state of necessity existed, then its conduct to suspend certain works of the project could be justified under the state of necessity as a circumstance precluding wrongfulness for failing to comply with its treaty obligations to construct and operate the barrage and locks system. As a consequence, Hungary would still be legally bound to perform its treaty obligations as soon as the state of necessity ceased to exist.²⁹⁹ The difference between the suspension and termination of a treaty on the one hand, and the non-performance of certain treaty obligations on the other, lies exactly within the fact that in the former case, the treaty ceases to have legal effects and to be in force, whereas in the case of non-performance the treaty remains legally binding on all the parties involved that still have to resume their obligations as soon as the ground precluding wrongfulness vanishes. As Professor Crawford noted on the matter, the existence of circumstances precluding the international responsibility of a state, such as necessity or countermeasures, render, for as long as they persist, the international obligation inoperative.³⁰⁰ Yet, the obligation does not cease to exist, a point that has often been highlighted as of great significance. In the words of Fitzmaurice:

Some of the grounds justifying non-performance of a particular treaty obligation are identical with some of those causing or justifying the *termination* of a treaty. Yet...the two subjects are quite distinct, if only because in the case of termination...the treaty ends altogether, while in the other [case]...it does not in general do so, and (if a paradox is permissible) the non-performance is not only justified, but 'looks towards' a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present...³⁰¹

Zoller observes in this regard that whilst suspension or termination have as a result the cessation of the legal effects of the treaty (and in the case of suspension for as long as this situation is persistent), non-performance does not result to the same effect. She illustrates this difference with an example. Accordingly, whenever a treaty is suspended

²⁹⁹ Ibid/(101).

³⁰⁰ Second/Report/Addendum/Crawford/1999/(222).

³⁰¹ Fourth/Report/Fitzmaurice/1959/41 in Second/Report/Addendum/Crawford/1999/(224).

the interest stops running, whilst in non-performance the interest continues to be calculated.³⁰²

Moreover, it has been very characteristically pointed out that:

by confirming that the consequences of illegal termination, and in particular whether they could be excused, had to be determined by reference to the law of State Responsibility, the judgment implicitly lays to rest some of the arguments that had been advanced in the literature that States parties to the Vienna Convention had forfeited the right to rely on the broader excuses precluding wrongfulness under the law of state responsibility.³⁰³

In addition to the above, Zoller is of the view that the 1969 VCLT has not abrogated customary international law, and consequently, principles of international law existing outside a certain treaty may be legitimately invoked in the form of retaliatory measures, such as for example the temporary dispensation of the obligations arising from the said treaty.³⁰⁴

At the same time it has been argued that the law of treaties and the law of state responsibility, although different in nature and different in scope, are not completely unrelated. More specifically, it has been noted that “the inherent systematic logic of international law requires that the distinct scope of different branches of international law should not be used in a counterproductive way, especially not when their *raison d’être* is not in the first place (or not at all) to be found in providing primary rules, but on the contrary, to consist of rules which are above all, of the utmost importance for the overall functioning of international law”.³⁰⁵ In this regard it has also been argued that the Court should follow an integrative approach in relation to these different branches of law and that such an attempt should not be rendered impossible by the mere existence of article 73 of the VCLT. In support of this position it has been pointed out that often states try to justify the breach of their international obligations on the basis of circumstances precluding wrongfulness arising both from the law of treaties and the law of state responsibility.³⁰⁶ According to this view, it seems that it is not really possible to separate the law of treaties from the law of state responsibility. With this in mind:

³⁰² Zoller/1984/89.

³⁰³ Evans/1998/692.

³⁰⁴ Zoller/1984/92-3.

³⁰⁵ Wellens/1998/793.

³⁰⁶ *Ibid*/794.

the law on State responsibility not only 'touches and interacts' with other branches of general international law, but constitutes the decisive body of rules governing non-compliance with any other legal obligation, and thus 'permeates' all sets of general, conventional and customary primary rules. The law on state responsibility occupies a quasi-constitutional place in the international legal order.³⁰⁷

Furthermore, the fact that two (or more) states decide to conclude a treaty means that this treaty will apply in their relations as *lex specialis*, regulating their rights and their obligations. Nevertheless, the existence of a treaty between two parties does not exclude the application of other branches of international law. As the ICJ held in its 1971 *Namibia Opinion*, "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation...the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore".³⁰⁸ This is further explored below.

According to some authors, the decision of the Court to adopt a strict interpretation in relation to the grounds allowed for the suspension or termination of a treaty sacrificed "substantive justice" over "legal security" as the former may call for the possibility to introduce new grounds under which a treaty may be suspended or terminated other than those already provided in articles 60-62 of the Convention. As the supporters of this opinion argue, this becomes even more compelling in cases where the continuance of a treaty imposes a particularly heavy burden upon the treaty parties.³⁰⁹

3. *Lex Specialis*, Self-contained Regimes and General International Law

Now that the interrelation of the law on state responsibility and the law on treaties has been clarified, it is imperative to examine the interrelation between the law on state responsibility and the law on treaties as *leges generales* on the one hand and specific legal regimes on the other. It has already been pointed out at the beginning of this chapter that what is specifically agreed upon by states will prevail over general rules of international law. This is particularly true in relation to obligations established by treaties, although it should be stressed that even a special custom could prevail over a general rule established by treaty.³¹⁰ It has therefore long been recognized that states when entering into agreements may choose to specify the legal consequences to derive from the infringement of their obligations under such agreements, or even to set up their own dispute settlement

³⁰⁷ Ibid/794.

³⁰⁸ ICJReps/1971/31-32/(53).

³⁰⁹ Reichert/Facilides/1998/842; Evans/1998/692.

³¹⁰ ILCreport/2004/288/(313).

procedures and establish their own enforcement mechanisms, even in derogation from the general rules not only of the law on treaties concerning the suspension and termination of treaties, but also from the general rules of the international responsibility of states. Therefore, these specific regimes, irrespective of whether customary or conventional, often complement, substitute or depart from general provisions.³¹¹ The *lex specialis* maxim has its roots on the widely consensual structure of international law and on the fact that general international law is “dispositive”, construed as meaning that it can largely be derogated from.³¹² The *lex specialis* has also been used as a means for the resolution of norm conflicts.³¹³

At the same time it needs to be pointed out that international law consists of several general and specific legal regimes establishing certain rights and imposing specific obligations which often are independent from one another and which stand autonomously in the international legal order. While the norms of these separate legal regimes frequently interact and seem to be complementary, sometimes they collide. The current state of international law recognizes certain rules for the resolution of such conflicts, such as the principle that the *lex specialis* prevails over the *lex generalis* or that the norm formulated at a later stage will replace the previous rule. Yet, there is little said about the possible dangers from conflicts arising with respect to irreconcilable norms of international law belonging to different legal regimes.

Mr Riphagen, having concluded that international law is separated between various interrelated subsystems in accordance to the function that each one of them fulfils, pointed out that a treaty may establish a distinctive subsystem with its own secondary rules to be set in motion whenever its provisions are infringed by any of the parties and which cannot be overruled by other subsystems. He stressed at the same time that the existence of such a treaty subsystem did not preclude the application of the rules of customary international law regarding the international responsibility of states. This is so because the treaty subsystem may itself collapse, “in which case a fall-back on another subsystem may be unavoidable.”³¹⁴ On the same footing the Study Group looking at the question of fragmentation of international law discussed further below, described general international law as “omnipresent” existing behind special rules and

³¹¹ Pellet/2001/56.

³¹² ILCreport/2004/286/(309).

³¹³ Ibid/285/(305).

³¹⁴ Third/Report/Riphagen/1982/30-31/(54).

regimes.³¹⁵ Nevertheless, “the interrelationship between the subsystems may be complicated by the fact that a particular set of actual circumstances may be relevant for more than one subsystem. Here the measure of organization of the relationship becomes particularly important: if it is not possible to allocate the situation to one or the other system, the more organized system prevails until it fails as such.”³¹⁶ Whilst it is possible that the same wrongful act violates rules belonging to different subsystems, and therefore a combination between these subsystems and their legal consequences may be unavoidable,³¹⁷ difficulty seems to arise whenever a specific conduct is lawful under a certain legal regime, or sub-system, and unlawful under another. It is to the inter-relationship of the various legal systems existent in the international arena that the attention is next turned, with particular emphasis given to the implementation of countermeasures under the general law on state responsibility within specific, or self-contained, regimes. The question gains particular interest concerning the relationship between public international law and the WTO: are the two to be viewed as two distinct spheres of international law with no interaction between them? Or are they to be viewed as complementing each other whenever possible?

But first, what does one mean by “self-contained” regimes?

The term, which is understood to express a subcategory of *lex specialis*,³¹⁸ appeared in the ruling of the ICJ in the dispute that broke out between the US and Iran in relation to the seizure of the US embassy and its diplomatic and consular staff in Teheran. In the proceedings initiated by the US before the Court, the Iranian government tried to defend itself and justify the events in the embassy by relying on alleged previous interventions in Iranian internal affairs by the US, such as the latter’s involvement in the *coup d’etat* of 1953 and the overthrow of the lawful national government. Nevertheless, the Court rejected this argument by stressing that no countermeasures were permissible in the field of diplomatic relations for the violation of the same kind, apart from those provided for by diplomatic law itself and in particular that of declaring a diplomat or a consular official as *persona non grata*, the breaking off of the diplomatic relations and the closure of the mission. More specifically the Court determined that whilst there is an obligation under general international law for the sending state to respect the laws and

³¹⁵ ILCreport/2004/287/(311).

³¹⁶ Third/Report/Riphagen/1982/30-31/(54).

³¹⁷ *ibid*/32/(69).

³¹⁸ ILCreport/2004/288/(314).

regulations of the receiving state and not to interfere in its domestic affairs, the violation of these obligations does not justify a similar response in disregard of the privileges and immunities accorded by diplomatic law by the receiving/injured state. According to the Court

[t]he rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are by their very nature, entirely efficacious.³¹⁹

According to the classical perception of international law from where the notion of "self-contained" regimes seems to derive, a regime is autonomous from international law if it meets two conditions: first, that its norms should not be applied or relied upon by other institutions existing outside the regime, and secondly that it is "self-sufficient" in the sense that it does not need to rely upon any other rules apart from the ones incorporated in it.³²⁰

The term appeared also in the work of the ILC on the codification of the law on state responsibility. More specifically, Mr Riphagen, who often uses the terms self-contained and objective regimes or sub-systems in parallel, made a distinction between general consequences of internationally wrongful acts and those included within special regimes. The *lex specialis* would prevail over the *lex generalis*, leaving only a *residual* role for the latter, meaning that in the event that the sub-system collapses or does not contain an adequate regime of legal consequences, the general rules will take over.³²¹ With respect to whether the right to countermeasures will be suspended it has been noted, that the provisions on state responsibility are applicable to every internationally wrongful act "except to the extent that the legal consequences of such a breach are prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law."³²² Simma is also of the view that a self-contained regime is one that precludes "more or less *totally* the application of the general legal consequences of wrongful acts, in particular the application of the

³¹⁹ *Teheran/Hostages/ICJReps/1980/38.*

³²⁰ Melescanu.

³²¹ In Simma/1985/116.

³²² Preliminary/Report/Riphagen/1980/128-9.

countermeasures normally at the disposal of an injured party”.³²³ If this is the case, then the need to narrow down as much as possible the existence of such regimes becomes apparent as the enforcement of international law would otherwise be severely jeopardized, especially with respect to violations that do not fall within the scope of these specific regimes. Thus, the need to resort to unilateral measures provided by general international law becomes even more pressing in the event that the wrongdoer fails to comply with the decisions of the institutions provided under the “special regime”, or where the violation persists despite the initiation of the regime’s proceedings. In such an event it is argued by Mr Arangio-Ruiz that the injured state will be able to resort to action permitted under international law in order to secure and protect its rights. Nevertheless, he highlights that such “external” measures not provided under the regime should be regarded as exceptional and to be only directed against wrongful acts of such gravity that put in danger principles highly valued.³²⁴ Due to these considerations, Mr Arangio-Ruiz, adopting a different line from the former Special Rapporteur Mr Riphagen, preferred not to include in the draft articles “special” restrictions on measures affecting obligations deriving from self-contained regimes. The general principles applicable to all unilateral measures should be able to resolve any issue to be arisen from treaties establishing “self-contained” regimes. He accordingly disagreed with the adoption of draft article 2 of part two as it seemed to exclude the application of the provisions regarding the consequences of an internationally wrongful act, whenever the legal consequences of an internationally wrongful act were determined by other rules of international law.³²⁵ He justified this on the ground that states, by introducing such special regimes aimed not to diminish the already existing mechanisms of protection, but rather to reinforce them.

It was further suggested that the term “self-contained regimes” was imprecise as no regime could be seen in isolation from general international law as firstly the latter plays a determinative normative role in the creation of such regimes and secondly it becomes active again whenever the special regime collapses.³²⁶ Professor Dupuy supports the view that the doctrine about self-contained regimes is misleading.³²⁷ Okafor-Obasi adds that a self-contained regime is a system created by a group of sovereign states in terms of full equality, and which provides its own rules concerning implementation,

³²³ Simma/1985/117 (emphasis added). Also Bartels/2002/394/fn160.

³²⁴ Fourth/Report/Arangio-Ruiz/1992/41/(116).

³²⁵ Ibid/42/(123).

³²⁶ ILCreport/2004/290/(318-9).

³²⁷ Dupuy/1999/797.

enforcement and other remedies. Due however to the equality of treaty and customary norms, states may resort to measures provided under either field, namely conventional or customary international law in order to remedy a violation. Even more so, a state may eventually resort to general international law if such system fails. For these reasons, no system under international law can genuinely be regarded as “self-sustained”.³²⁸

3.1. The Question of Application of General Rules of International Law Within Self-contained Regimes

Simma, in a very interesting article published in 1985, examines this question in the spectrum of three possible examples of self-contained regimes: the law on diplomatic immunities, the European Economic Community, and human rights treaties.

3.1.1. The Law on Diplomatic Immunities

Here Simma is not convinced with the conclusion of the ICJ in the *Teheran Case* according to which an infringement of the diplomatic privileges and immunities cannot be cured with the infringement by the injured party of the same rules because after all, as he points out, diplomatic law is all about reciprocity. Nevertheless, even if one were to accept that the regime on diplomatic immunities does not allow for their violation even by way of countermeasures in response to a similar breach, for reasons that according to Simma still need to be clearly explained, nothing can preclude countermeasures in the form of suspension of obligations in other fields. Thus, diplomatic law can be conceived of as a self-contained regime only in a very narrow sense, as it does not preclude the application of other special remedies but only imposes certain limitations *ratione personae* and *ratione materiae*.³²⁹ As a result, even a violation of the diplomatic immunities would entitle the injured state to resort to countermeasures insofar as they are limited by the principle of proportionality and do not violate norms of *jus cogens* character or humanitarian obligations.³³⁰

³²⁸ Okafor/Obasi/2003/36.

³²⁹ Simma/1985/121.

³³⁰ Ibid/120-1; Also comment by Reuter/YILC/1984/264/(30); Zemanek/1987/40.

3.1.2. The EU

It is a common position today that the law under the EU, especially under the Community pillar, is an autonomous legal order that arguably establishes a self-contained regime with its own effective and sufficient judicial, and to some extent enforcement, mechanisms to deal with violations (see for example the powers of the Commission under articles 226-228 EC Treaty and the suspension measures against the member state which fails to comply with its Community obligations under article 7 of the Treaty on European Union).³³¹ Furthermore, the European Court of Justice has itself rejected a right “on the part of member States from taking justice into their own hands” by not fulfilling their *own* Community obligations.³³² More specifically it has been the persistent position of the ECJ that the member states have forfeited their right to take unilateral measures under general international law.³³³ Despite these two points, the EC Treaty does not cease to constitute a treaty under international law. Thus, the applicability of the general rules of international law on state responsibility and the rules on the law of treaties cannot be entirely precluded even with the express will of the member states participating in the Community structure. This will gain particular significance in the event, no matter how hypothetical at the moment, that this structure collapses or its own remedies are inadequate to respond to persistent violations of the Community law. Accordingly, there are authors who support the view that the faculté of states to resort to countermeasures under general international law remains if the EEC machinery has been used to no avail. As noted, “Through such a fundamental change of circumstances any treaty system excluding the applicability of certain general legal consequences and/or countermeasures will fall back on the general regime.”³³⁴

As further pointed out by Mr Arangio-Ruiz it should not be concluded that whenever a state avails itself of remedies in the context of such self-contained regimes, it abandons once and for all its rights and faculties of unilateral reaction under general international law. Although it will have a duty first and foremost to use the means awarded to it by the specific regime, it will still be entitled to utilise the measures provided under general international law, the extent of which will be determined on the basis of “availability

³³¹ Article 7 (ex Article F.1) of TEU.

³³² See *Commission/Luxembourg* and *Commission/Belgium/Cases/1964/1232*.

³³³ *Fourth/Report/Arangio-Ruiz/1992/35/(98)*.

³³⁴ *Simma/1985/127*.

and effectiveness of the remedies envisaged by the treaty-based 'regime'".³³⁵ He takes the position that the EEC has many general international law features itself, consisting of many international legal relationships among the member states and the community and largely depending on reciprocity. In addition it is subject to general international law rules such as the law on state responsibility.³³⁶ It would thus seem peculiar, at least from an international law point of view, for a member state not to be able to withdraw from the community. For this reason Mr Arangio-Ruiz concludes that the EEC is not really a self-contained regime, at least not in relation to the right to countermeasures as preserved by international law. Thus, it would be unjustified not to recognize such remedies, especially in the event of failure of the community mechanism to resolve the dispute.³³⁷ Consequently, general international law in relation to legal consequences is not entirely precluded from applying at a Community level, at least whenever all the other remedies provided for by the system have been exhausted without success.

The fact that the European Treaties are not to be read in isolation of general international law is further reflected in Article 6 of the Treaty on the European Union which now falls within the jurisdiction of the ECJ. More particularly, article 6 (1) provides that "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States". Paragraph 2 of the same article goes on to add that "the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law". The significance of this provision, especially of paragraph 1, is further reflected in article 7 TEU, which provides that if the principles covered under paragraph 1 are infringed by any member state then the Council may decide to suspend some of the rights deriving from the TEU. Whilst this for some arguably enhances the "self-containment" of the Community legal order, it has been observed that the connotation of article 7 with article 6 (1) in particular is of great significance since it reveals that the action taken by member states is not monitored "solely within the context of Community law, but against the broader background of international human rights principles".³³⁸

³³⁵ Fourth/Report/Arangio-Ruiz/1992/40/(114).

³³⁶ Rosas/2002/51.

³³⁷ Fourth/Report/Arangio-Ruiz/1992/136/(100).

³³⁸ Rosas/2001/60.

The problem of course arises when the Community institutions are unwilling to take action against a member state that violates these fundamental principles established under general international law. According to a narrow interpretation which prohibits countermeasures other than those, and for the reasons established by the Community Treaties as a *lex specialis* regime, no action will be able to be undertaken with the suspension of the obligations arising under these Treaties. If, on the contrary, it is accepted that the general law on countermeasures is applicable in parallel to such regimes, as this is the exact purpose of countermeasures in the first place it may be argued that there is nothing to prevent the suspension even of Community obligations (apart from the Community treaties themselves). Furthermore, if one accepts that a member state of the EU may suspend its obligations arising from the Community towards a third state, like the UK did in 1982 towards Argentina, then the question is raised on what legal ground similar action towards a member state would be prohibited. Had the UK been justified in suspending its obligations arising out of the Community towards Argentina because of a violation that did not fall within the Community context but rather outside it (use of force), then the argument of those supporting that self-contained regimes prohibit the application of countermeasures unless so provided by this regime, weakens significantly. The other member states of the European Communities did not seem to protest at the time that the UK action against Argentina was in violation of its Community obligations, as a regime *lex specialis* and which for this reason would prevail over a general right to countermeasures under general international law. To expect from a state which participates in a specific group of states, such as the EU, and has undertaken certain treaty commitments to another state, whether a member state or not, to comply with its obligations just because this treaty regime provides only for specific and limited grounds of non-performance or suspension (which in both cases it would relate to violations of the obligations arisen under this regime only) would amount to imposing a duty to the injured state to trade with the occupier of its territory and with the violator of its rights.

Finally, the intrusion of general international law, including customary rules, into Community law could not be more clearly indicated than in the *Racke Case*.³³⁹ In this case, which is examined in detail in Chapter 4, the ECJ relied on the customary rule of fundamental change of circumstances to justify a Community regulation which was in

³³⁹ *Racke/1998/3655*.

violation of the 1983 Agreement concluded between the EEC and the Socialist Federal Republic of Yugoslavia.

3.1.3. Human Rights Treaties

It must be said here that whilst certain human rights treaties may provide adequate enforcement mechanisms to remedy any violations, and the European Convention on Human Rights offers such an example, most treaties, especially those in the UN context, lack a compulsory sanctioning or enforcement mechanism thus leaving their implementation to the discretion of member states for so long as compliance best serves their interests. However, even within the EConv.HR, countermeasures are precluded as the Convention creates a series of objective obligations.³⁴⁰ The relevant question one needs to address is whether the violation of such rules permits the application of legal consequences that fall outside the closed “circuit” of self-contained regimes existing in the law on state responsibility, or whether their qualification as self-contained regimes keeps them distant and autonomous from the rules on state responsibility. Simma is of the view that if the mechanisms provided in such specific regimes, which have to be given priority, have been exhausted without the compliance of the violating state, then the rules on state responsibility will come into play to fill the legal gap. He says in this regard:

It has yet to be proved that such a “decoupling” of human rights treaties from the enforcement processes of general international law was actually intended by the negotiating States. As long as such proof is not furnished one has to stick to the premise that multilateral treaties for the protection of human rights, like all other treaties, embody correlative rights and duties between the contracting parties *ut singuli*, resulting in a duty on each party to fulfill its obligations vis-à-vis all the others, and conversely, in a right for each party to demand compliance from every other party and, if necessary, to enforce it through countermeasures.³⁴¹

The above coincides with the view that the international legal order is still largely a consent-built one, therefore making it very difficult to justify preference or prevalence of the general rules of international law over the express agreement of states insofar as norms other than *jus cogens* and obligations *erga omnes* are concerned. Nevertheless, if under a specific legal regime there is no provision for specific remedies, then the rules

³⁴⁰ *Pfunders*/1961/176.

³⁴¹ *Simma*/1985/133.

of general international law will once again take over.³⁴² It can be said in this respect that a specific rule does not extinguish the general rule but rather makes it “temporarily”, and in so long there is agreement to, ineffective. It suspends its effects but only for as long as the special rule has not successfully being challenged or disputed. It was in this context that the PCIJ ruled in the *Chorzow Factories Case* that the omission of the parties to a specific convention to include an obligation to make reparation in the event of an infringement did not preclude such right which it described as a “principle of international law”. It went further to add that “Reparation therefore, is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.”³⁴³

A similar approach was adopted in the *South Africa Advisory Opinion* where the ICJ held that in relation to the right to terminate a treaty nothing could preclude the application of a general rule of international law unless specifically precluded by a specific treaty.³⁴⁴ This position was re-affirmed in the *ELSI Case*,³⁴⁵ whilst the Iran-US Claims Tribunal confirmed this approach by stating that although *lex specialis* would prevail over *lex generalis*, “the rules of customary law may be useful in order to fill in possible *lacunae* of the law of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions.”³⁴⁶

3.2. The Question of Application of Countermeasures Within Self-Contained Regimes in Response to a Violation Under General International Law

3.2.1. The WTO Example

Compliance with the rules of general international law and the relationship between *lex specialis* with *lex generalis* gains significance also in another context, that of the WTO. The WTO, a system that provides for specific rules and sets up its own dispute settlement mechanisms, may deviate, by common agreement of its member states, from

³⁴² Pauwelyn/2001/541/fn44. Also, Lauterpacht noted as early as 1949: “It is the treaty as a whole which is law. The treaty as a whole transcends any of its individual provisions or even the sum total of its provisions. For the treaty, once signed and ratified, is more than the expression of the intention of the parties. It is part of international law and must be interpreted against the general background of its rules and principles”. Lauterpacht/1949/76.

³⁴³ *Chorzow/Factories/PCIJ/A/1929/21* in Mavroidis/2000/764.

³⁴⁴ ICJReps/1971/47/(96).

³⁴⁵ ICJReps/1989/47/(96) in Pauwelyn/2001/541-2.

³⁴⁶ *Amocol/Case/1987/189/(112)* in Pauwelyn/2001/541-2.

the 1969 VCLT and the rules on state responsibility which both constitute general rules of international law, even though in different subject-matters. Whilst reliance on non-WTO law by the WTO judicial panels when interpreting the meaning of WTO rules or filling procedural gaps is quite a common phenomenon, the position differs with respect to the legitimacy of countermeasures within the WTO system for violations outside the system. This is specifically so in view of the fact that a WTO member state may only deviate from its obligations under the WTO on grounds of national security and the general exceptions provided under Article XX of the GATT concluded in 1947. Otherwise the uniformity and effectiveness of trade regulations would admittedly be endangered if member states were entitled unequivocally and on their own discretion to refuse to comply with their treaty commitments under the WTO. Nevertheless, whilst there is the view that countermeasures for violations that fall outside the system should be permissible and could be used as a defence provided that the WTO obligation in question is bilateral in nature (so that its violation by no means will affect the rights of other innocent WTO member states), other scholars believe that they would be unlawful.³⁴⁷ Those supporting the first view make the point that the *lex specialis* will prevail only whenever there is a specific condition in the WTO treaty to prohibit the intrusion of the general rules. In all other circumstances, it will co-exist with the rest of the body of rules of international law.

It remains to examine whether the WTO treaty indeed bans the application of countermeasures provided under international law taken either in addition to other remedies already provided for by the covered agreements, or as an instrument of political and economic coercion for achieving goals outside the limited scope of the WTO.

3.2.2. Legal Nature and Jurisdiction under the WTO

The WTO, apart from containing a body of legal rules indicating the rights and obligations of its member states, sets up its own enforcement mechanisms and dispute settlement procedures. These procedures are contained in the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter DSU) and are to be distinguished from those mechanisms provided under the GATT. In particular, the WTO gives the right to all member states to have automatic recourse to the *ad hoc*

³⁴⁷ Pauwelyn/2003(a)/945/fn135.

judicial panels and the standing Appellate Body which have the power to make legally binding recommendations and suggestions of the way that the state found to be in breach of its WTO obligations could bring its acts in conformity with its treaty undertakings and the recommendations made by the adjudicating bodies.³⁴⁸ The conclusions of these panels may then be veiled with legal effect once they are referred to and adopted by the Dispute Settlement Body. The DSB is the Body before which parties can raise issues relating to the implementation of the panels' reports. The establishment of the panels, the adoption of their reports by the DSB and the authorization of retaliation by means of trade sanctions, have an automatic effect "*unless there is a consensus against it*".³⁴⁹ In other words, the consensus of the member states is not a precondition for initiating the dispute settlement mechanism. This is considered granted, provided that no state expressly indicates its view to the contrary, thus deviating from the regime under the GATT which was structured on the basis of the positive-consensus rule. Moreover, the DSU makes the dispute settlement mechanism under the WTO of a compulsory nature. Whilst under the GATT it was provided that member states "may" authorize the "appropriate" suspension of concessions on the ground of the "seriousness" of the circumstances, under article 22.6 of the DSU the DSB is obliged ("shall") to grant such authorization for the suspension of concessions or other obligations once the defaulting state has failed to comply with and implement the recommendations and rulings within the set time limits. Such authorization is not conditional upon the "seriousness" or the "appropriateness" of the situation, provided that the suspension is "equivalent to the level of the nullification or impairment" in accordance with article 22.4.³⁵⁰ Furthermore, whenever an infringement is found and no agreement for compensation is reached, the complaining state may seek the authorization of the DSU to "suspend concessions or other obligations under the covered agreements",³⁵¹ or in other words, to have recourse to countermeasures although this term nowhere appears in the DSU. Once again, the authorization to resort to countermeasures (which in the context of the WTO can only be bilateral) is automatic and may only be refused if there is an agreement by the member states against them. With the inclusion of specific procedures and remedies for dealing with violations of its rules with the ultimate purpose of inducing conformity (as opposed to any concept of

³⁴⁸ Mavroidis/2000/788.

³⁴⁹ Pauwelyn/2000/336.

³⁵⁰ Charnovitz/2001/803.

³⁵¹ Ibid/792.

punishment),³⁵² the WTO is arguably significantly strengthened and re-enforced as an autonomous legal order that exists in parallel with other regimes provided under international law.

It is therefore not without logic that Article 3.2 of the DSU regards the WTO dispute settlement system as a “central element in providing security and predictability to the multilateral trading system”, one that protects the rights and obligations of its member states. Looking, however, at the question of whether and to what extent WTO member states may only resort to the measures provided under the WTO agreements in response to violations that incur within the WTO legal order, or as to whether WTO member states may have resort to measures provided under the law on state responsibility as well, two schools of thought seem to prevail. The supporters of the first school of thought believe that unless a multilateral treaty sets up a self-contained regime or specifically provides so, the injured state may not limit itself to the measures and mechanisms provided under the infringed treaty, but may also apply “extra-contractual” measures. The supporters of the “solidarity” concept on the other hand, reject the idea of imposition of measures outside the scope of the infringed multilateral treaty. Sachariew opposes the possibility of application and implementation of measures outside those already provided by the infringed treaty as he finds it difficult to understand how such measures would be able to be applied without, or even against, the consent of the other members to the treaty. Furthermore, he believes that such a possibility would be difficult to reconcile with the principle of proportionality if each and every single state to the multilateral treaty decided to apply countermeasures *ut singuli*.³⁵³

With respect to the nature of the WTO, the following has been said:

WTO law is a specific subsystem of international law with specific rights and obligations, specific claims and causes of action, specific violations, specific enforcement mechanisms and specific remedies in case of their violation. The WTO dispute settlement system is also concerned with the distinct but parallel question of the limited jurisdiction and incapacity of the WTO adjudicating bodies to apply and enforce norms other than those of the WTO.³⁵⁴

Therefore, the WTO entitles the judicial panels to adjudicate only on those matters specifically defined and included in the covered agreements thus granting them with

³⁵² Ibid/794.

³⁵³ Sachariew/1988/286.

³⁵⁴ Marceau/2002/755.

limited jurisdiction, whilst in a case of conflict with other norms of international law, to give priority to the rights and duties deriving from these agreements as a regime of *lex specialis*. The WTO judicial panels have jurisdiction to examine complaints made by a member state that a certain benefit afforded to it directly or indirectly under the WTO agreements “is being nullified or impaired” by the action of another member state that fails to meet its treaty commitments.³⁵⁵ However, the limited jurisdiction of the WTO judicial panels does not unequivocally limit the applicable law for the determination of the issues before them. On the contrary, and in the absence of an express provision, the DSB, the judicial panels and the Appellate Body can resort to and rely on all sources of international law in determining the cases brought before them, on the condition that they do not add or diminish the rights and obligations provided in the covered agreements (articles 3.2 and 19.2 of DSU respectively). Therefore, it is suggested that whenever the rights and obligations protected under the WTO agreements are threatened by such other rules of international law that are applicable in the WTO dispute settlement procedure, then priority should be given to an interpretation in agreement and in consistency with the WTO treaty as establishing a regime *lex specialis* (even if that would effectively mean an interpretation in violation of the obligations arising from other international legal instruments).³⁵⁶

As a consequence of the limited jurisdiction provided for under the covered agreements and of the fact that the DSU provides for *specific* remedies that the panels and the Appellate Body are entitled to *recommend* and *suggest* (art. 19 of DSU), the WTO adjudicating bodies do not have the authority to examine claims that fall under another system of international law, such as for example claims concerning the violation of human rights.³⁵⁷ As argued, international law consists of various systems which are not necessarily linked. Whilst a measure may be unlawful in one of these systems, it may be totally legitimate in another. Although states members to the WTO will always be responsible for fulfilling their obligations under other systems of international law, “they cannot use the WTO remedial machinery to enforce them”.³⁵⁸ It is accordingly argued that, “The drafters of the WTO treaty never wanted to provide non-WTO norms with direct effect in WTO law, nor allow states to benefit from free use of the WTO

³⁵⁵ Article 1.1 of DSU.

³⁵⁶ *Bartels/2001/507,518-9*. See *Hormones/Case/1997/(125)*.

³⁵⁷ *Marceau/2002/762-3*.

³⁵⁸ *Ibid/775*.

remedial mechanism to enforce rights and obligations other than those of the WTO treaty.”³⁵⁹

One must also not forget that under article 23, regarded one of the fundamental provisions of the DSU, the power to determine a violation of the covered agreements under WTO and to decide on countermeasures rests upon the WTO judicial bodies. It reads as follows:

(2) Members shall: (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding.

Therefore, as it is suggested, this provision prohibits unilateral action, transferring this competence and the competence to deal with WTO violations to the WTO adjudicating bodies, thus making the WTO a self-contained regime (if such a regime can really exist in international law, as suggested earlier) but precludes the application of the general rules of international law on countermeasures.³⁶⁰ Furthermore, article 23 limits the use of countermeasures according to which:

(7) The necessary prior authorization of the membership before the (winning) Members can use retaliatory sanctions (Article 22 (2) – 22 (6) of the DSU) once all the prior procedural safeguards have been respected.

...

(9) The level of countermeasures is also regulated and WTO arbitrators are given exclusive jurisdiction to determine a level of suspensions of obligations having trade effects equivalent to the level of nullification of benefits (a criteria distinct from the ‘appropriate’ or ‘proportionate’ benchmark under general international law).

It thus seems so far that the remedies permitted under the WTO treaty concern the obligation for cessation, non-repetition and satisfaction only with very strict conditions on the right to countermeasures.

³⁵⁹ Ibid/778.

³⁶⁰ The issue was addressed in the Panel Report in US-Certain EC Products para 6.133: “In short the regime of counter-measures, reprisals or retaliatory measures has been strictly regulated under the WTO Agreement. It is now only in the institutional framework of the WTO/DSU that the United States could obtain a WTO compatible determination that the European Communities violated the WTO Agreement, and it is only in the institutional framework of the WTO/DSU that the United States could obtain the authorization to exercise remedial action”. In Marceau/2002/760.

This suggests according to many that the member states wanted to preclude an open-ended right to countermeasures and wanted to transfer to the settlement mechanisms the responsibility to do so.³⁶¹

Thus, whilst states would still be liable under the general rules on state responsibility for the violation of their general obligations, they would not be held responsible before the WTO adjudicating bodies. At the same time, if a state is found in breach of its obligations under a specific legal regime and before the judicial mechanisms of that regime, the rules concerning its liability formed in the context of this regime will prevail irrespective of what justifications there may exist under general international law. The judicial bodies of such regimes, due to their restricted powers and jurisdiction, will have primary responsibility to apply the law of the specific regime. Koskenniemi and Leino therefore believe that it cannot be asked by specific bodies such as the WTO bodies to expand their competences so as to enable them to adjudicate on matters of general international law. Rather, this will only be accomplished with the establishment of strong institutions to represent non-economic interests.³⁶²

Despite the above, it is to be remembered that the WTO remains a treaty under international law and as such:

the WTO agreement cannot, therefore, be applied in isolation from other rules of international law. Just as private contracts are automatically born into a system of domestic law, so treaties are automatically born into the system of international law. Much the way private contracts do not need to list all the relevant legislative and administrative provisions of domestic law for them to be applicable to the contract, so treaties need not explicitly set out rules of general international law for them to be applicable to the treaty...³⁶³

The WTO stands in the international legal order as an integral part of general international law, and it is thus influenced, evolved, and developed by its rules and principles. The relationship between the WTO and general international law has been described by Pauwelyn as a mutual relationship of enrichment.³⁶⁴

The impact of the general rules on state responsibility on specific legal regimes was also examined by the ICJ in the *Nicaragua Case*. This ruling has often been criticized due to

³⁶¹ Marceau/2002/773.

³⁶² Koskenniemi-Leino/2002/574.

³⁶³ Pauwelyn/2003(b)/1001.

³⁶⁴ Pauwelyn/2001/552.

the Court's failure to determine what the US as a third state could do in view of the recognition that Nicaragua had frequently violated international law by militarily incurring into the territory of neighbouring countries (Honduras and Costa Rica), and by supporting armed bands and rebels. Whilst the Court did not accept that Nicaragua's action amounted to an armed attack which would justify a trigger of the right to collective self-defence, it held that the trade embargo imposed by the US against Nicaragua infringed the 1956 Treaty on Friendship, Commerce and Navigation concluded between the two countries, leaving no room for examining the US action in the light of Nicaragua's own default and in particular the violation of its Charter obligations. In considering article XXI of the Treaty as a possible justification of the US measures, the Court emphasized that the party should prove that such action was necessary to its essential security interests. The Court went on to conclude that from the circumstances of the particular case that no such necessity emerged.³⁶⁵ However, this conclusion also received criticism as according to one view the Court should have examined the trade embargo in the light of either the Treaty itself or the law on reprisals. As noted in this regard:

It cannot be correct, it is submitted, to exclude all those treaty commitments from a possible application of the right of reprisals which are conditioned by specific exception clauses, as the security clause in the respective Treaty. It would be going much too far to see this as a self-contained regime in the sense the International Court of Justice has used this notion in the Tehran Hostages case. Trade agreements in the widest sense are the area where peaceful reprisals must apply in the first place if this area of law on State responsibility should not become obsolete.³⁶⁶

The problem grows in significance since in most of the circumstances treaties allow derivations from the treaty obligations it is only for reasons closely associated with and established by the treaty, restricting in this manner the general use of countermeasures. Zoller in particular argues that precluding states party to a certain treaty from responding to an external violation by violating their obligations under the treaty would render international law ineffective. If one construed treaties, whether bilateral or multilateral, as "locked circles" that prohibit both measures outside the treaty for violations within the treaty and measures within a treaty for violations occurring outside such treaty, this would amount to the alienation of international law by creating several legal regimes existing in parallel but with absolutely no relationship between them. As

³⁶⁵ For an analysis of the ruling see Frowein/1994/372.

³⁶⁶ Ibid/376,426.

she rightly remarks, treaties “would have a legal life of their own independent of their surroundings. States after being their creators, would become their prisoners, the Pygmaliions of international law”.³⁶⁷ Zoller continued that irrespective of their nature, customary or conventional, international rules are related and together form the existing international legal order. To demand states to refrain from temporarily not performing their obligations, any obligations, towards a wrongdoing state by way of reprisals for the violation of any of their own rights, would not only endanger the unity of the international legal order as the treaty would become unconnected with the rest of the corpus of international norms, but it would also remove “the indirect guarantee of compliance which the treaty embodied. Such a situation would be detrimental to both customary and treaty law”.³⁶⁸ In 1977, US Representative Pease was arguing, in support of US measures against Uganda even in violation of its GATT obligations, that there existed “higher principles involved than blind adherence to free trade dogma” and that this agreement should not be deemed as “sacrosanct and inviolable”.³⁶⁹ The position that state action cannot be confined within a specific treaty is also reflected in the statement of the French Prime Minister Briand who, rejecting Germany’s arguments that France could not resort to sanctions outside the Versailles Treaty, said that there still existed other sanctions under international law.³⁷⁰

This view seems to also apply with respect to other international agreements such as those concerning the protection of human rights. Thus, according to the conclusions of the American Law Institute, a state party to an international human rights agreement has at its disposal not only the remedies provided under these agreements but also the remedies provided under general international law in the event of the commission of an internationally wrongful act.³⁷¹ Frowein says in this respect that to preclude action other than that provided under a specific treaty would be to afford weaker protection when needed, especially regarding human rights violations.³⁷²

³⁶⁷ Zoller/1984/85-6.

³⁶⁸ Ibid/87.

³⁶⁹ Pease/1977 in Fredman/1979/1162.

³⁷⁰ See Briand/Statement/131 in Zoller/1984/88.

³⁷¹ Law/Restatement/1987/Vol.2/174 in Frowein/1994/399-400.

³⁷² Frowein/1994/400.

At the WTO level this position is reflected in the *Gasoline Case* according to which “the General Agreement is not to be read in clinical isolation from public international law”.³⁷³ As Pauwelyn observes:

It is true that the DSU has to be considered as *lex specialis* and that it can - and in certain areas, does - deviate from general international law. If any ambiguity were to persist in the DSU, however, as to whether a breach of WTO rules activates the secondary obligation of cessation, recourse should be made to residual international law rules. These rules make clear beyond doubt that in case wrongful act is found, the state concerned has to stop that conduct. The DSU determines, in turn, the means by which the prevailing WTO member is authorized to obtain fulfillment of that secondary legal obligation of cessation.³⁷⁴

Further, the WTO judicial bodies have themselves many times referred to the general principles of international law and customary international law, and to other treaties, whilst article 3.2 of the DSU provides that the agreements under the WTO must be interpreted “in accordance with customary rules of interpretation of public international law”. Furthermore, the power of the WTO panels to refer to other sources of international law for an objective application of the agreements under the WTO is safeguarded under both articles 11 and 7.2 of the DSU.

Bearing in mind the above, the WTO is not strictly speaking a self-contained regime as other rules of international law such as the rules on state responsibility, rules relating to the judicial settlement of disputes, the rules regarding the conclusion, termination, suspension or application of treaties, and the rules on how to resolve conflicts between legal norms are applicable, insofar as there is no provision in the WTO treaty to require otherwise. In conclusion, to say that the WTO law precludes the application of rules of general international law would amount to saying that the WTO is viewed as “a self-contained regime” whilst “the field of general public international law as a fragmented system with sealed-off compartments”.³⁷⁵ In addition to the above, even self-contained regimes do not totally and permanently deviate from the general legal regime, but only to the extent that there is express agreement to the contrary. As Simma points out:

the general regime of State responsibility can only be again called to the foreground after all remedies provided in the ‘subsystem’ have been exhausted without any positive results and when further tolerance

³⁷³ *Gasoline/1996/17*.

³⁷⁴ Pauwelyn/2000/341.

³⁷⁵ Pauwelyn/2003(b)/1029.

of the imbalance of costs and benefits caused by non-performance can no longer *bona fide* be expected from an injured party.³⁷⁶

3.2.3. The General and Security Exceptions under Articles XX and XXI of GATT

Article XX of GATT exempts from the prohibition of trade restrictions *inter alia* measures taken for the protection of human life or health. While such measures are justifiable for the protection of human life or health *within* the territory of the responding state, this becomes less clear with respect to measures taken to protect human life or health in another member state's territory.³⁷⁷ The latter requires a distinction between restrictions of products themselves produced in a manner contravening human rights, and measures taken against products which although not produced in a manner violating human rights, are produced by a member state that violates human rights generally (the term "generally" not to be construed in a vague and ambiguous way). It is suggested that in this latter category one should speak about "sanctions" and not about "trade restrictions" as provided by Article XX.³⁷⁸ This raises two other relevant and quite significant issues, that of whether a WTO member state may respond to the commission of a wrongful act under general international law, such as genocide, by another WTO member state by suspending its obligations deriving under the WTO agreement between them, and whether the answer to this is at all influenced by the fact that the former state is acting on the basis of an *obligation* to respond to genocide, or a mere *entitlement* under general international law. It needs to be remembered here that not all violations of international obligations make it possible for response by any other state indiscriminately. Rather, an examination of the nature of the rule infringed is required in order to be able to determine whether a state may or may not enforce the law by countermeasures or otherwise. Similarly, it is suggested that trade sanctions in the context of WTO against a member state not fulfilling its obligations under general international law are not permitted unequivocally by any other member state, if at all.³⁷⁹ Even more significantly, a distinction is made between unilateral "measures" which enforce an existing right, and "counter-measures" which pre-suppose the violation of an obligation.

³⁷⁶ Simma/1985/395.

³⁷⁷ Bartels/2002/355.

³⁷⁸ Ibid/2002/357-8.

³⁷⁹ Ibid/2002/361.

It is only extraterritorial trade measures in the form of primary rights that can be permitted under Article XX. By contrast, counter-measures in response to the violation of another party of an obligation arising outside the WTO covered agreements are *prima facie* excluded from the blessing of Article XX. Or, to put it more prosaically, WTO members have a right to “protect” or “promote” certain legally defined interests outside their jurisdiction, and in certain cases even in the territory of another WTO member, but they are unable to “enforce” that member’s obligations by way of counter-measures unless authorized to do so under an agreement. In the WTO context, we may therefore dispense with the question, addressed above, as to which human rights obligations will be enforceable by counter-measures.³⁸⁰

As already mentioned above, the WTO is a specific regime that expressly prohibits the unilateral enforcement of the rights and obligations deriving from the WTO agreements. At the same time, under a Ministerial Declaration made in 1982 the GATT Contracting Parties undertook the commitment to “abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement”.³⁸¹ However, it is doubtful that this Declaration creates any legally binding effect.

While article XX safeguards trade restrictions on products that have been produced in a process and method that infringes human rights or health, it exempts from its scope the enforcement of trade measures that take the form of countermeasures. Such countermeasures are not allowed within the context of the WTO, even if these are to be permitted under the general rules on state responsibility. This is qualified by the condition that there has not been an agreement to authorize such countermeasures on the basis that such an agreement does not put at risk the rights and obligations of third parties.

Article XXI on the other hand allows exceptions from the obligations arising under the WTO treaties on grounds of national security. Although WTO member states enjoy wide discretion when relying on security reasons to justify conduct irreconcilable with their obligations, in the sense that the judicial panels are not entitled to look into whether a threat to national security interests indeed existed and the justifiability of the measures taken in response to the threat, states need to exercise their discretion in good

³⁸⁰ Ibid/2002/393-4.

³⁸¹ Ministerial/Declaration/1982. Also in Keesing/1983/32169A.

faith.³⁸² On the basis of this wide scope of the notion of “essential national security” emerging “in time of war or other emergency in international relations” it could be claimed that serious violations of human rights such as genocide fall within the ambit of this provision.³⁸³

The approach followed by the WTO judicial panels and the Appellate Body in relation to the admissibility of trade restrictions was for a long time based on the exemptions under articles XX and XXI. It is suggested nevertheless that there is a differentiation in the position of the Appellate Body in the *Case of Argentina-Footwear*. This case concerned the allegation that Argentina was in breach of its GATT obligations and in particular of Article VIII (1) (a) for having imposed tax on imported products. Argentina attempted to justify its act on the ground that it had agreed to do so with the International Monetary Fund. However the panel did not accept that there were any reasons to exempt Argentina from fulfilling its obligations under the GATT noting the following:

Argentina did not show an irreconcilable conflict between the provisions of its ‘Memorandum of Understanding’ with the IMF and the provisions of Article VIII of the GATT 1994. We thus agree with the Panel’s implicit finding that Argentina failed to demonstrate that it had a legally binding commitment to the IMF that would somehow supersede Argentina’s obligations under Article VIII of the GATT 1994.³⁸⁴

Whilst for a long PERIOD the approach of the WTO judicial panels in determining whether a certain measure was in violation of the obligations deriving from the covered agreements relied on the existence of general or security exceptions, the passage above seems to suggest a new approach. To this end, it may be argued that WTO obligations may be circumvented by an existing conflicting rule of international law.

Despite the significance of the questions (and thus of the answers) arising from a possible conflict between an *entitlement* even to respond to serious violations such as genocide and specific agreements which preclude the general regime of responsibility, it seems that in the context of the WTO judicial panels the specific rules will prevail. The issue remains as to whether the violation of trade obligations arising under the WTO for instance could be justified under state responsibility. This has not been resolved in the

³⁸² See Akande/2003/383.

³⁸³ Brandtner-Rosas/1999/706.

³⁸⁴ *Argentina/Footwear*/1998/(69).

context of the 2001 articles on state responsibility which will be the focus of the next section.

4. The 2001 Articles on State Responsibility

In its commentary on article 50 of the 2001 articles on the law on state responsibility entitled *Obligations not affected by countermeasures*, the ILC recognizes the right of states to enter into specific agreements to preclude countermeasures, as a regime *lex specialis*. Reference is made to this end to the WTO and to the fact that under article 23 a member state may only suspend concessions or other obligations under the WTO agreements only with the prior authorization of the DSB. It is pointed out that:

This has been construed both as an “exclusive dispute resolution clause” and as a clause “preventing WTO members from unilaterally resolving their disputes in respect of WTO rights and obligations”. To the extent that derogation clauses or other treaty provisions (e.g. those prohibiting reservations) are properly interpreted as indicating that the treaty provisions are “intransgressible”, they may entail the exclusion of countermeasures.³⁸⁵

This found expression in part four under article 55 which provides the following:

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

The ILC, in its commentary on this provision, acknowledges the right of states to enter into specific agreements that will depart from the otherwise applicable rules of international law concerning the legal consequences to derive from the violation of a primary rule, namely the law on state responsibility. Whether such deviation is of an exclusive or even complementary/coexisting character thus precluding the general legal regime in its entirety or in part, is a factor to be determined by the will of the parties themselves. It is further commented that there may be circumstances under which the legal consequences to be derived from the breach of an “overriding” rule may be of peremptory character themselves. It is explained here that any response to the violation of a *jus cogens* norm may not extend to the violation of another *jus cogens* norm. More specifically, the ILC highlighted that:

³⁸⁵ Crawford/2002/290-1.

In certain cases the consequences that follow from a breach of some overriding rule may themselves have a preemptory character. For example States cannot, even as between themselves, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to preemptory norms of general international law. Thus the assumption of article 55 is that the special rules in question have at least the same legal rank as those expressed in the articles. On that basis, article 55 makes it clear that the present articles operate in a residual way.³⁸⁶

It seems from the above, and especially from article 55, that the ILC precludes the application of the general rules on the law on state responsibility whenever specific rules precisely and expressly determine the legal consequences to derive as a result of *their* breach. It could also be argued that both the article and its commentary seem to imply that the *lex specialis* regime has to prevail over the general rules of international law in relation to countermeasures, even if such countermeasures are taken in response to a violation of a *jus cogens* norm that lies outside such a *lex specialis* regime. However, article 55 seems to remain silent with respect to the application of the general law on state responsibility within a specific regime as a result of a violation of an obligation that exists outside that regime. In other words, article 55 fails to clarify the relationship of *lex specialis* with countermeasures in response to “extra-contractual” violations and according to which “The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with Chapter II of Part Three” (article 22). From a general international law standpoint, the violation of obligations deriving from the WTO by way of countermeasures in response to a violation that occurred outside that regime will be lawful. This solution will not however prevail if one accepts that the *lex specialis* regime under article 55 will take precedent over article 22 above and under all circumstances. Support for the latter solution upgrades the *lex specialis* to superior law in which the intrusion of general international law is totally and permanently precluded, thus endowing the specific legal regime with absolute nature. In the view of this author however this does not seem to be the most appropriate approach. In her opinion, if it were accepted that countermeasures for reasons falling outside a specific treaty were always precluded then there would be a conflict between the notion of countermeasures itself, which by definition permits as lawful the violation of *any* obligation (with limited exceptions) of international law, and article 55 of the final articles on state

³⁸⁶ Crawford/2003/306-7.

responsibility. How could countermeasures ever be applied if prevalence is unequivocally always given to the *lex specialis* regime? This point gains particular significance in the context of the increasing competences in trade matters of the WTO. Hence, the view which sees WTO rules having an impact “on almost all other segments of society and law”³⁸⁷ could not be more true, especially in the light of the effects of liberalization of trade on environmental or human rights concerns. If the entitlement of states to resort to countermeasures in the form of trade restrictions is taken away, even for the most heinous internationally wrongful acts, then states are not left with many more means and powers to enforce international law. This, however, does not only have significance whenever a breach of a *jus cogens* norm is involved, in which case the prohibition of countermeasures by a state other than the injured must also be taken into account, but also for breaches not of such a serious nature. If it is recognized that the WTO in particular imposes uniform state behaviour in more and more trade areas, then it diminishes significantly the sphere of state action if one accepts that the WTO obligations can only be suspended, terminated or non-performed in response to the violation of another WTO obligation and only under the procedures provided by the WTO agreements. In such an event, the role of countermeasures under the general rules on state responsibility becomes vague and meaningless. Although the need to restrict the powers of the stronger states in relation to countermeasures must not be overlooked, it is also imperative to find other ways of restricting such powers, for example by setting clear legal standards on a state’s entitlement to countermeasures, rather than merely abolishing such powers once and for all.

It is therefore suggested that a correct interpretation of article 55 would be one that supports the prevalence of the mechanisms and regulations recognized under a specific regime in response to the violation of the obligations established within such regime, thus leaving room for countermeasures in response to external violations.

5. In the Risk of Fragmentation of International Law

One of the increasingly interesting areas that has recently attracted the attention of the ILC and which will be at the scope of the present section is that of fragmentation of international law. In the absence of a clear separation of powers in the international

³⁸⁷ Pauwelyn/2001/539.

legal order, international law comprises several autonomous legal regimes and norms which may at times clash between them, endangering the consistency of international law.

The fragmentation of international law is not a new phenomenon. The conflict between the West and the East during the Cold War period prevented the development of the international legal order into a coherent system of norms. Although aspirations about the “completeness” of international law revived with the abolition of the walls between the two worlds, international law was once again faced with fragmentation, but this time because of a new enemy, namely the rapid proliferation of legal systems.³⁸⁸

In its 52nd session held in 2000, the ILC decided to include within its long-term work the problem of fragmentation of international law, acknowledging its increasing importance for the consistency and unity of international law.³⁸⁹ In a study pursued by Mr Gerhard Hafner annexed to the 2000 ILC report,³⁹⁰ the problem of fragmentation appeared as the result of the lack of homogeneity and organization of international law which until the present day consists of several “erratic” legal regimes, systems and subsystems. Despite the contribution of these regimes to the progression of the international legal order, they may also cause friction among norms belonging to different legal systems, often having the effect of creating obligations upon states which are incompatible and irreconcilable between them.³⁹¹ This unavoidably raises the responsibility of a state which, unable to conform to its parallel obligations, is caught up in a mayhem of international rules and legal systems which most of the times lack of a hierarchical nature.³⁹² In 2002, the Study Group established by the ILC during its 54th session to investigate the scope of the question under consideration defined the term “fragmentation” as indicative of the effects of the “expansion and diversification of international law”.³⁹³

Some of the causes identified as contributing to the problem are: the fact that international law consists of a law of co-ordination rather than subordination; that it lacks central instruments which would be responsible to resolve any collisions

³⁸⁸ Koskenniemi-Leino/2002/559.

³⁸⁹ ILCreport/2000/292.

³⁹⁰ Hafner/ILCreport/Annex/2000.

³⁹¹ Ibid/321-2.

³⁹² ILCreport/2002/240/(506).

³⁹³ CAHDI/2002/34.

threatening the uniformity of international law; the emergence, in addition to the synallagmatic obligations provided under traditional international law, of obligations owed to individuals and the international community as a whole; the existence of competitive rules; the widening of the scope of international law with the increase of the actors in the international arena but also of enforcement machineries especially provided for under specific regimes; the existence of several parallel secondary norms which often prevail over the general rules on state responsibility or even the law on treaties.³⁹⁴ In addition, it has been argued that the lack of both a clear hierarchy of norms and homogeneity in the international legal order, the proliferation of international judicial bodies often having jurisdiction over the same matters, the parallel development of often conflicting legal norms and the emergence of a pluralism of legal regimes also exacerbate the problem.³⁹⁵ Furthermore, the accommodation of new principles and new ideas of a “constitutional” nature in the body of international law has only added to the confusion.

More analytically, such inconsistency may, and has appeared, within the context of the *ad hoc* International Tribunal for the Former Yugoslavia on the one hand and the ICJ on the other. In this regard, there has been different approach in the rulings of the ICJ and the ICTFY on specific questions of law. In its Advisory Opinion on *The Legality of Threat or Use of Nuclear Weapons* of 1996 the ICJ ruled that armed reprisals should be proportionate. However, not long after this ruling the ICTFY was concluding that such reprisals were entirely prohibited.³⁹⁶ In *Celebici* specifically the Appeals Chamber signified that there was no hierarchy between it and the ICJ and that it was autonomous from the ICJ.³⁹⁷ In this respect Hafner also draws the attention to the fact that in the light of lack of a specific provision regarding the principle *nullum crimen sine lege* in the Statute of the Tribunal, there could be a conflict between the obligations of a state arising from the establishment of the Tribunal which came into force with a SC resolution on the one hand, and its obligations under the International Covenant on Civil and Political Rights on the other. Furthermore, in the *Belilos Case* the ECHR gave prevalence to the specific provisions of the Convention on the issue of reservations over

³⁹⁴ Hafner/ILCreport/Annex/2000/326-31.

³⁹⁵ Professor Koskenniemi, although not rejecting the problem, very pointedly argues that international law has never been unified so that to risk a possible fragmentation at this instance. However, the term “fragmentation” should be construed as revealing the situation where there exist conflicting legal norms which may undermine the coherence of international law. See Koskenniemi-Leino/2002/576.

³⁹⁶ ICJReps/1996/246/(46); *Martić/Case/1996* in Koskenniemi-Leino/2002/563.

³⁹⁷ *Celebici/Case/2001*.

the provisions of general international law on the same matter.³⁹⁸ In the *Lockerbie Case* the ICJ said that Libya should comply with its obligations under article 103 of the UN Charter even if it was in contravention with other obligations, and in particular with the 1971 Montreal Convention.

It needs to be stressed that a conflict may appear with respect to both primary norms - if there are more such norms regulating the same subject, and secondary norms - if an internationally wrongful act incurs several consequences existing in various systems and subsystems of international law. Especially in the latter case, the existence of multiple enforcement mechanisms, each one of which claims to be the most appropriate for the resolution of a given dispute on the basis of the rules within which it exists and is structured upon, tends to enhance rather than diminish the already “disintegrated nature of international law.”³⁹⁹

The Study Group, in the report it prepared in 2002, highlighted that further consideration should be given among others to the function and scope of *lex specialis* norms and the problem of self-contained regimes, the interpretation of treaties in the light of other relevant rules of international law applicable between the parties and in view of contemporary developments and the concerns of the international community, and the hierarchy of some norms such as *jus cogens*, obligations *erga omnes* and article 103 of the UN Charter.⁴⁰⁰ In its 2003 report, the Study Group drew a line between institutional and substantive elements of the question of fragmentation: while the former deals with the issue of institutional hierarchy of the various actors, especially of the jurisprudence of international courts and tribunals, the latter relates to the incoherence or incompatibility of substantive rules. The Study Group considered that its attention should be turned on the substantive element instead.⁴⁰¹ In identifying the areas in which conflict in relation to the substantive law could emerge, reference was made to conflict arising as a result of different interpretations of general international law, conflict between general and special law, and conflict between specific legal regimes.

Moreover, the Study Group highlighted the need to investigate the conditions of the establishment of self-contained regimes, their scope of application towards general

³⁹⁸ *Belilos/Case/1988*.

³⁹⁹ Hafner/ILCreport/Annex/2000/332.

⁴⁰⁰ ILCreport/2002/241/(512).

⁴⁰¹ ILCreport/2003/269/(416-7).

international law, and the circumstances under which there is a “fall back” to the general rules.⁴⁰² However, the conclusion of the Study Group, at least for the time being, that whether or not a specific regime had failed should be looked for in the regime itself is unsatisfactory as it does not solve crucial issues such as the relationship between countermeasures within a specific regime for serious violations occurring outside it.⁴⁰³

On the other side there are arguments supporting that the plethora of specific legal regimes contributes to the enhancement of the international legal order, whose main defect has always been its unenforceability. A study undertaken in 1996 by the Netherlands Yearbook of International Law concluded that such specific systems, with their own rules and mechanisms, strengthened compliance with the primary rules they establish.⁴⁰⁴ As Koskenniemi and Leino point out:

The ICJ, a human rights body, a trade regime or a regional exception may each be used for good and for ignoble purposes and it should be a matter of debate and evidence, and not of abstract ‘consistency’, as to which institution should be preferred in a particular situation. The universalist voices of humanitarianism, human rights, trade or the environment should undoubtedly be heard. But they may also echo imperial concerns, and never more so than when they are spoken from high positions in institutions that administer flexible standards that leave the final decision always to those speakers themselves.⁴⁰⁵

Along the same lines and in relation to the proliferation of international judicial bodies, Professor Abi-Saab remarks that it constitutes a “healthy phenomenon...in a system that has notoriously suffered, throughout its existence, from the dearth (not to say lack) of objective determinations”.⁴⁰⁶ However, he also highlights the necessity to preserve the unity of the overall system within which special regimes are conceived and created. He thus precludes that there can exist entirely self-contained regimes as otherwise such regimes would not be part of the general legal system, but rather they would themselves become legal orders of their own, “a kind of legal Frankenstein, or Kelsen’s ‘gang of robbers’”.⁴⁰⁷

⁴⁰² ILCReport/2004/290/(319).

⁴⁰³ Ibid/292/(329-30).

⁴⁰⁴ Wellens/1995/28.

⁴⁰⁵ Koskenniemi-Leino/2002/578-9.

⁴⁰⁶ Abi-Saab/1999/925.

⁴⁰⁷ Ibid/926.

Kirchner identifies two dimensions of conflict resolution in international law: the first, which the 1969 VCLT seems to follow, relates to a conflict of laws approach, whilst the second concerns a public law approach which aims to bring coherence in the process of “constitutionalization” of the international legal order by reconciling the phenomena of fragmentation on the one hand and constitutionalization on the other with a view of establishing “an overall public law approach”.⁴⁰⁸ He believes that this reconciliation can be achieved with the incorporation in the *corpus* of international law of constitutional notions such as *jus cogens* norms, and the moving away from a dogmatic perception of international law as being of a contractual nature merely involving public entities.⁴⁰⁹

Undoubtedly, the problem of fragmentation of international law will only increase in significance, especially with the awarding of more contractual freedom to states in the absence of a unified code of conduct in the event that a conflict between two or more specific and general legal regimes occurs. The conclusions of the ILC on the matter are expected with great interest, with the hope at the same time that the ILC will be able to correspond to the big questions that will be born as a result and which go to the very essence of the nature of contemporary international legal order.

6. Conclusion

The notion of self-contained regimes was introduced with the purpose of identifying those regimes which establish a complete legal regime of rights, obligations and legal remedies in the case of their breach and which set up the appropriate dispute settlement bodies and enforcement mechanisms. Thus, the rules of general international law concerning for example the responsibility of states including the legal consequences of a violation such as countermeasures would be precluded from applying insofar as the issue is regulated under the specific regime which prevails. Accordingly, whenever an obligation imposed by this regime is violated, only the measures specifically provided can be applied with the exclusion of any other rules of international law.

However, the “exclusivity” of such regimes in relation to the other rules of international law has frequently been called into question. One needs therefore to remember that specific norms evolved within such specific regimes are formed between certain states

⁴⁰⁸ Kirchner/2004/54.

⁴⁰⁹ Ibid/63-4

to serve certain purposes, and those purposes only. Accordingly, these rules cannot resolve an issue that arises within a different legal regime, but on the contrary they can only deal with issues specifically provided by them. It follows from this that before resorting to or relying on the general norms of international law, one needs to first look at the terms of the specific rules. This is a question of interpretation. If however the method of interpretation does not produce satisfactory answers according to which reliance can be made on the specific rules, then the general rules of international law will once again become relevant. It has therefore been noted in chapter three that no such specific regime can “stand” on its own, as it never ceases to be part of the general legal whole.

Likewise, the need to implement general international law, even when this is explicitly prohibited by specific rules, becomes apparent whenever the only means of protection available to a state injured by a certain wrong, or even by a state acting in the name of community interests, lies in the context of such specific obligations. Otherwise, and as already discussed in this chapter, to give prevalence to these specific rules will be something like attaching to them a status of *jus cogens*, diminishing significantly, to the extent of extinction even, the application of countermeasures under general international law. In addition to that, the practice of states reveals that most of the times countermeasures taken in response to a given wrongdoing involve violations of obligations arising from such specific rules. This issue becomes particularly relevant in the context of the current examination, and specifically in the context of the next chapter. More specifically, if a norm permitting countermeasures by states other than the injured in response to infringements concerning *jus cogens* norms and obligations *erga omnes*, the significance of which has been illustrated as the object of separate examination under chapters one and two, exists or may evolve in the future, then it will serve no purpose if states are precluded from not performing obligations that derive within the context of specific legal regimes. This is because it is usually with the suspension of obligations falling within such regimes that countermeasures become more effective.

Notwithstanding the above, the difficulties which may be created by the fact that whilst a certain conduct may be lawful under one legal regime but unlawful under another raise separate questions which must not be undermined or ignored. It has therefore been shown in this chapter that it is essential that these legal concerns are addressed in a

manner such that the unity of international law, whether always existent or just starting to emerge, is not to be impaired.

With the conclusion of the examination of the relationship between specific rules and the law on countermeasures under general international law, the examination is next continued with the elaboration of existing state practice regarding countermeasures taken in response to violations of collective interests.

CHAPTER 4

Countermeasures in the Name of Community Interests in State Practice

1. Introduction

The legitimacy of sanctions for the purpose of inflicting hardship (punitive or other) upon the targeted state in a broader sense, and in particular irrespective of whether imposed in violation of certain international obligations (countermeasures) or not, has often been put into question. Having developed in a legal system with its roots deeply found on the principle of the sovereign equality of states, the imposition of coercive measures by one state against another was believed to be an “attack” on the foundations of the system itself. It was therefore inconceivable that in a non-hierarchical international legal order a state which was equal with all the others could impose such measures at all. In addition, their effectiveness, especially those of an economic nature, was, and is until to this day disputed. The particularly burdensome and punitive sanctions inflicted upon Germany after its defeat in WWI,⁴¹⁰ have often been blamed for not re-integrating the country into the international community, enhancing in this way a concealed menace which was later to break out with WWII and its catastrophic results for mankind. Furthermore, the sanctioning system provided under the League of Nations which could be triggered only in case of war committed by a member state, but not in response to violations short of war, was not sufficient to prevent forceful acts, such as the bombardment and occupation of Corfu in 1923 by Italy, which argued that its action did not amount to war, or the invasion and occupation of Manchuria by Japan some ten years later.⁴¹¹ Nor was there an organized system to impose sanctions, the application of which was left to member states themselves.⁴¹² Only on one occasion were the sanctions under the Covenant of the League of Nations invoked, unsuccessfully, in particular against Italy for invading Ethiopia in 1935-1936.

In the years that followed WWII and until the end of the Cold War era, the debate on the issue of economic measures evolved around two substantially different and

⁴¹⁰ Elagab/1988/29.

⁴¹¹ Neff/2003/50-1.

⁴¹² Shaw/2003/1166.

conflicting schools of thought. The first of these opinions reflected the view of Western states which, alarmed by the communist threat, showed willingness in certain cases to use economic measures against what they considered to be an expression of communist expansion in the world through serious violations of the most fundamental principles of international law. This is demonstrated *inter alia* by the economic measures imposed by Western states against the USSR for its intervention in Poland in the 1980s. The other trend represented the position of countries belonging to the Soviet bloc that, wary of foreign intervention in what they regarded as falling within their exclusive jurisdiction, opposed any notion of economic coercion. Although economic sanctions were initially conceived as an instrument of the powers of the SC under Chapter VII for the maintenance of international peace and security, practice was soon to show that the antiparathesis of two poles, the East and the West, was much stronger. What the one side proposed would be vetoed by the other unless where, and this rarely happened, no conflicting interests existed, for instance in the case of an arms embargo imposed against South Africa in 1977. As Mayall observed, the trend during the Cold War period was “clearly towards using sanctions as a symbol of ‘alliance’, European or even Third World solidarity rather than as an instrument of international order”.⁴¹³

In the light of the decentralism of the international legal system and the outlawing of the use of force and punitive, even if peaceful, action in contemporary state affairs, it became imperative for states to find alternative ways to protect their rights established, either by custom or by treaty. It is within this context that countermeasures, namely peaceful unilateral remedies which themselves constitute a violation of international law in reaction to another infringement, have evolved. It can be said, therefore, that countermeasures are self-executing measures in the sense that they are applied by the affected states because there exist no other mechanism to remedy a certain wrongdoing, or even if such mechanisms exist they are ineffective or inadequate, especially where immediate action needs to be taken.

The emergence of the concept of the international community as a whole, the recognition of collective values, and the categorization of internationally wrongful acts into serious and less serious violations and which fell within the scope of examination of the first two chapters, were intended to change the perception and understanding of countermeasures especially by states other than the injured, to adopt the terminology

⁴¹³ Mayall/1984/633.

used in the 2001 articles on state responsibility. Despite however the fact that these legal developments contributed significantly to widening the circle of subjects entitled to invoke the responsibility of a state that has committed an internationally wrongful act, the legitimacy of countermeasures in the name of general interests remains unresolved.

This chapter mainly focuses on countermeasures as distinct from other measures such as retaliation that although unfriendly in nature they do not infringe any international rule as some incidents do not fall within the category of third-state countermeasures. Nevertheless, the increasing concern for human rights violations in other countries as reflected in the inclusion in treaties of "human rights clauses" discussed below, the conditionality of foreign aid and assistance upon human rights improvements, and the categorization of states according to their human rights records or their support of terrorism activities, such as the US' often cited reference to countries belonging to the "axis of evil", may be indicative of the determination of states not only not to tolerate but also to take action in response to serious violations of international law. This is the reason that such examples of state practice regarding action which does not however violate any norm of international law are not ignored from the context of the examination carried out in this chapter. It is therefore the opinion of the author that these cases are not entirely free from any legal value for the international community as they may be illustrative of what direction international law may take on the question of countermeasures by states other than the injured in the years to come.

Yet, this should not be construed as meaning that states which wish to impose their own values can find shield behind the notion of countermeasures. For any action in breach of an international duty to be justified, there needs to be a prior violation of a clearly established obligation by the targeted state. In chapter three there was an attempt to illustrate that the increasing state interdependence in economic, financial and trade affairs - the WTO offers just one such example - makes it more likely that, at least in the future, the imposition of a certain measure will be in contradiction of an international obligation arising in a specific legal context (*lex specialis* or self-contained regimes). And while the violation of international obligations by a state directly injured by another violation is widely accepted in state practice, there is ongoing controversy with respect to the acceptability and legitimacy in international law of countermeasures taken

by states that have suffered no direct injury to an interest that is not specifically and individually owed to them but only to an interest that is shared.

What is essentially at the heart of this examination is whether states not injured in their individual but rather in their collective rights, are entitled to take countermeasures against the defaulting state for the preservation of the international *ordre public*. This means that in the absence of a clear and unequivocal rule recognizing such right, the investigation will concentrate on the practice of states. It is state practice that will tell us whether the required, *inter alia*, *opinio juris* exists for the formulation of such a customary rule.⁴¹⁴ It has already been noted earlier that the ILC in adopting the 2001 articles concluded that state practice did not provide evidence for the existence of a rule permitting countermeasures of this kind. Nevertheless, from an examination of the state practice below one can see that it does not exclude third-state countermeasures either. Whilst there exists a veil of uncertainty with respect to the legal ground upon which such countermeasures actually rely, as states have been extremely cautious in their justifications, two possible interpretations may be given in this regard. Either the states resorting to such measures were knowingly acting in violation of international law, or they were relying on something which justified their course of action. Although this by itself would not preclude wrongfulness, it would reveal a certain *opinio juris* that is moving in the direction of gradually formulating a customary rule of international law. This will be examined more analytically after the existing state practice has been analyzed.

Finally, it needs to be pointed out that what this examination attempts to reveal is state action which has been in violation of international obligations rather than domestic laws.

2. Coercive Action Other Than Countermeasures

The decision to enter into trade exchanges with another state belongs entirely within the discretion of each state. In the absence of an international agreement there is nothing to oblige states to engage in economic or other relations.⁴¹⁵ The US position on this matter was always firm, as is revealed by the decades-long imposition of an embargo against

⁴¹⁴ Warbrick/1991/55.

⁴¹⁵ Eagleton/1957. Also Picchio Forlati-Sicilianos/2004/101.

Cuba. More specifically, the US government has always maintained that in the lack of any treaty commitment states possess an inherent right to exercise full control over their trade relations and to take decisions concerning the exports and imports of goods with other countries at will.⁴¹⁶

In these cases where no specific international obligation is involved, state practice offers abundant examples of especially economic responses to serious violations of fundamental principles of international law. Accordingly, when the Suez Canal crisis broke out in 1956 as a consequence of the decision of the Egyptian government to nationalize the Canal, the US distanced itself from the attack undertaken against Egypt by both the UK and France. Wary that such action encouraged Soviet aggression but mostly undermined the role of the UN and the most fundamental principles of the Charter such as the prohibition of the use of force, the US attempted unsuccessfully to resolve the matter within the UN. Although the US found itself on the opposite side to its traditional allies, it was determined to use even its economic power in order to put an end to the UK/French aggressive policies against Egypt. To this end, the US made the provision of loans and aid in oil supplies very much needed by both countries conditional upon a ceasefire.⁴¹⁷ On other occasions, the US did not hesitate to deny military assistance based on human rights considerations in countries such as Chile, Uruguay, Philippines, Brazil, El Salvador, Guatemala, Nicaragua, Ethiopia, Argentina, and South Korea.⁴¹⁸ A similar approach was undertaken by European countries within the framework of regional organizations such as the EU. In particular, and in the context of its external relations with third countries, the EU introduced clauses on human rights considerations according to which the continuation of the cooperation between the EU and these states is made conditional upon respect for human rights.

Nevertheless, the application of economic measures against another state has not been without difficulties or lacking controversy. On the contrary, it is often argued that article 2 (4) of the Charter prohibits not only armed force but also economic force.⁴¹⁹ However, this view does not seem to prevail either in the literature or in state practice. States have frequently resorted to their economic advantages to induce certain conduct by an opponent state. The EU itself uses trade and economic benefits “in exchange” for

⁴¹⁶ US/Digest/1976/577.

⁴¹⁷ Bowie/1974/61-5.

⁴¹⁸ Hufbauer/1985/5,461.

⁴¹⁹ Ferguson Brown/1988-89/66-7.

respect for fundamental rights. The prohibition of economic coercion may however arise in another context, that of non-intervention and the prohibition of the use of economic, political or other measures in order to exert pressure on the sovereign rights of another state for the purpose of securing advantages of any kind. This principle finds expression in article 2 (7) of the Charter and in the 1970 Declaration on Friendly Relations, and its customary character can be doubted with difficulty. In this context, what is prohibited is not *any* economic coercion, but rather coercion that intends to subordinate the sovereign rights of another state.⁴²⁰

3. Foreign Policy and Human Rights

During the 18th century the US policy was much more reserved concerning support of universal moral values due to fears that the US would be viewed as an imperialistic power.⁴²¹ With the protection of human rights at home having a dominant role it was hoped that the American example would exercise influence over other states as well. In the years that followed WWII special focus was given to the anti-communist struggle, even if that meant establishing alliance with countries that supported repression and committed human rights violations themselves. Human rights concerns gave way to national security considerations with the former US Secretary of State, Henry Kissinger, noting that “it is dangerous for us to make the domestic policy of countries around the world a direct objective of American foreign policy...The protection of basic human rights is a very sensitive aspect of the domestic jurisdiction of...governments.”⁴²²

The monolithic obsession to restrain communism in the world to the disadvantage of human rights and other fundamental principles of international law elsewhere came to a halt when US foreign policy was re-formulated so as to include human rights issues. Since 1973, the US Congress pressed for the inclusion of internationally recognized human rights in the foreign policy agenda and which is to be credited with this development. In particular, during the period 1974-78 several legislative measures were adopted to link foreign security and economic assistance with human rights. Among them, Section 32 of the 1973 Foreign Assistance Act associated economic and military assistance to foreign governments with respect for human rights and the 1974 Foreign Assistance Act amended Section 502B according to which the President should

⁴²⁰ Ibid/69.

⁴²¹ Forsythe/1989/102.

⁴²² US/House/of/Representatives/1973/507.

withhold security assistance from governments which were flagrantly violating human rights, subject to the exception of 'extraordinary circumstances' imperative for the protection of vital national interests.⁴²³

One of the principal objectives of President Jimmy Carter was the promotion and protection of human rights for the establishment of a new world order. It was the administration's belief that human rights considerations should form a substantial part of US foreign policy regarding bilateral relations with other states and policy issues, concerning such issues as arms sales and foreign aid.⁴²⁴ Human rights considerations became a central issue of concern for that administration whose commitment to human rights was said to be "absolute".⁴²⁵ According to that view the US possessed both a "legal right" and responsibility under the UN Charter and international law to react to human rights violations,⁴²⁶ although the American foreign policy was not always disassociated from national interest.⁴²⁷ It needs however to be pointed out that most of the measures associating benefits and other assistance with the protection of human rights were adopted at a national level at the discretion of the US government through legislative acts and executive orders, and not because or in violation of specific international legal obligations.

In contrast, Canada, while acknowledging that international law gave states discretion to impose economic measures in response to "objectionable" conduct of another state provided that no specific international obligations were infringed - thus rejecting countermeasures as defined earlier - took a more restrained view. More specifically, "as a matter of legal and commercial policy" economic sanctions should be imposed only on the basis of a SC resolution adopted under Chapter VII, or by states acting collectively in reaction to fundamental violations of international law and peace and security, in pursuance of a UN, even General Assembly, resolution.⁴²⁸ According to the Canadian Government economic sanctions constituted a derogation from the general principle concerning friendly relations among states and therefore any decision for their

⁴²³ See US/Digest/1976/170. Also see Arms/Export/Act/1976; International/Financial/Institutions/Act; International/Development/Act/1977 in US/Digest/1977/221. Yet, when Turkey invaded Cyprus in 1974 the US, in violation of both its domestic and international legal obligations continued providing the former with both military and economic assistance. For a thorough legal analysis of the administration's refusal to suspend assistance to Turkey see Rossides/1991.

⁴²⁴ Kommers-Loescher/1979/212.

⁴²⁵ Carter/1977.

⁴²⁶ Ibid.

⁴²⁷ See statement of Foreign Secretary Cyrus Vance in Salzberg-Young/1977/269-274.

⁴²⁸ CYIL/1983/311.

application should not be taken “lightly”. However, from the above it is not clear whether Canada was objecting to the implementation of sanctions by all states, whether injured states or not, or whether it was confined to states not directly affected by a certain wrongdoing. We would be inclined to accept that this line of thinking related to third state countermeasures, as it would be very hard to prohibit states whose rights have been violated from taking action against the defaulting state, even by way of countermeasures.

In another memorandum by Canada issued in 1985 it was noted that retaliatory action in violation of international law was justified if it came in response to another international illegal act. Stressing that sanctions violate customary rules of international law as reflected in the 1970 UN Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States, it was noted that “it is the purpose behind certain economic measures that serves as the essential criterion to separate legally permissible conduct from illicit conduct”.⁴²⁹ Once again, no clear reference to third states countermeasures was made.

The Netherlands for its part, and following a mandatory decision of the SC in 1968 to impose sanctions against Southern Rhodesia, introduced the so-called Sanctions Bill to fill in the legal loopholes in the national legislation for the implementation of the SC mandate. As noted in the Explanatory Memorandum the Bill was purported to be used as a tool toward the national implementation of international decisions, recommendations or agreements concerning the maintenance of international peace and security, or the furtherance of the interests of the international legal order. When asked to define the phrase “international accords” the Dutch government stressed that it did not want to exclude from the scope of the Bill accords which although they did not constitute a decision of a certain international organization, were taken within the framework of an international organization. Under the explanation given, “decisions” taken by the EEC Council for common action, or under the European Political Cooperation could also fall into this category.⁴³⁰ The Bill allowed the application of measures for *inter alia* gross violation of human rights and breaches of the international legal order that could threaten international peace and security.⁴³¹

⁴²⁹ CYIL/1985/388.

⁴³⁰ NYIL/1978/235-237.

⁴³¹ Sanctions/Bill/1975-76/8.

4. European Community Action

Human rights considerations and the observance of fundamental principles of international law could not be discarded from the ambit of the EU which in some occasions did not hesitate to resort to countermeasures in response to serious infringements of international law, even despite the fact that none of its members had been individually affected. A crucial question that arises in this respect is on what legal grounds the EU, which in the 1980s was essentially structured on the common economic interests of its member states rather than on common foreign policy strategic goals, was allowed to take countermeasures in disregard of its own obligations under international law, for reasons not strictly falling within its exclusive competences, and even against states not members to the Union. This problem, which raises questions especially in the context of international and European law,⁴³² was particularly apparent in the action taken by the EC against Argentina.

The adoption of the 1987 Single European Act and the conclusion of the 1992 Treaty on EU have dramatically re-orientated not only the Community internal policies, but also its external policies on issues of defence, security and human rights in such a way so as to enable one to argue that it is upon these changes that the exercise of countermeasures by the European institutions can now rely.⁴³³

The incorporation of articles 6 and 7 in the TEU and the particular weight the EU attaches to human rights considerations in its external relations as can be revealed from the numerous "human rights clauses", the clear interconnection of human rights with unilaterally granted benefits and trade preferences, the emphasis given by the ECJ to human rights as an integral part of the general principles of law, and the political conditions including respect for human rights as preconditions for accession to the EU, are all indicative of the increasingly growing interdependence between the EU and these internationally sacred values.

The legal framework applicable in the case of implementation of measures decided at a Community level in the form of embargoes on a wide spectrum of areas, withdrawal of unilaterally afforded benefits or suspension of treaties concluded by the Communities,

⁴³² Ibid/185.

⁴³³ Ibid/186.

often varies according to whether there exists a SC resolution authorizing or even imposing such measures. In the former case, the decision of the SC will prevail in accordance with article 103 of the Charter that provides that the obligations deriving therefrom should prevail over all other international obligations. Until 1970 the implementation of UN measures was largely perceived as falling within the domain of the member states and thus no regulations were adopted in order to give them legal effect at a Community level. This was meant to change in 1970 with the establishment of the European Political Co-operation, institutionalized in 1987 with the Single European Act. The EPC intended to enhance the cohesion and unity of the member states regarding issues in the interests of the Community such as external policies and to establish, subject to the consensus of all member states, a “common European identity in their foreign affairs.”⁴³⁴ According to this system, it was through Council Regulations adopted after the political consultation of the member states in the context of the EPC that UN sanctions were given effect. With the adoption of the TEU such measures can now take effect under the Common Foreign and Security Policy pillar and the EC. More specifically this practice is reflected in article 301 (formerly article 228a) which provides for measures adopted by qualified majority by the Council acting on the Commission’s proposal, whenever “it is provided, in a common position or in a joint action adopted by the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries”. The Amsterdam Treaty, while not amending this provision, introduced a new article, article 300 (2) under the EC treaty, according to which the application of an agreement may be suspended with a decision taken by the Council (by qualified majority or unanimity according to the matter under consideration) without the consultation of the European Parliament and without making reference to a decision taken under the CFSP.⁴³⁵

Difficulty is raised with respect to economic measures imposed in violation of existing treaties or other international commitments and in the absence of SC authorization. The EC was faced with considerations of this legal nature in the case of the gross violations in Uganda, thoroughly analyzed below. The fact that the EC continued its payments to the brutal regime of Idi Amin finds explanation as noted “in the limited possibilities for

⁴³⁴ Ibid/186-7.

⁴³⁵ Paasivirta-Rosas/ 2002/209.

reaction which general international law offered".⁴³⁶ Moreover, and as previously discussed in chapter 3, under the law of treaties a specific agreement can be suspended or terminated on the ground of human rights considerations only if the treaty so provides or if the human rights violations go against the very object and purpose of the treaty.⁴³⁷ Furthermore, such measures do not necessarily aim at restoring international peace and security, like UN measures, but rather they "constitute a deliberate reaction against international law violations by other States".⁴³⁸ They can only be justified if they are provided under another treaty or a rule of customary international law, such as countermeasures, if allowed at all. They must further be distinguished from acts of retaliation which concern unfriendly, yet internationally lawful conducts. This is the case of withdrawal of unilaterally awarded benefits, and many such examples can be found at Community level. Since such benefits constitute the exercise of sovereign rights their withdrawal does not constitute an internationally wrongful act.⁴³⁹

The issue differs with respect to measures taken in violation of specific conventional or other international obligations. This has driven the Community when negotiating agreements with third states to include human rights clauses. This admittedly affords the Community institutions flexibility granting them the right to terminate or suspend a treaty towards a state that does not conform with such principles, without having to rely on general international law for the non-performance of an agreement.⁴⁴⁰ As noted in this regard, a human rights clause "does not seek to establish new standards in the international protection of human rights. It merely reaffirms existing commitments which, as general international law, already bind all states as well as the EC in its capacity as a subject of general international law", although it was acknowledged that such a clause derived its legitimacy from an international agreement.⁴⁴¹

From the examination of state practice it can be seen that the suspension or termination of a treaty has often been justified not on the provisions of the treaty itself but rather on rules of customary international law like fundamental change of circumstances or impossibility of performance as a result of a state emergency or civil war.⁴⁴² It is

⁴³⁶ Riedel/1999/723.

⁴³⁷ Ibid/724.

⁴³⁸ Paasivirta-Rosas/2002/210.

⁴³⁹ Ibid/212.

⁴⁴⁰ Brandtner-Rosas/1998/474.

⁴⁴¹ Ibid/475.

⁴⁴² Riedel/1999/724-5.

therefore suggested by this author, as already discussed in the previous chapter, that should the invocation of customary rules of the law of treaties be accepted, then equally the customary rules of the law on state responsibility, including the rules on countermeasures, should also be able to apply within a specific treaty, even for reasons not specifically provided by it. Riedel and Will argue that since the EC is not a party to human rights treaties, it would “possibly” be entitled to take reprisals (countermeasures) only for “violations of the minimum standards of human rights protection recognized in customary international law as valid *erga omnes*”.⁴⁴³ Of course, the main challenge here will be to prove that there indeed exists a right to countermeasures by a state other than the injured under customary international law.

5. An Examination of Responses to Violations of Collective Interests in State Practice

It is suggested to divide the investigation of state practice into two categories. In particular, the first category will include cases which although they do not involve the infringement of specific international obligations arising either from treaty or custom, they are illustrative of the determination of states to exert economic and other pressure against states in response to serious violations of fundamental collective interests. In this category reference will also be made to measures whose characterization as lawful countermeasures is disputed not because they are not in contravention with any international norm, but rather as not fulfilling one of the other conditions of countermeasures, namely the fact that they must be taken in response to a previously committed internationally wrongful act. The second category will include state practice which in the opinion of the author supports the implementation of countermeasures by states other than the injured in response to violations of obligations established either for the common good of a group of states, or the international community as a whole.

The results of the current research in either category are cited by way of chronological order rather than significance.

⁴⁴³ Ibid/726.

5.1. State Action Not Amounting to Countermeasures

5.1.1. Soviet Action against Israel (1956)

In 1956 the Soviet Union obstructed the shipment of petroleum by the Soviet Petroleum Export Corporation to Israeli importers by not granting an export license to the company that had reached the agreement with Israel. This action was taken as a consequence of Israel's aggression against Egypt in the Suez Canal crisis.⁴⁴⁴ When the dispute was brought by Israel before the Soviet Foreign Trade Arbitration Commission the petroleum Corporation invoked grounds of *force majeure* for its failure to honour its agreement.⁴⁴⁵ It is observed that under international law a state-owned enterprise may invoke *force majeure* whenever the performance of its treaty commitments towards a private party is not possible due to a government order or decision of the controlling state, for reasons not foreseen at the time of conclusion of the agreement. In this event the state-owned company is treated by law as a private enterprise, and thus discharged of its obligations under the treaty, provided that certain conditions are met with.⁴⁴⁶

In addition to the above measure the Soviet government decided to cut off diplomatic relations with Israel by recalling its ambassador, a measure that does not infringe specific international obligations.⁴⁴⁷

The significance of this particular incident does not lie in the fact that it provides evidence of state practice supporting countermeasures by a state whose rights have not been individually infringed, but rather in the fact that it reveals the determination of one state, here the Soviet Union, to inflict economic burden upon another, Israel, for violating a fundamental principle of international law, namely the prohibition of the use of force. Of course the position would substantially change had the Soviet Union have possessed a specific obligation under customary or conventional international law to export petroleum to Israel or to conduct trade and commercial activities with it.

⁴⁴⁴ Doxey/1971/33-34; also Lillich/1976/24.

⁴⁴⁵ US/Digest/1970/861.

⁴⁴⁶ Scott-Maravilla/2002/82.

⁴⁴⁷ *Suez/Canal/Crisis*.

5.1.2. OAS Action Against the Dominican Republic (1960)

In the light of alleged subversive and aggressive acts against Venezuela and its involvement in the attempted assassination of the Venezuelan President, the OAS decided to take action against the Dominican Republic in a resolution adopted in 1960 and with which all OAS member states had to comply under the Treaty of Rio de Janeiro.⁴⁴⁸ The resolution condemned the Trujillo regime for acts of aggression and intervention against a foreign country whilst it authorized the implementation of a number of measures against the Dominican Republic. This action was justified under article 6 of the Treaty which authorized the OAS to take action whenever the territorial integrity or political independence of any American state was affected by any situation that posed a threat to the peace in the continent.⁴⁴⁹ The measures initially involved the cutting off of diplomatic relations, the partial interruption of economic relations and an export ban of military equipment to the Dominican Republic which later extended to the prohibition of exports of petroleum and petroleum products and lorries. This action was to have effect as long as the Dominican Republic constituted a threat to the peace and security of the hemisphere. It needs to be pointed out that that was the first time that the OAS decided the imposition of sanctions against a member state.

In accordance with Articles 53 and 54 of the UN Charter the Secretary-General of OAS reported the action to the SC. The Soviet Union argued that under article 53 only the SC was entitled to authorize the application of enforcement action by regional organs against any other state, and for this reason the OAS was not empowered to take any action against the Dominican Republic.⁴⁵⁰ The US responded that what article 53 actually precluded was forcible action and not economic, commercial and other peaceful measures, although this was not the position taken by the US during the drafting of the UN Charter.

The OAS member states, although acting on the basis of a treaty authorization, were third states to the violations that were allegedly committed by the Dominican Republic. It is in this sense that their reaction in defending principles which had been established for the collective interest of the OAS and not for each one of them individually gains

⁴⁴⁸ Akehurst/1967/188-89.

⁴⁴⁹ Ibid/192. Nevertheless, it needs to be mentioned that the Bogota Conference of 1948 which led to the drafting of the OAS Charter intentionally did not incorporate the notion of sanctions for human rights violations except whenever international peace was threatened. Ibid/205.

⁴⁵⁰ Claude/1964/49.

significance in the context of this examination, even if their action, in the form of the measures mentioned above, is not found to be in breach of any international obligation.

5.1.3. The Case of Greece and the European Convention on Human Rights (1967)

On 21 April 1967 a military coup emerged in Greece which resulted in the overthrow of the democratically elected government and in its substitution with a dictatorial regime. To establish its powers the regime proceeded to adopt numerous measures aiming at suppressing any political opposition or reaction. With the Royal Decree of April 1967 a state of emergency was declared and certain Constitutional provisions were suspended. In June 1967 the Standing Committee of the Consultative Assembly of the Council of Europe passed a resolution deploring the situation in Greece and calling upon the signatory states to the EConv.HR, on the basis of what was then Article 24, to refer the so-called Greek case to the European Commission of Human Rights.⁴⁵¹ A few months later, and in compliance with the resolution, Denmark, Norway and Sweden initiated proceedings against Greece before the Commission arguing that the Royal Decree was in violation of the Convention, and in particular of the right to freedom from arbitrary arrest and detention (art. 5), the right to a fair trial (art. 6), the right to private and family life (art. 8), the right to freedom of thought, conscience and religion (art. 9), the right to freedom of expression (art. 10), the right to peaceful assembly and association (art. 11), the right to an effective domestic remedy (art. 13) and the right not to be discriminated against on the basis *inter alia* of political beliefs (art. 14). They also claimed that Greece had improperly invoked Article 15 of the Convention that allowed for derogations from the Convention as there existed neither a war or public emergency threatening the life of the nation, nor were the measures adopted and their continued application under the Royal Decree “strictly required by the exigencies of the situation”. Just days later, the Netherlands filed similar proceedings against Greece.

Two questions must be addressed here. The first has to do with whether Denmark, Norway, Sweden and the Netherlands possessed a right to file proceedings against Greece under either the Convention or international law, whilst the second is to consider whether such action resulted from these states being individually injured, or injured in their collective interests, either as members of a specific group or of the international

⁴⁵¹ The resolution is reproduced in Council of Europe, Directorate of Information, Doc. B (67) 37 (26.6.67).

community as a whole. This has significance for the question whether these states were entitled to resort to countermeasures or not.

On the basis of former article 24 of the Convention any contracting party was entitled to bring a claim before the Commission for alleged violations by another party, irrespective of the fact that the alleged violation was not directed against the nationals of the state bringing the action. In this regard no special interest was needed to be shown. Therefore, the answer to the first question above is that under the EConv.HR, which constitutes an international agreement, the member states were indeed entitled to seek judicial review by referring a case of infringement to the bodies established under the Convention for the supervision and safeguarding of its provisions.

In relation to the question whether such a contracting state would be bringing an action under former article 24 as an injured state or not, the Commission had previously concluded that:

A High Contracting Party, when it refers an alleged breach of the Convention to the Commission under Article 24, is not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as bringing before the Commission an alleged violation of the public order of Europe.⁴⁵²

It is clear from the above that the four states acting against Greece were not acting on the ground that there had been an infringement against rights individually owed to them. While the alleged violations took place thousands of miles away from the four complainants, none of their nationals or their other interests had suffered any kind of direct injury from Greece's action. On the contrary, it was Greece's own nationals that were the direct victims of the violations. The four countries rather took the action in defence of certain values established for the collective interest and good of the countries party to the Council of Europe. Their action therefore falls under what it now constitutes article 48 (a) of the ILC 2001 articles on state responsibility.

During the period concerned, once a complaint arrived before the Commission, the Commission had to examine it and try to reach a friendly settlement of the dispute among the parties involved. In the absence of a consensus, the Commission had to refer its conclusions on the facts and on the alleged violations of the Convention to the

⁴⁵² *Austria/ECHR/1961/140.*

Committee of the Council of Ministers which could decide to send the case to be examined by the Court. However, at the time of the dispute concerned, Greece had not accepted the jurisdiction of the Court, and as a result the case could not be referred to it without its consent. Whenever a case could not be referred to the Court, former article 32 gave the Council of Ministers some adjudicatory jurisdiction to determine the dispute, although this capacity was criticized as the Committee of Ministers constitutes a political rather than a judicial body.⁴⁵³ Once the Committee of Ministers concluded under this power that there had been an infringement of the Convention, it could order the violating party to take all the appropriate measures suggested by the Commission to comply with its obligations, and could set a deadline by which date the state should conform. Among other measures that could be taken under this provision, the Committee of Ministers could request the Greek government to abolish the Royal Decree Act that established the state of emergency and suspended the Constitution. In the event that there was no compliance, former article 32 (3) provided that “the Committee of Ministers shall decide...what effect shall be given to its original decision and shall publish the Report”. At the same time, the Statute of the Council of Europe allowed the expulsion of a contracting party whenever it violated “the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms”.

As in the case of measures imposed by the OAS against the Dominican Republic, here also the four states participating in the proceedings against Greece were acting on the basis of an international treaty to which they adhered. However, the fact that the four countries here were defending common principles and values, those of fundamental human rights should not be overlooked. It is also not without significance that Greece, feeling the pressure of the proceedings against it, took the decision to withdraw from the Council of Europe. Although this was not the reaction the applicant states had wished for, it does reveal the pressure that the dictatorial regime in Greece faced in the international arena, something that would not have happened had no such action been instigated in the first place. When similar action was taken some years later by the Scandinavian states, the Netherlands and France against the military regime that assumed power in Turkey at the beginning of the 1980s, the judicial organs of the Council of Europe stressed that the Convention is a “constitutional instrument of

⁴⁵³ Buergenthal/1968/446.

European public order in the field of human rights”,⁴⁵⁴ which goes beyond merely establishing bilateral commitments between its member states. Rather, it creates objective obligations entitling all states to seek their observance.⁴⁵⁵

The situation in Greece did not leave unaffected its relations with the EEC with which it had been connected pursuant to an Association Agreement since 1962. The European Parliament, in reaction to the military *coup d'état*, passed what was later described as an unprecedented resolution expressing its solidarity with the Greek people who were “suffering in defense of the ideals of freedom and democracy”.⁴⁵⁶ The Parliament also made clear that for as long as Greece lacked democratically elected institutions the Association Agreement was at stake and it would not be implemented fully unless Greece respected its obligations under the EConv.HR. The *coup d'état* also provoked a number of formal parliamentary questions to the Commission of the European Communities.⁴⁵⁷ More specifically, and at the same time that Denmark, Sweden, Norway and the Netherlands instigated proceedings against Greece before the EComHR, the Commission of the EEC rejected a \$10 million loan for development, despite the fact that the request had already been approved by the European Investment Bank.⁴⁵⁸ Most importantly however, and despite the clear uncertainty as to how to deal with the situation that emerged in Greece, the Commission decided to carry out those parts of its Association Agreement with Greece which involved specific obligations like in the areas of trade and tariffs, while to associate those areas which still required negotiations and were not bound by specific legal duties with political reform in Greece.⁴⁵⁹ Rejecting claims for the renunciation or suspension of the agreement the Community institutions relied upon legal grounds in view of the absence of specific clauses in the agreement.⁴⁶⁰ What is interesting is whether the EEC had the competence to “freeze” certain parts of the agreement since the latter made no specific provision that could be accommodated to the situation that emerged as a result of the coup, apart from some reference in the preamble for the need to strengthen peace and liberty. Accordingly, the political criteria of the Greek association could only be drawn by inference, whilst it remained unclear what the EEC could do in case of their violation.⁴⁶¹

⁴⁵⁴ *Chrisostomos/ECHR/1991/113/(121)* in Frowein/1994/345.

⁴⁵⁵ Frowein/1994/360.

⁴⁵⁶ OJ/1967/No.10/2058. Also Parlement/Europeen/Debats/1967/11-20.

⁴⁵⁷ For instance see OJ/1967/No.243/2.

⁴⁵⁸ *New York Times/1967/14*. See Buergenthal/1968/448.

⁴⁵⁹ *Coufoudakis/1977-78/117-8*.

⁴⁶⁰ *Ibid/128*.

⁴⁶¹ *Ibid/121*.

At the same time, Greece itself was very reluctant to challenge the Community and the legality of its decision towards it since the Community had been extremely cautious in enforcing its specific legal obligations arising from the agreement.⁴⁶²

Yet, Buergenthal notes that were Greece to be expelled from the Council of Europe, the EEC itself would be under tremendous pressure to suspend its Association Agreement with Greece. To conclude:

But even if the Community should for legal reasons be unable to comply with a demand for the complete suspension of the Association Agreement, it is clear that Greece would be economically harmed by a Community policy which limited co-operation with Greece exclusively to a grudging compliance with the clearly-defined obligations of the Association Agreement and left unexecuted the wider aims of this treaty.⁴⁶³

Buergenthal is of the opinion that it would have been very difficult to suspend the Association Agreement in its entirety as a consequence of the coup because apart from a general reference in the preamble of the Agreement for the safeguarding of peace and liberty by the parties, there was no other clause upon which such action could be based.

The hesitation of the EEC member states to suspend their Association Agreement with Greece reveals the scepticism which existed at the time regarding the imposition of countermeasures by states other than the injured in international law. However at the same time the European states, through the above described action instigated in the EEC and the Council of Europe, did not remain inactive in respect of the flagrant human rights violations taking place in Greece, therefore enhancing the notion of economic and other coercion in the name of collective interests.

5.1.4. Netherlands Action against Surinam (1980)

With the overthrow of the government of Surinam in February 1980 by Colonel Bouterse and in response to the serious human rights violations taking place on the territory of Surinam, the Netherlands decided to suspend its Treaty on Development Cooperation, circumventing the normal procedures provided under the treaty and invoking as its justification the principle *clausula rebus sic standibus* (fundamental

⁴⁶² Ibid/126.

⁴⁶³ Buergenthal/1968/449.

change of circumstances) which would have immediate and direct effect.⁴⁶⁴ Two elements need to be fulfilled for the lawful application of this doctrine: first, that the changed circumstances constituted an essential basis for the consent of the contracting parties when concluding the treaty and secondly, that the changed circumstances radically altered the obligations to be performed under the treaty. It has been argued in this regard that the suspension of the treaty by the Netherlands could not be justified on the ground of change of circumstances since the condition for respect of human rights did not constitute the basis of the agreement between the two countries.⁴⁶⁵ Most significantly however, the Dutch government attempted to justify its act upon the fact that the Surinamese actions were in violation of the International Covenant for Civil and Political Rights to which both countries were signatories, in particular the rights to life and freedom from torture which were regarded as establishing obligations *erga omnes*.⁴⁶⁶ Since the Netherlands was not acting as an injured state but rather was upholding the protection of fundamental human rights established for the collective good, this example sets another significant precedent of state practice supportive of action for the protection of collective interests, despite the fact that the argument put forward by the Dutch government in order to justify its decision did not rely on a right to third-state countermeasures, but rather on the ground of fundamental change of circumstances. It is for this reason that the ILC itself, in the commentary of article 54 of the final articles, distinguished this example from other cases which clearly set a precedent in favour of countermeasures by states other than the injured.

5.1.5. US Action Against Iraq (1980)

This incident arose in early 1980 as a result of an attack upon an Israeli kibbutz by the Arab Liberation Front which Iraq allegedly supported. The US, in response to this attack decided to suspend an agreed sale to Iraq of \$208 million worth of turbine engines thus subjecting it to countermeasures on the ground of terrorist involvement. These trade restraints lasted until 1982, and in 1984 the US imposed a further embargo on chemical exports to Iraq that could be used for the development of chemical weapons.⁴⁶⁷

⁴⁶⁴ Okafor/Obasi/2003/98-9. Also Hufbauer/1985/726.

⁴⁶⁵ Chinkin/1996/196.

⁴⁶⁶ Okafor/Obasi/2003/100.

⁴⁶⁷ Hufbauer-Schott-Elliott/1990 in Petman/2004/366.

This incident, although not widely referred to in commentary may indeed offer another example of possible third state countermeasures in response to serious violations of international law, in view of the fact that it is not entirely clear whether the agreed sale was the object of a private contract, or whether it constituted an agreement between the US and Iraq in which case the suspension would be in breach of international law. Furthermore, as it has often been stressed, there needs to be a specific obligation clearly infringed by the targeted country before countermeasures can be justified against it. For the US to be entitled to resort to countermeasures, although as already seen this is very much disputed as the attack was not directed against it, it would need to establish that Iraq, by clearly and unequivocally supporting terrorism, had violated a customary rule of international law which created obligations *erga omnes*. In this respect this case seems to be similar to the claims, examined below, made by the Arab states against the US and other countries for supporting Israel, allegedly contributing in this way to the violation of an *erga omnes* obligation. Provided that this requirement is fulfilled and that the US with the suspension of the turbine engine sales was in breach of its own treaty obligations towards Iraq, then the case would enhance state practice regarding the recognition of a right to third state countermeasures. Due however to the doubts which exist relating to whether certain state obligations had been infringed by the US in the particular case, it is regarded necessary to include this example in that category of cases not clearly illustrating state practice in support of third-state countermeasures. In any event, the significance of this incident should not be undermined as it reveals the determination of one state not directly injured by a given wrongful act to take such measures necessary for the protection of what can arguably be described as collective interests.

5.1.6. The Bonn Declaration (1978) and the Hijacking Incident (1981)

In 1978 the Heads of State and Government of the seven most industrialized countries of the world⁴⁶⁸ issued the so called Bonn Declaration, which reflected their determination to take immediate action against a country which refused to extradite or prosecute individuals involved in the hijacking of aircrafts or to return such aircraft by halting "all incoming flights from that country or from any country by the airlines of the country concerned". This section will not focus on the question of whether the Declaration could lawfully create obligations and be directed against innocent states that

⁴⁶⁸ Canada, France, the UK, the US, West Germany, Italy and Japan.

have committed no wrong. The Bonn Declaration however may be useful in the context of the current examination concerning the existence of enough or substantial state practice to support the existence of a right by not directly injured states to resort to countermeasures by suspending their own aviation obligations towards the targeted state in response to violations of obligations *erga omnes*.

From the wording of the Declaration it can be noted that the participating states took the commitment - whether legal or political remains to be seen - to take such action against a state refusing to extradite or prosecute, irrespective of the nationality of the aircrafts involved in the hijacking and the individuals affected therefrom, or the territory on which such hijacking took place, and irrespective of whether that state had accepted the Declaration.⁴⁶⁹ One of the issues that needs to be addressed here is on what legal grounds such a Declaration could establish obligations, especially against a state not having consented to it. It is submitted that any legal obligations regarding the return of the hijacked aircraft or the prosecution or extradition did not arise as a result of the Declaration, but instead, either from a customary rule of international law having an *erga omnes* character, or the Tokyo Convention on Offences and Certain other Acts Committed on Board Aircraft⁴⁷⁰ and the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, provided of course that the targeted state had been a party to these instruments.⁴⁷¹ Therefore, if a state is not a party to any of these international agreements it is difficult to establish its international responsibility, even more so because the Declaration does not seem to be part of these Agreements establishing special enforcement mechanisms in the event of their violation. Moreover, Busuttil argues that since the two Conventions have not been universally endorsed, it is very difficult to say that they reflect customary norms of international law.⁴⁷² Accordingly, the mere fact of refusing to comply with any of the terms of the Declaration does not establish the responsibility of the state.⁴⁷³ In addition, the Declaration does not reveal an intention on the part of its parties to strengthen it with legally binding effects, as a result of which it is doubtful if it creates any legal obligations even as between them.⁴⁷⁴

⁴⁶⁹ ILM/1978/Vol.17/1285.

⁴⁷⁰ See Busuttil/1982/476.

⁴⁷¹ Ibid/477.

⁴⁷² Busuttil/1982/480. Also Chamberlain/1983/620.

⁴⁷³ Busuttil/1982/481.

⁴⁷⁴ Ibid/487.

Legal considerations regarding the Bonn Declaration have arisen from the decision of the seven states which adopted it to implement its provisions against Afghanistan. In March 1981 a Pakistani aircraft was hijacked and taken to Afghanistan. In view of the Afghan government's failure to cease giving refuge to the hijackers the seven states condemned the decision of the Afghan government as being in flagrant violation of the obligations arising from the Hague Convention to which Afghanistan was a party, and considered a suspension of all flights to and from Afghanistan as provided under the Bonn Declaration unless Afghanistan complied with its obligations. A few months later, and in the light of no progress having been made by Afghanistan, the UK, France and West Germany, the only countries having air agreements with the country, decided to denounce their air services agreements with Afghanistan. However, it is imperative to examine on what legal grounds these three states based their actions. In other words, they could only have lawfully taken such action, excluding the question of the lawfulness of third state countermeasures, if the obligation breached was individually owed to them or specially affected them or if it was an obligation *erga omnes*. Chamberlain suggests in this regard that although it was difficult to conclude that the obligations entailed in the Hague and Montreal⁴⁷⁵ Conventions were part of customary international law, he is of the opinion that "certain principles of customary international law can be formulated on the basis of these Conventions as well as of other international instruments" and in particular various UN and ICAO resolutions.⁴⁷⁶ Therefore, according to his view all states possessed a duty under customary international law not to allow their territories to be used as safe havens for terrorists and individuals involved in acts of hijacking, provided that their refusal to extradite or prosecute was not the result of technical difficulties but rather of intentional systematic failure to do so.⁴⁷⁷ However, the fact that all states have a certain duty does not necessarily imply that in case of its violation all states have an interest to react. Chamberlain argues in this regard that if the wrongdoing state is a party to any of the Conventions mentioned above, then the other states parties will be entitled to take retaliatory measures against it under general international law, as that state is in breach of an international obligation owed to all the parties to the Conventions. He finds it however difficult to support the legitimacy of retaliatory measures against a state that is not party to these conventions, unless the

⁴⁷⁵ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed in Montreal, 23 September 1971 in Chamberlain/1983/617.

⁴⁷⁶ Chamberlain/1983/629.

⁴⁷⁷ Ibid/630.

other states are directly affected by the violation.⁴⁷⁸ Although it is not entirely clear, it seems to be suggested that only all the other parties to the Conventions would be entitled to respond to a violation of an obligation *erga omnes partes* which has been established for the collective interest of the group. Therefore it would be essential, adopting this approach to establish whether both Afghanistan and the states taking action against it were parties to these Conventions.

The case becomes even more complicated by the fact that the denunciation of the agreements by the three countries did not take effect until one year later, something that was consistent with the terms of the agreements themselves.⁴⁷⁹ Chamberlain in particular criticizes this extremely politically cautious position of the UK, West Germany and France to give one year's notice before actually giving effect to the denunciation of their respective agreements with Afghanistan.⁴⁸⁰ Finally, it needs to be reminded that countermeasures must be of a temporary character. Issues of suspension or termination of a treaty fall within the law of treaties and not the law on state responsibility.

Yet, the particular gravity of hijacking on the safety of international aviation could be said to establish a customary obligation *erga omnes*. Even if there exists little proof in international law for the customary and *erga omnes* nature of the obligation to extradite or prosecute or even to return the aircraft, could it not be the case that these obligations derive from the principal prohibition of hijacking itself? Furthermore, it is the determination of these not specially affected states to react to what they viewed as a serious violation of international law that has significance for the purposes of this section.

5.1.7. The Imposition of Martial Law in Poland and the Soviet Involvement (1981)

When in December 1981 the Polish government ordered, with the alleged encouragement, advice and technical assistance of the Soviet Union, the application of martial law in the country with the repression of trade unions, political dissidents and civil rights, the US expressed its profound condemnation and concern for the situation

⁴⁷⁸ Ibid/630.

⁴⁷⁹ Ibid/628. Also see Frowein/1994/418; Keesing/1978/29293; Keesing/1981/31071; Keesing/1982/31545.

⁴⁸⁰ Chamberlain/1983/ 632.

that emerged as a result. Immediately after the decision of the Polish government US President Ronald Reagan, in the absence of a SC resolution, gave instructions for the suspension of the most significant elements of the country's economic relationships with Poland, the actions of which were, according to the American government, in violation of the UN Charter (although not specifying which principles exactly had been violated), the Helsinki Final Act (a not legally binding instrument although in certain cases it reflects customary norms of international law) and the Gdansk agreement of August 31, 1980 with the leaders of the Solidarity movement.⁴⁸¹ At the same time the US government called upon Poland to release all the political dissidents whose only offence was to exercise their civil and political rights "enshrined in many international documents to which [Poland] was a party".⁴⁸² Whilst the shipment of food aid continued on the condition that this was received by the Polish people themselves, all shipments of agricultural and dairy products were suspended until their distribution could be monitored by independent agencies. Furthermore, the US: stopped the renewal of the Export-Import Bank's line of export credit insurance to Poland; opposed the extension of any new credits and Poland's membership in the International Monetary Fund; and was recommending allying countries to impose restrictions on their high-technology exports to Poland. In exchange for the lifting of these measures, which were not however in violation of international obligations as required by the definition of countermeasures, President Reagan called the Polish government to release all those arbitrarily held in prison, to cease the violence against the Polish population, to lift the martial law, and to restore the internationally recognized and protected, inalienable rights of the Polish people to freedom of speech and association.

In addition to the above action the US government announced that it would suspend aviation privileges in the US to Polish airlines and that it was in the process of suspending the fishing rights of Poland within American waters. With respect to Poland's civil aviation privileges the US proceeded with the suspension of the 1972 US-Polish Air Transport Services Agreement on December 26, 1981.⁴⁸³ The Civil Aeronautics Board informed LOT (Polskie Linie Lornicze) about the suspension of the foreign air carrier permit issued to LOT. LOT protested against the suspension on the ground that the President's decision was in violation of the 1972 Agreement which did not permit for its suspension or termination and which was effective until March 1982.

⁴⁸¹ Cumulative/Digest/1981-1988/III/2974.

⁴⁸² Keesing/1982/31454.

⁴⁸³ 23 UST 4269, TIAS No 7535.

More specifically, the Agreement provided that the operating permission granted to the airlines of the two parties could be withheld, suspended or revoked on the ground that the targeted airline does not satisfy the standard procedures of the aeronautical authorities of the state applying the suspension; or that the airline fails to comply with the regulations of the suspending state regarding admission and departure of air services; or that the suspending state believes that the designated airlines of the other party are not owed or controlled by it. It can therefore be seen that the Agreement permitted for no suspension or termination for grounds other than the ones provided by it, including human rights violations. Furthermore, the suspension or termination of the Agreement could take effect only after the consultation with the other party, with the exception of Article IV (A) (2) of the Agreement relating to entry and exit regulations, something that the US had failed to do. It is noted that the state of emergency as a result of the imposition of martial law did not seem to provide a satisfactory legal ground for justifying the US insuspending the Agreement without satisfying the condition of consultation, nor did it directly affect US interests.⁴⁸⁴

The suspension of the Polish civil aviation rights by the US had a strong economic impact on Polish tourism. If justification of the US decision within the Agreement cannot be supported, it is necessary to determine whether such action was justified under any other legal ground of general international law. Whilst consideration was given to circumstances which could render the Agreement void, such as being in violation of a *jus cogens* norm, it was concluded that no such grounds could be proven as existing in the particular case. Furthermore, it was noted that the suspension of the Agreement could not rely on material breach or fundamental change of circumstances recognized under the general law of treaties as valid reasons for the suspension of a treaty.⁴⁸⁵ The US decision should be therefore examined in the context of the general law on state responsibility and in particular countermeasures. The difficulty, however, would be to identify the internationally wrongful act committed by Poland for which the US, as a non directly injured state, would be entitled to complain, either by resorting to countermeasures or otherwise.

In justifying their decision the US Government pointed to the “exceedingly serious world events”. In particular:

⁴⁸⁴ Malamut/1983/191-3.

⁴⁸⁵ Ibid/196-7.

Clearly, under such circumstances, there resides in the President and the Executive [b]ranch of the U.S. Government ample authority to suspend application of an Executive Agreement between the United States and a foreign country, whether or not such suspension is provided for under the specific terms of the Agreement.⁴⁸⁶

In 1982 and following the adoption of further repressive measures by the Polish government, the US suspended Poland's MFN status on the ground that it failed to meet the import percentage required under the GATT. President Reagan stressed that the US would not remain passive to Poland's "outrages", adding: "Make no mistake: their crime will cost them dearly in their future dealings with America and free peoples elsewhere".⁴⁸⁷ He further stressed: "By our actions we expect to put powerful doubts in the minds of the Soviet and Polish leaders about this continued repression...The whole purpose of our actions is to speak for those who have been silenced and to help those who have been rendered helpless".⁴⁸⁸

The imposition of martial law in Poland and the suspension of human rights caused reaction in Europe as well. In a statement issued in January 1982 by the Foreign Ministers of the EC member states, they condemned the situation as an infringement of the "most elementary human and citizens' rights, contrary to the Helsinki Final Act, the United Nations Charter and the Universal Declaration of Human Rights" the significance of which went beyond merely Polish borders.⁴⁸⁹ However, in announcing the steps it was ready to take the EC adopted a more careful approach limiting measures on considering credit, economic and food assistance to Poland.⁴⁹⁰ Due to disagreements among the member states the measures were limited to the import of luxury goods and thus expected to have only symbolic significance.⁴⁹¹ Despite this it was made clear that the EC countries would seek consultation and close cooperation on the developments with the US. When examining at a later stage what further action to take they requested the Permanent Representatives Committee and the Commission to study the economic measures already resorted to by the US, their scope and their impact on the economy and trade of the EC member states.⁴⁹² Moreover, the European Council announced the

⁴⁸⁶ Cumulative/Digest/1981-1988/II/2182.

⁴⁸⁷ Washington Post, 24 Dec. 1981, A1 in Hufbauer/1985/686.

⁴⁸⁸ President Ronald Reagan, 29 December 1981 in Hufbauer/1985/701.

⁴⁸⁹ EC/Bulletin/1981:12/1.4.2.

⁴⁹⁰ Ibid. Also EC/Bulletin/1982:1/2.2.38; EC/Bulletin/1982:2/2.2.44. Keesing/1982/31453.

⁴⁹¹ Keesing/1982/31453.

⁴⁹² EC/Bulletin/1982:1/2.2.38.

termination on the basis of special terms of foodstuff sales to Poland whilst the exports under normal terms would remain unaffected.⁴⁹³ At a NATO level it was stressed that the massive violations of human rights and fundamental civil liberties were in breach of the Charter, the Universal Declaration of Human Rights, and the Helsinki Accords.⁴⁹⁴

The problematic aspects in this case arise not only as to whether or not the US and in fact any other country possessed the right to resort to countermeasures in response to a violation of international law not injuring them in their individual rights, but also because in the opinion of this author the US would also have difficulty in justifying their action against Poland in the absence of specific and clearly spelled out international obligations *erga omnes* with which Poland had failed to comply. If there is going to be a recognition of a right to countermeasures in the name of general interests in international practice, literature and jurisprudence there needs to be extra caution. This is because we do not want a general right by states not specifically injured or affected to resort to countermeasures whenever a violation has taken place, but only whenever violations of obligations with a certain content, namely *jus cogens* norms or *erga omnes* obligations, established for the collective interest, have occurred. Accordingly, the US action must be looked at on the basis of Poland's obligations. Was Poland, by imposing the martial law in the country, violating a specific international obligation? And if the answer is in the affirmative, was that obligation possessing an *erga omnes* character which could trigger the invocation of the responsibility of the defaulting state by any other state? Whilst it is true that in contemporary international law human rights violations do not fall within the exclusive jurisdiction of states, it is equally true that not all human rights obligations have an *erga omnes* character. Accordingly, not all human rights violations would entitle any state to invoke the responsibility of the wrongdoer, unless of course otherwise provided. This is reflected in the reference in the *Barcelona Case* to "basic" human rights having an *erga omnes* nature, as if to be distinguished, as already suggested, from other human rights not possessing such qualification.⁴⁹⁵ It could therefore be argued that the infringement of trade union rights or the freedom of expression could not give rise to any entitlement on the part of the US unless they were in breach of international obligations owed to the international community as a whole, or established for the collective good of a group of states.

⁴⁹³ Ibid.

⁴⁹⁴ Malamut/1983/197/fn41.

⁴⁹⁵ ICJReps/1970/(34,35,91).

In parallel with the measures adopted against Poland, the US called upon the USSR to allow the restoration of basic rights in Poland and warned it that the US would “have no choice but to take further concrete political and economic measures affecting our relationship”⁴⁹⁶ in the event that the repression in Poland continued. A few days later the US announced that it would extend the economic measures to the Soviet Union for its role and interference in the situation in Poland. In a statement issued on 29 December 1981, it was noted that:

The Soviet Union bears a heavy and direct responsibility for the repression in Poland. For many months the Soviets publicly and privately demanded such a crackdown. They brought major pressures to bear through now-public letters to the Polish leadership, military manoeuvres and other forms of intimidation. They now openly endorse the suppression which has ensued.⁴⁹⁷

According to the US, the USSR was in breach of its obligations under the Helsinki Final Act (although this is not a legally binding instrument), and the UN Charter.⁴⁹⁸

Among the first steps taken was the suspension of landing rights to the US by the Soviet airline Aeroflot. Aeroflot had at the time been granted permission under Section 402 of the Federal Aviation Act of 1958 to conduct two roundtrips per week between Moscow and New York/Washington DC made conditional on “all applicable provisions of any treaty, convention, or agreement affecting international air transportation now in effect or that may become effective during the period this permit remains in effect, to which the United States and the U.S.S.R. shall be parties”.⁴⁹⁹ The two countries were bound by a bilateral agreement, namely the US-USSR Civil Air Transport Agreement of 1966. According to the Agreement the service to be operated by designated carriers should be approved by both parties. Although numerous intergovernmental agreements took effect since the conclusion of the 1966 Agreement in order to determine the service levels, the last of these intergovernmental agreements had expired in 1979 with the common understanding that future agreement would determine the acceptable pattern of service. However, these negotiations never took place. It was therefore the position of the US government that since no further agreement existed on the schedules, frequency and capacity of flights conducted by Aeroflot, the latter was conducting its flights at the

⁴⁹⁶ Cumulative/Digest/1981-1988/III/2968.

⁴⁹⁷ Keesing/1982/31456.

⁴⁹⁸ Ibid.

⁴⁹⁹ Cumulative/Digest/1981-1988/III/2970.

discretion of the US government.⁵⁰⁰ It was therefore noted that the suspension of Aeroflot's flights to the US in response to the USSR's involvement in the situation in Poland was not in violation of the Aviation Agreement with the Soviets as there was no guaranteed level of service under the agreement at that moment. At the same time, reference was made to the world events that preceded the decision on the suspension of Aeroflot's rights which were of overriding importance.⁵⁰¹

Other measures decided against the Soviet Union were: the suspension of issuance or renewal of export licenses for high tech items such as electronic equipment and computers; the closure of the Soviet Purchasing Commission office in New York; the suspension of negotiations on the extension of the grain agreement between the two countries; the suspension of negotiations for a new maritime agreement and the imposition of stricter requirements for port-access to all Soviet vessels in the light of the forthcoming expiration of the US-USSR bilateral maritime trade agreement and as from that day; the expansion of restrictions and controls on the export of oil and gas equipment and pipe layers to the Soviet Union, initially imposed in 1978 in response to human rights violations, so as to include commodities and technical data for transmission or refinement of petroleum or natural gas for energy usage; and the intention of non-renewal of US-Soviet agreements coming to an end, like for example the agreements on energy, science and technology.⁵⁰² It is worth-pointing out that none of the measures just referred to was in breach of obligations arising either from customary or conventional norms. At the same time, the US put pressure on the countries participating in the construction of a new natural gas pipeline to withhold their co-operation with the USSR. However, West Germany, France and Japan refused to suspend the project.⁵⁰³ In January 1982 the US ceased export licences for the export of components for gas compressor turbines needed for the construction of a pipeline deal between the USSR and the Western European firms.⁵⁰⁴ It seems that some European states were reluctant to proceed with more determinative measures against the USSR not on legal concerns, but rather on economic considerations.⁵⁰⁵ This conclusion is rather strengthened by the fact that not only did certain European states like West

⁵⁰⁰ Ibid.

⁵⁰¹ Ibid/2971.

⁵⁰² Ibid/2969.

⁵⁰³ Keesing/1982/31453.

⁵⁰⁴ Washington Post, 30 December 1981, A1 in Hufbauer/1985/697.

⁵⁰⁵ Keesing/1982/31458.

Germany and France not suspend already existing agreements with the USSR, they also proceeded with the conclusion of new ones.⁵⁰⁶

With respect to the Soviet Union the European Council decided to reduce its imports in February 1982.⁵⁰⁷ This took effect with Council Regulation 596/82 with which the Council decided to suspend the preferential treatment of goods imported from the USSR which were exempted from quantitative restrictions according to previous Council Regulations, because Community interests required so, although no further explanation was given regarding what that meant.⁵⁰⁸ However it needs to be noted that this concession had previously been unilaterally granted to the Soviet Union, and therefore with its suspension no international obligations were infringed on the part of the EEC. The EEC member states based their action on former article 113 - which allowed the member states, whenever negotiating agreements with third states to reach their decision by qualified majority- and not on former article 224 as the crisis did not seem to fulfil its conditions with respect to serious internal disturbances or obligations for the maintenance of international peace and security. Greece, for political reasons denied to participate in any kind of trade and other measures against the USSR. Accordingly, the regulation noted that Greece was not to join in the implementation of the measures against the USSR on grounds referring to economic and trade difficulties faced by it.⁵⁰⁹ Furthermore it is noted that the EEC action against the USSR did not entail the violation of trade agreements within the GATT context.⁵¹⁰

The UK on the other hand announced restrictions on the movement of Soviet and Polish diplomats and that there would be no new financial aid to Poland, measures that were not however inconsistent with international law. The UK government commented that these measures "are not really sanctions as such but a signal to the Polish and Soviet authorities of Allied disapproval. We believe this is just as strong a signal as the US measures".⁵¹¹

Despite the action taken especially by the US, countries like France, Italy and West Germany continued their agreements with the Soviet Union. As a result, and by the

⁵⁰⁶ Ibid/31459.

⁵⁰⁷ EC/Bulletin/1982:2/2.2.44.

⁵⁰⁸ OJ/1982/L72/15.

⁵⁰⁹ Kuyper//1982/147.

⁵¹⁰ Ibid/165.

⁵¹¹ Washington Post, 16 February 1982, A1 in Hufbauer/1985/689.

summer of 1982, the US government announced the extension of the ban on oil and gas equipment sales to foreign subsidiaries of US firms and foreign companies which produced equipment under US license.⁵¹² This decision, which was criticized by many European states as having extraterritorial effect,⁵¹³ need not be examined here.

It is the belief of this author that the precedent these cases set must be examined with caution. The measures taken against Poland and the Soviet Union both raise significant questions concerning their legitimacy not only in respect of secondary rules, particularly countermeasures, but also in respect of the primary rules infringed and to which such measures were a response. Unless the international obligations *erga omnes* infringed by Poland and the Soviet Union are specifically identified, the reaction taken mainly by the US but also by other states will be viewed with suspicion. Specifically in relation to the Soviet intervention, whilst it could be argued that it was in violation of the prohibition of intervention in the internal affairs of another country, such a claim would be difficult to be sustained had the Soviet Union been acting with the consent of Poland.

5.1.8. US Action against Nicaragua (1982)

In 1982 the US government, by Proclamation No. 4941 established a quota on the import of sugar which had a direct impact on Nicaragua's exports of the product in the American market. This came in response to Nicaragua's alleged interference in the sovereignty of neighbouring countries. In 1984 a GATT panel was invited to look at Nicaragua's claims that the US action was in violation of its GATT obligations as it was taken for political rather than economic reasons and therefore it was unjustified as discriminatory. The US not only did not attempt to rebut Nicaragua's allegations, but also confirmed that its decision, although it had trade implications, was not taken for trade considerations. It refused to justify its action under any exception clauses or in the context of GATT. It rather stressed that the specific dispute could not be resolved in the context of GATT, without producing further arguments for this purpose. It is merely noted that the US only contested that "its action was fully justified in the context in which it was taken".⁵¹⁴ The panel, restricted by its own terms of reference, found it sufficient to examine the dispute on the basis of GATT, accepting Nicaragua's claims.

⁵¹² Hufbauer/1985/697.

⁵¹³ Ibid/697-8.

⁵¹⁴ GATT Basic Instruments and Selected Documents, United States - Imports of Sugar from Nicaragua, Supplement No. 31, Report of the Panel adopted on 13 March 1984, (3.11).

It seems from the above that the US did not hesitate to violate its trade obligations in the light of concerns that fell outside the GATT system. However, in order to remedy the fears of vulnerable states with respect to the validity of third-state countermeasures, we must find ways to strengthen the grounds on which states willing to resort to such measures may rely and to impose the most stringent conditions. It needs therefore to be stressed that although this case offers a clear example of violation of specific treaty obligations, uncertainty may exist with respect to the wrongdoing initially committed by Nicaragua which would justify not only countermeasures by an injured state, but also by third states. In other words, before one can incorporate this example as indicative of state practice in support of third-state countermeasures, it must first be determined as to whether Nicaragua had infringed its international obligations, and if the answer is to the affirmative, as to whether the infringed obligation had an *erga omnes* character. Had the US argued that its action was in response to unlawful use of force by Nicaragua, then this example would clearly be establishing a precedent of state practice in support of countermeasures by states other than the injured in response to a serious violation of international law.

In 1985 the US government issued Executive Order No. 12513 entitled "Prohibiting Trade and Certain Other Transactions Involving Nicaragua" which it justified on the grounds of an unusual and extraordinary threat to the national security and foreign policy of the US as a result of Nicaragua's aggressive policies in Central America of subverting its neighbouring countries, destabilizing military buildup and enhancing its military and security ties with the USSR and Cuba. The Order prohibited all imports of goods and services from, and all exports to Nicaragua were prohibited. At the same time all Nicaraguan air carriers were banned from engaging in any transportation from or to the US, whilst all vessels of Nicaraguan registry were prevented from entering into US ports.⁵¹⁵ Nicaragua on its part argued that the trade embargo was in violation of the UN Charter, the OAS Charter, the GATT, and the 1956 US/Nicaraguan Treaty of Friendship, Commerce and Navigation and Protocol. The latter was terminated by the US, invoking arguments that the policies and actions of the Nicaraguan government were incompatible with normal commercial relations between the two countries. The US was thus reacting to Nicaragua's use of force in violation of the UN Charter against its neighbours, Honduras and Costa Rica, by incurring into their territory and supporting

⁵¹⁵ Cumulative/Digest/1981-1988/III/2979.

armed bands and rebels. In a subsequent complaint filed by Nicaragua against the US within the GATT context concerning the trade embargo, a GATT panel was actually unable to examine the merits of the case because the US had invoked the security clause under Article XXI. However, the panel, not really convinced by the US justification, noted in its 1986 report that irrespective of whether the US action was justified under Article XXI, such boycotts contradicted the very purposes of the GATT for non-discriminatory and freedom from obstacles to trade practices.⁵¹⁶

It is remarkable that when the dispute was brought before the ICJ by Nicaragua, the Court, despite the fact that it acknowledged Nicaragua's own wrongful acts and in particular the use of force in violation of article 2 (4) of the Charter, failed to examine the US termination of the 1956 Treaty on Friendship, Commerce and Navigation in the context of the law of countermeasures. Instead, the Court stressed that a state was entitled to cease trade relations with a certain state only insofar as there was no treaty or other commitment under international law.⁵¹⁷ Examining further whether the US decision to terminate the treaty could be justified under the article XXI exemption from GATT, the ICJ held that in the absence of evidence from the US, the embargo did not fulfill the condition of necessity for the protection of essential security interests as provided under that provision.⁵¹⁸

This incident, viewed in the context of general international law rather than that of a regime *lex specialis* such as the GATT, could have some legal significance for the purposes of the current examination, although the US government did not rely on a right to respond to serious violations of collective interests by way of countermeasures, but rather on grounds of national security as it was already entitled to do under GATT.

5.1.9. EC Measures against Haiti (1991)

In 1991 a military coup that took place in Haiti ousted the democratically elected President of the island, Jean-Bertrand Aristide. The OAS responded immediately by requesting its member states to impose economic sanctions. In May 1992 the OAS decided to step up the trade sanctions against Haiti and in particular to ban from all

⁵¹⁶ GATT Doc. L/6053 (1986)18.

⁵¹⁷ *Nicaragua/Case/ICJReps/1986/138,87*. For a critical evaluation of the Court's judgment see Frowein/1994/374.

⁵¹⁸ *Nicaragua/Case/ICJReps/1986/141/(281-2)* in Frowein/1994/375.

ports in the hemisphere ships delivering oil and other commercial cargoes to Haiti, to ban commercial flights from transporting goods and to cease the issuing of travel visas.⁵¹⁹ In another context the Committee of Ministers of the ACP States recommended that states parties to the Lome IV Convention suspend trade with Haiti, also a party to this Convention, although there was initial hesitation as to the legality of such action under the Convention.⁵²⁰ The EC states, in the context of the EPC decided in the lack of any SC authorization to impose a trade embargo in infringement of the Lome Convention, which although it made reference to human rights did not incorporate a right to democracy. This case has been criticized not so much regarding whether such action without SC authorization was permissible or not, but rather about the fact that the violation of an international obligation on Haiti's part was doubtful. According to this position military coups fall within the domestic jurisdiction of states and, whilst the Lome Convention made reference to human rights, it is difficult to construe that a right to democracy was also incorporated under this provision.⁵²¹

5.1.10. Countermeasures against Yugoslavia (1991)

Along with the question of whether third states may be involved in the imposition of unilateral economic countermeasures for the commission of serious violations of international law, is the question of whether regional organizations, such as the EU with its increasing economic powers, are also entitled to resort to similar action.

With the outbreak of the ethnic conflict in the former Social Federal Republic of Yugoslavia the international community was faced with one of the worst humanitarian crises ever since the end of the Second World War. In a statement issued in July 1991 in the context of EPC, the EC and its member states expressed their deep concern for the increasing violence in Yugoslavia and called for the immediate initiation of negotiations between the conflicting parties. It was made clear in the statement that any peace effort should give due respect to human rights including the right of minorities and the right of people to self-determination and full consideration of the UN Charter principles and other norms of international law relating to the territorial integrity of states. Leaving open the possibility of even unilateral military action in the event of any further breach of the cease-fire, the Community and its member states agreed to apply,

⁵¹⁹ Keesing/1992/38905.

⁵²⁰ Ibid.

⁵²¹ Chinkin/1996/201.

prior and in the lack of authorization by the SC,⁵²² an embargo on armaments and military equipment that would have effect in the whole of the territory of Yugoslavia. At the same time they called upon other states to do the same, whilst also deciding to suspend the second and third financial protocols with Yugoslavia for so long as normalization of the situation was prevented.⁵²³

The first SC resolution on Yugoslavia⁵²⁴ was not passed until September 1991 with which the Community action was confirmed and approved. More specifically, with resolution 713 the SC expressed its full support to the efforts *already* made by the member states of the EC along with the states participating in the Conference on Security and Cooperation in Europe for a peaceful and comprehensive settlement in Yugoslavia, and to their decision to suspend the delivery of all military weapons and equipment to Yugoslavia. At the same time, the SC acting within its powers under Chapter VII decided that all states should impose an embargo upon all military material and equipment to Yugoslavia.⁵²⁵

The embargo however did not prevent the worsening of the situation and for this reason in November 1991 the EC and its member states, within the framework of another EPC meeting, decided to proceed with further action. Highlighting the seriousness of the crisis with the “indiscriminate bloodshed” and “the unacceptable threats and use of force against the population of Dubrovnik”, the EC adopted the so-called “Yugoslav counter-measures”. These measures involved: the immediate suspension of trade and cooperation with Yugoslavia and a further decision to finally terminate the agreement; the restoration of quantitative restrictions for textiles; the exclusion of Yugoslavia from the Generalized System of Preferences; and the suspension of benefits under the Phare program, a measure however which was not inconsistent with any treaty.⁵²⁶ Furthermore, the EC expressed its determination to work for consensus within the SC for the imposition of an oil embargo. These measures were given effect by a number of regulations and decisions passed by the EU Council within the scope of the EEC and the European Coal and Steel Community. On the basis of Regulation No 3300/91, and whilst cognizance is given *inter alia* to SC resolution 713 and to the radical change of

⁵²² Bohr/1993/256-268.

⁵²³ EC/Bulletin/1991/No.7-8/Vol.24/(1.4.3).

⁵²⁴ The term “Yugoslavia” is used in the text of all the SC resolutions from September 1991 until May 1992.

⁵²⁵ SC/Res/713/1991/(6).

⁵²⁶ EC/Bulletin/1991:11/(1.4.4).

circumstances as a result of the hostilities taking place in the territory of Yugoslavia and their impact on trade and economic relations, the EU Council decided to suspend the trade concessions under the Cooperation Agreement between the EEC and the SFRY. With Regulation No 3301/91, in which no reference is made to resolution 713, the EU Council decided to impose quantitative restrictions on textile products originating in Yugoslavia. With Council Decision 91/586/ECSC, the 1983 Cooperation Agreement between the EEC and the SFRY and its Protocols, in addition to the Agreement concerning the ECSC existing between them, were suspended with immediate effect. The denunciation of the Agreement between the member states of the ECSC and SFRY came with Council Decision 91/587/ECSC on the ground, with no reference to resolution 713, that “the situation in instruments to be upheld”. The same wording was used for the denunciation of the Agreement between the EEC and Yugoslavia with Council Decision 91/602/EEC. The trade concessions granted under the ECSC were suspended with Decision 91/588/ECSC with reference made to resolution 713 and as a result of the threat to peace the situation in Yugoslavia was creating. Yugoslavia was also expelled from the list of beneficiaries of the Community’s generalized tariff preferences scheme for 1991, on the ground that “the situation which obtains in Yugoslavia no longer enables this country to remain on the list of beneficiaries of generalized tariff preferences”.⁵²⁷ Again, this measure was not in contravention with any specific obligation.

In the period from April to May 1992 the Commission, upon request from the Ministers of Foreign Affairs, decided a number of measures to be taken against the Republics of Serbia and Montenegro and sent the list with the suggested measures to the Council.⁵²⁸ On 27 May the member states agreed to impose a total trade embargo against Yugoslavia, a prohibition on all export credits and the suspension of scientific and technical cooperation, whilst disagreement occurred with respect to an air transportation moratorium and an oil embargo. Two days later the SC passed resolution 757 (1992) with which it decided upon the banning of all imports and exports, air transport from and to Serbia and Montenegro, transport and financial services, and scientific, technical and cultural cooperation.

⁵²⁷ OJ/1991/L315/47; OJ/1991/L315/1; OJ/1991/L315/3; OJ/1992/L122/1; OJ/1991/L315/48; OJ/1991/L315/49; OJ/1991/L315/50; OJ/1991/L315/46; OJ/1991/L325/23.

⁵²⁸ Agence/Europe/ 1992/No.5728/3; Agence/Europe/1992/No.5734/6.

It needs to be noted that whilst in many cases the Community action, in the form of legally binding instruments, was adjusted in order to comply with SC resolutions, the legal justification on which the regulations and decisions rely seems to vary. Although no express mention is made in the above regulations, decisions and statements by the policy-makers of the EC of the right of the Community to resort to third-state countermeasures even in the absence of an express SC authorization and in defense of fundamental principles of international law, it is clear that the action taken did not rely exclusively on such a resolution. On the contrary, the Community action at times even precipitated UN action. Furthermore, there is nothing to clearly and unequivocally indicate that the EC acted in accordance with the SC resolutions because it had a legal obligation to do so. It is thus suggested that the EC is only legally bound by the UN Charter to the extent that it codifies general rules of international law.⁵²⁹ The possibility of a conflict between an obligation under Community law and under the UN Charter to which all EC member states are parties is intended to be resolved by the inclusion in the Treaty of Rome of Article 297 (ex Article 224) according to which derogation from the EC Treaty is permitted "in order to carry out obligations it has accepted for the purpose of maintaining peace and international security". Therefore, it seems that EC member states are allowed to take economic or other measures in compliance with their other obligations under international law for the maintenance of international peace and security, provided that a consultation among the member states is made "with a view to taking together the steps needed to prevent the functioning of the common market being affected" by measures taken by a member state unilaterally. However, Article 297 does not preclude Community action in the form of sanctions within its exclusive competences on common commercial policy.⁵³⁰ At the same time Article 307 of the Treaty of Rome (ex Article 234) aims to remedy a conflict between Community law and public international law with the cooperation between the EC and its member states. It is concluded that since the EC is not the addressee of SC resolutions nor does it take over the obligations of its member states under other international legal instruments such as the UN Charter, the member states inserted Article 297 for the purpose of securing their international responsibilities other than the ones arising under Community law, which the EC cannot disregard.⁵³¹

⁵²⁹ Bohr/1993/264-65.

⁵³⁰ Ibid/266.

⁵³¹ Ibid/268.

In a very interesting case brought before the ECJ for a preliminary ruling, the lawfulness of Council regulation (EEC) No 3300/91 of 11 November 1991 with which the trade concessions established by the Cooperation Agreement signed on 2 April 1980 by the Member States of the EEC and the SFRY were suspended with immediate effect, was put into question.⁵³² The Cooperation Agreement was denounced with Council Decision 91/602/EEC of 25 November 1991. The Agreement provided, among others, the reduction of custom duties on imports into the Community of wine of fresh grapes not exceeding a specific tariff quota. Although the force of the Agreement was to have an unlimited period, it was also agreed that it could be denounced by giving six months' notice to the other party. It was mainly argued by the applicants that the Cooperation Agreement provided for no human rights clauses, and therefore no non-execution clauses, as a consequence of which its suspension could not be justified. The Community on the other hand argued that the suspension of the Agreement was justified under customary international law on the ground of *rebus sic stantibus* (fundamental change of circumstances). Concerned first with whether the unilateral suspension of the Cooperation Agreement and specifically of the trade concessions on the ground that there had been a fundamental change of circumstances complied with the law on treaties under customary international law (and with which the Community institutions were bound), the ECJ concluded that there was nothing to affect the validity of the Council regulation in dispute. More specifically it pointed to the wide-ranging objectives of the Cooperation Agreement which included among others the promotion of economic and social development and the welfare of the populations of the Contracting Parties, finally holding that the maintenance of peace in Yugoslavia constituted an essential element of the consent of the parties when concluding the Agreement. As a consequence, the disintegration of the country created a fundamental change of circumstances which justified the suspension of the Agreement in question.⁵³³ It needs to be stressed however that no attempt for justification of the measures under a right to third-state countermeasures was made. The legal justification given for the suspension of both the Cooperation Agreement and the Agreement concerning the ECSC was that there had been a significant change of circumstances which affected trade and economic relations with Yugoslavia. This justification seems to fall within the law of treaties rather than the law on state responsibility, possible weakening the argument that the Community at the time was acting with the concrete belief that it possessed a right under general

⁵³² *Racke/1998/3655*.

⁵³³ *Kuijper/1998/20*.

international law to resort to countermeasures in response to a situation that raised concerns to the international community as a whole, even if itself was not directly affected by it. However, as Chinkin points out, it would be difficult to prove in this case the existence of the two elements necessary to establish fundamental change of circumstances as a valid ground for the suspension or denunciation of a treaty. More specifically, whilst it would be possible to argue that peaceful condition in the SFRY constituted a precondition for the continuation of the Cooperation Agreement, it would be difficult to prove that the internal hostilities radically changed the EC's obligations under the treaty. She notes in this regard that, "Under the Vienna Convention impossibility of performance is more generally seen as applicable to situations where the subject matter of the treaty has ceased to exist rather than loss of political authority by one of the treaty parties".⁵³⁴ Moreover, and irrespective of whether or not in the present case there indeed existed such a change of circumstances as to justify the denunciation of the agreements, one wonders whether this could be used as an excuse for any threat to the peace and security and any humanitarian crisis. It follows that any discussion on the law on countermeasures would become pointless and there would not even be a need to rely on such justification since treaties would be able to be denounced or suspended on the ground of fundamental change of circumstances. The author is therefore of the view that the fundamental change of circumstances must be used with constraint and that it will not be able to be relied upon in all cases that arise in the future. It is therefore imperative that the international legal order finds appropriate means to address humanitarian crises within the law on state responsibility itself, and perhaps by resort to countermeasures even by states who have not themselves suffered any injury.

Moreover, despite the fact that the *Racke Case* concerned the application of general international law, in particular the principle *rebus sic stantibus* as the legal basis for the suspension of the agreement (although as noted international law recognizes other grounds for the non-execution of a treaty such as countermeasures), it illustrates the general problems of law which arise as a result of the non-execution of an agreement between two states, irrespective of the reasons behind it. This is because the *pacta sunt servanda* rule constitutes one of the most fundamental principles of international law.⁵³⁵ The Court, by examining the legality of a Community act in the light of customary

⁵³⁴ Chinkin/1996/197.

⁵³⁵ Brandtner-Rosas/1999/703-4.

international law, did not intend to give the impression that customary rules have direct effect at a Community level. As suggested, it would be wiser to raise a question of legality of a given rule or act, whether Community or other, in the light of customary rules of international law rather than relying directly upon a customary rule in order to set aside such a rule or act.⁵³⁶

When the EC imposed sanctions against Yugoslavia in 1992 even before a SC resolution, the SFRY argued that the sanctions, by not applying uniform treatment in the entire territory of Yugoslavia infringed the Most-Favoured Nation treatment clause, and as a consequence it requested the establishment of a panel to look into the case. However, the GATT Council declined to look into the substance of the claim as it found that the FRY could not automatically be regarded as having succeeded the SFRY in its Contracting Party status.⁵³⁷

The economic measures adopted by both the SC and the EC from 1992 to 1995 aimed at inducing Yugoslavia to accept a settlement in Bosnia. The responsibility for the enforcement of the measures adopted by the EC, the West European Union and other institutions was given to the Sanctions Assistance Mission established for this purpose. The final result of this associated action was the termination of support for Bosnian-Serb forces by the regime under Slobodan Milosevic. It has often been admitted that the sanctions imposed against Yugoslavia during that period played a significant role in the decision of the “most immoderate leadership”⁵³⁸ under Milosevic to enter into negotiations.

5.1.11. Denmark v. Turkey (2000)

Another significant case brought before the ECHR is the inter-state application of Denmark against Turkey. Although the case was later settled with the agreement of the two parties, and despite the fact that the violations occurred against a Danish national, thus giving Denmark the status of an injured state, it is worth looking at the specific terms of the settlement. The complaint of the Danish government concerned allegations that a Danish national detained in Turkey was subjected to ill-treatment in violation of article 3 of the Convention. In the settlement that followed, a declaration made by the

⁵³⁶ Kuijper/1998/21.

⁵³⁷ Paasivirta-Rosas/2002/212.

⁵³⁸ Luttwak/1995/118 also in Cortright/2001/119.

Turkish government was incorporated as an integral part of the settlement. In the declaration Turkey acknowledged that there were occasional and individual cases of torture and ill-treatment in the country whilst stating a series of legislative and other measures on its part to decrease such violations. Turkey expressed its commitment to continue improvement measures in the field of human rights and especially against torture, and to cooperate with international organs and mechanisms in order to deal with these problems. Moreover, Turkey undertook to participate in a number of projects concerning the training of police officers especially in relation to investigation and human rights issues whilst the two countries decided to establish a continuous political dialogue between their governments which would also involve human rights considerations.⁵³⁹

The example is stimulating because Denmark did not confine itself to remedies regarding the particular dispute but went even further by requiring, as part of the settlement, certain re-assurances that torture practices in Turkey would stop. Even more interesting, Denmark undertook to financially support a bilateral project the purpose of which would be the training of Turkish police officers “in order to achieve further knowledge and practical skills in the field of human rights”.⁵⁴⁰

5.2. Countermeasures by States Other Than the Injured in State Practice

5.2.1. The Arab Oil Embargo (1973)

5.2.1.1. An Introduction to the Arab-Israeli Conflict

Since the Arab-Israeli war of 1947 many Arab countries engaged in an economic offensive against Israel and other states supporting it. It is on this ground that in 1957 Arab states refused overflight and landing rights to Air France over their territories because of its involvement in financially enhancing the Israeli film industry.⁵⁴¹ In a statement made by the Secretary of the Arab League it was stressed that the Arab states targeted only those firms that were assisting in the strengthening of Israel’s economy, war efforts and its expansionist and aggressive objectives.⁵⁴²

⁵³⁹ *Denmark/Turkey/ECHR/2000.*

⁵⁴⁰ *Ibid.*

⁵⁴¹ *Doxey/1971/29.*

⁵⁴² *Ibid/29.*

In 1967 Israel, citing security reasons in the context of anticipatory self-defence, launched a military attack the result of which was the invasion and occupation of parts of Egyptian, Syrian and Jordanian territory. It was argued that the attack constituted an unlawful use of force not justified under article 51 concerning self-defence as there had not been a previous armed attack to which Israel had to respond, nor an imminent threat to its security.⁵⁴³ Despite UN calls for cessation of this aggressive policy, Israel continued to occupy these territories by force.

In 1973 and after years of unsuccessful negotiations new hostilities broke out between Egypt and Syria in an effort to regain their territories on the one hand, and Israel on the other. During the conflict, the US was providing Israel with military equipment such as jet fighter planes and equipment to replace Israel's losses.⁵⁴⁴ It was against this background that states injured by Israel's actions, like Egypt and Syria on the one hand, and not directly injured states such as Iraq, Kuwait, Algeria, Bahrain, Qatar, Libya and Saudi Arabia on the other, decided upon oil reductions for a number of states supporting directly or indirectly Israel. The deployment of what was later to be known as the "Arab Oil Weapon" as an economic means of coercion raised many concerns about its legality under international law. The first question of importance is as to whether and which Arab states were entitled to take any action against Israel since not all of them were affected by Israel's policies in the same way. And secondly, whether third states like the US, the Netherlands, South Africa, Portugal and Rhodesia⁵⁴⁵ could be subjected to economic measures and especially countermeasures, on what legal grounds in view of the fact that they were not directly involved in the dispute, and by whom. Since countermeasures are only allowed in response to a violation of international law and must be directed against the defaulting state, it is imperative to identify whether these states, by supporting Israel, were committing a wrongful act themselves.

5.2.1.2. The Legality of the Oil Measures in International Law

There can be little doubt that action by an injured state against the wrongdoer is justified. Had other states not individually affected by Israel's unlawful use of force taken unilateral peaceful measures against it in violation of their own obligations, it

⁵⁴³ Shihata/1977/107. See SC/Res/252/1968, SC/Res/267/1969, SC/Res/271/1969, SC/Res/298/1971.

⁵⁴⁴ Paust-Blaustein/1977/9-10.

⁵⁴⁵ Arab/Communique/1973 in *ibid*/42.

would only enhance the argument in favour of third state countermeasures in response to flagrant violations of international law. Could however these states impose countermeasures against third states to the dispute? As it has often been stated, for countermeasures to be lawful they must come as a response to another internationally wrongful act. Only if it was established that the US and the other countries had violated a specific international obligation could countermeasures be imposed on them, either by the injured state, or arguably by third states.

As frequently stated by the Arab states the measures were aimed at the liberation of the Arab territories occupied by Israel and the restoration of the rights of Palestinians.⁵⁴⁶ It can thus be argued that the US and the other states, in providing assistance to Israel were violating their customary obligation not to provide aid or assistance in the commission of an internationally wrongful act, and especially in the violation of an obligation *erga omnes*. This duty is owed to all states collectively, and its violation would entitle all states to invoke the responsibility of the wrongful state. The imposition of the oil embargo by the Arab states could as a result be indicative of practice supportive of third state countermeasures. But had the Arab states, in imposing the embargo, been infringing specific international obligations?

Paust and Blaustein have argued that the exercise of economic coercion by the Arab countries was in violation of the UN Charter⁵⁴⁷ and of the most-favoured-nation treatment clause under the GATT which prohibits discriminatory practices among the member states and the imposition of export restrictions.

It needs to be noted that among the states participating in the embargo, only Kuwait and Egypt were parties to the GATT. Whilst Egypt, as the directly injured state in the dispute could have made a valid defence under article XXI, it is more likely that Kuwait's action could be considered as countermeasures taken in response to a violation owed to the international community as a whole, namely the duty not to support the infringement of an *erga omnes* obligation. However, no attempt was made by any of the parties involved to bring up the matter in the GATT.⁵⁴⁸

⁵⁴⁶ Arab/Resolution/1973 in Paust-Blaustein/1977/45.

⁵⁴⁷ Shihata/1977/71-2.

⁵⁴⁸ Neff/1988/137.

In relation to the legitimacy of the Arab measures with the bilateral trade agreements concluded between the US and Saudi Arabia, Iraq and Oman, only the first agreement concluded with Saudi Arabia seems to *prima facie* raise the issue of the illegality of the oil embargo. More specifically, this agreement⁵⁴⁹ concluded in 1933 provided that the two countries accord to each other unconditional most-favoured nation treatment on the import, export and other duties and charges on commerce and navigation. Nothing in the treaty seemed to allow prohibitions or restrictions on any of the grounds given by Saudi Arabia when imposing the embargo against the US.

Shihata on the other hand supporting the legitimacy of the Arab measures argued that these were taken “in an attempt to secure an objective of the highest international order: The restoration to the lawful sovereigns of illegally occupied territories and the restoration of the rights of peoples deprived of self-determination.”⁵⁵⁰

Although not expressly worded, this justification seems to be equivalent to the argument in support of third state countermeasures for the infringement of superior norms of the international legal order.

What is indeed noticeable however is that the US had never officially accounted the Arab measures to be in breach of their treaty obligations.⁵⁵¹

In relation to the legitimacy of economic measures taken by states not directly injured by another state, Shihata argued that such measures, apart from deriving authority from state practice and the fact that there was no rule of international law prohibiting them, were all the more legitimate if they aimed at safeguarding respect for international law.⁵⁵² Therefore the emphasis is placed on the legitimacy of the objective itself. Supporting that the oil measures deployed by the Arab states were not in violation of any customary or conventional rule of international law he says:

A general and absolute prohibition on the use of economic measures for political purposes in the international sphere is still an idealist's dream. Before it hardens into a rule of international law, enforcement machinery must develop for the protection of the militarily weaker states, which may happen to have a relatively great economic power. Precluding such states from the use of their economic power in

⁵⁴⁹ Provisional/Agreement/1933 in Paust-Blaustein/1977/356-57.

⁵⁵⁰ Shihata//1977/130.

⁵⁵¹ Ibid/131. Also Lillich/1977/157.

⁵⁵² Shihata/1977/124.

the settlement of political disputes before a general ban is imposed on armaments and in the absence of an effective collective security system could not serve the interests of international justice. It would only help the development of what President Roosevelt once described as "a one-way international law which lacks mutuality in its observance and therefore becomes an instrument of oppression".⁵⁵³

5.2.1.3. Conclusion

It has already been pointed out that the wrongfulness of countermeasures arises only when certain legal conditions are met. It follows from this observation that were the US and the other states assisting Israel to be found in violation of specific obligations under international law, arguably the obligation not to render aid or assistance in the violation of one of the most fundamental principles of international law such as the prohibition of the use of force, then they could be the subjects of countermeasures consistently with international law. This however raises another crucial question concerning the subjects entitled to resort to such countermeasures, bearing in mind that not all states were affected in the same way by the wrongful act in question. In the author's opinion, this case, which is not mentioned in the commentary of article 54 of the final articles on state responsibility, offers a significant example of state practice supportive of third state countermeasures, at least with respect to the measures adopted by Kuwait and Saudi Arabia, and for this reason it deserves more attention in the future.

5.2.2. US Embargo against Uganda (1978)

In 1971 Idi Amin took power in Uganda signalling a period of a brutal dictatorship with 8 years of extermination, torture and economic exhaustion for the people of Uganda. In the light of these atrocities the African states remained silent, with few exceptions, under the pretext of the principle of non-intervention in the internal affairs of another state, fearing that possible involvement would turn against them like a boomerang.⁵⁵⁴ They also feared that American involvement and intrusion in the affairs of a small African country like Uganda by way of economic sanctions bore a risk of similar action against them in the future.

The US government had not been favourable towards the notorious regime and its serious and persistent violations of human rights from the very beginning. With a series

⁵⁵³ Ibid/132.

⁵⁵⁴ Ullman/1977-78/530.

of measures as early as 1973 the US government decided the closure of the US embassy in Kampala, the suspension of its economic assistance to Uganda and its refusal to renew it unless there was improvement of the human rights situation in the country, the opposition to international development loans to Uganda, the ban on the export of munitions and control over other sensitive materials.⁵⁵⁵ Despite these efforts there was a certain amount of reservation with respect to the employment of unilateral countermeasures against Uganda. Even the Carter Administration was hesitant due to its own trade and economic concerns and the possibility of other countries using economic means for the pursuit of political goals against the US. Reluctant to set an unwanted precedent, the Carter Administration stressed that any boycott action taken by the US government would be in violation of its obligations under the GATT. This governmental line found expression in the statement made by the Assistant Secretary of State for Congressional Relations Douglas J. Bennet according to whom:

Boycott actions are not consistent with the principles of the General Agreement on Tariffs and Trade (GATT), to which the United States is committed as the basis for international commercial relations. Whenever these principles [of GATT] are set aside, their overall authority as a protection for our own international trade interests is undermined. Therefore, as a general matter, we are extremely reluctant to take actions which contradict these principles.⁵⁵⁶

Behind this position laid a well-rooted belief of American policy-makers that is traced back to the 19th century and according to which the US, as a major trade power, should refrain from associating trade with political ends. This trend was strengthened after the Second World War where economics and politics were construed as two different spheres, the one being autonomous from the other. This was necessitated from the fact that the influence of politics in trade and economic matters had in the past catastrophic consequences for international stability, peace and security, a prominent example being the last world war. It was perceived that economic measures should be applied only in response to economic violations unless they were authorized by the SC, whilst human rights violations should find cure through political means such as denunciation.⁵⁵⁷

Furthermore, there was a need on the part of the US government to differentiate the Ugandan case from other US imposed embargoes as against Cuba, Vietnam, Cambodia and North Korea which rather relied on national security reasons and enforcement of

⁵⁵⁵ Fredman/1979/1159.

⁵⁵⁶ Ullman/1977-78/534.

⁵⁵⁷ Ibid/534.

UN decisions.⁵⁵⁸ Moreover, the American government did not consider that there existed such extraordinary circumstances so as to justify countermeasures.⁵⁵⁹

Nevertheless, US Representative Pease stood firm on the Ugandan case. "If we adopt sanctions against Uganda", he said, "we would be establishing a new principle in our trade policies. We will indicate that we recognize limits of decency beyond which other governments may not go in their treatment of their own citizens. We will demonstrate that in special cases the Congress will use its authority to insist upon corporate responsibility where it may otherwise be lacking".⁵⁶⁰

In 1977 American foreign policy changed considerably, becoming more actively and substantially involved in order to terminate Amin's rule.⁵⁶¹ It had become clear by then that the main source of Uganda's foreign capital (which was later used to sustain the regime) derived from coffee exports abroad, and in particular to the US. On the contrary, the Ugandan coffee going to the US constituted only 7% of coffee imports in the country. For this reason the Congress concluded that to take action through boycotting Ugandan coffee would not severely harm the American economy. It was further realized that where military force could not be taken due to the general prohibition of the threat or use of force, it was the exertion of economic pressure that bore any chances of bringing the brutal regime in Uganda to an end.⁵⁶² It was also clearly understood that inaction regarding the atrocities that took place in Uganda meant acceptance of Amin's remaining in power.

In 1978 the US Congress issued a Declaration of Policy that was incorporated in Section 2151 of Title 22 of the US Code Annotated on Foreign Relations and Intercourse. According to that declaration, as a consequence of the inter-dependence of nations largely owed to technological, economic and political advancements, the protection of the liberties, economic prosperity and security of the American people were "best sustained and enhanced in a community of nations which respect individual civil and economic rights and freedoms and which work together to use wisely the world's limited resources in an open and equitable international economic system."⁵⁶³

⁵⁵⁸ Fredman/1979/1160.

⁵⁵⁹ Ibid/1160.

⁵⁶⁰ Pease/1977 in Fredman/1979/1162.

⁵⁶¹ Nurnberger/2003.

⁵⁶² Ullman/1977-78/531.

⁵⁶³ Foreign/Relations/Act/1979/300-01.

On 7 October 1978 the Congress passed a law entitled "Multilateral and Bilateral Action to Halt Atrocities in Cambodia and Uganda" with the purpose of dealing with the humanitarian situations that emerged there and with the aim of abolishing the brutal regimes that ruled in the two countries. More specifically the law pointed to the "systematic and extensive brutality" taking place in Cambodia and Uganda which both required "special notice and continuing condemnation by outside observers". In order for any action to be effective and substantial, as the influence of the US alone was very limited, the US government was urged to seek multilateral support through the UN and other international bodies, and to encourage action by states with stronger links with the two countries mentioned above. Furthermore, the Congress directed the President to ban the export of military, paramilitary and police equipment to Uganda and to impose visa restrictions for any Ugandan government official wishing to enter the US for military, paramilitary or police training purposes. The lifting of these measures was made conditional upon a determination by the State Department that the Ugandan government had conformed with the rule of law and international human rights. Finally, the law authorized the submission to the SC of a draft resolution for a mandatory arms embargo on Uganda to be implemented by all the members of the UN.⁵⁶⁴

Only few days later the Congress, having concluded that the government of Uganda under the power of General Idi Amin had committed genocide against the Ugandan people, adopted Public Law 95-435 according to which Uganda's serious misconducts permitted for "an exceptional response by the United States". Thus the Congress called the US to essentially build up a policy by which it would disassociate itself from any state having committed what the US described as the international crime of genocide. For this reason it was decided that the direct or indirect importation of any products grown, produced or manufactured in Uganda by any corporation, individual, institution or group would be banned "until the President determines and certifies to the Congress that the Government of Uganda is no longer committing a consistent pattern of gross violations of human rights".⁵⁶⁵ The export ban also extended to cover articles, materials or supplies such as technical data or other information that fell within the US jurisdiction or exported by any person subject to US jurisdiction. The Congress further urged the US President to encourage an international response to the human rights violations in Uganda, such as the infliction of economic restrictions by other states of

⁵⁶⁴ Uganda/Act1.

⁵⁶⁵ Uganda/Act2.

the international community. In addition to these measures the Congress included Uganda in the list of states which would be denied any assistance, monetary or other, along with Cambodia, the Socialist Republic of Vietnam and Cuba.⁵⁶⁶

On 10 October 1978 President Jimmy Carter authorized the imposition of a trade ban upon Uganda and in February 1979 the embargo against Uganda took effect with Executive Order 12117 for as long as the Ugandan Government did not cease its practices of gross violations of human rights.⁵⁶⁷

These measures were in violation of the US' obligations under the GATT to which Uganda was also a member state, especially of its duty not to impose any export restrictions and quotas in their economic relations. It is worth pointing out that the US government did not attempt to justify its action on the basis of the exemptions provided under the GATT, such as for instance under Article XXI which authorizes exceptions from the agreement on grounds of national security. On the contrary, the government justified its action as a result of the genocide committed by the Ugandan government against its own people.⁵⁶⁸

The EEC member states on the other hand took a more cautious stand towards Uganda, owing to their concerns that they had to comply with treaty commitments towards that country. In particular, it was noted on several occasions that the EEC member states were bound by the Lome Convention which made no reference to any action that could be taken against Uganda in view of its gross human rights violations, and that as with all the other ACP countries they had to fulfil their obligations deriving from an international agreement.⁵⁶⁹ It was even noted that the Ugandan case differed from the situation that emerged in Greece as a result of the *coup d'etat* in 1967 and as a result of which the EEC "froze" its relations with Greece under the Association Agreement in that the latter contained already in the preamble reference to the basic principles of the Community such as human rights, which was not the case with the cooperation agreements with Third World countries.⁵⁷⁰

⁵⁶⁶ Uganda/Act3.

⁵⁶⁷ Executive/Order/1979.

⁵⁶⁸ Embargo/Act/1978. Also Third/Report/Addendum/Crawford/2000/14.

⁵⁶⁹ OJ/1977/71; OJ/1978.

⁵⁷⁰ OJ/1977/71.

Only few months after the implementation of the American countermeasures, and as a result of the Tanzanian invasion of Uganda which had the support of Ugandan exiles and dissidents, Amin was forced to flee the country. Although many associate Amin's loss of power to the Tanzanian invasion and not to the US trade embargo, it was noted that the US stand was not without effect in bringing down the inhuman regime of Idi Amin.

In conclusion, the US action constitutes an invaluable precedent for the use of unilateral measures in violation of specific international obligations (countermeasures), like GATT, imposed by a state not directly injured in response to serious violations of international law such as genocide and other serious human rights infringements. It reveals the intention and determination of the US, despite certain legal hesitations, to take action, even in violation of international law, in the rise of "special", as was often cited, circumstances. Although this example alone may not satisfy the requirement of *opinio juris*, it certainly points in the right direction.

5.2.3. The Soviet Invasion in Afghanistan (1980)

The invasion by the Soviet Union of Afghanistan in December 1979 provoked the immediate reaction of the US government which decided upon the implementation of a number of measures against the Soviet Union. These measures were taken before a resolution passed by the General Assembly pursuant to which the Soviet Union was called to withdraw its troops from Afghanistan, and were justified on grounds of national security and the foreign policy interests affected by the Soviet invasion.⁵⁷¹ It needs to be stressed however that not all measures resorted to by the US government were inconsistent with international law.

Among the measures which were in violation of specific international obligations was the withdrawal of ratification by the US Senate of the SALT II treaty which had already been successfully negotiated between the US and the USSR. It was the position of both the US and the Soviet Union that states were bound under customary international law to refrain from taking action that would conflict the object and purpose of an agreement that had been signed but not as yet ratified, a principle which is also reflected in the

⁵⁷¹ Cumulative/Digest/1981-88/III/2967.

1969 VCLT.⁵⁷² Therefore this measure falls within the category of countermeasures. The US further decided the curtailment of Soviet fishing rights in American waters in violation of the 1976 US-USSR Agreement concerning Fisheries off the Coasts of the US,⁵⁷³ and the restriction of Aeroflot flights to the US.⁵⁷⁴

Among the measures taken by the US against the USSR which do not however fall within the category of countermeasures was the suspension of the export of grain that exceeded the amount which the US had been committed to sell. This is of course conditioned on the assumption that there was not a unilateral declaration by the US agreeing to provide more grain than what was already agreed, in which case it would create a legally binding obligation against it. In any event, the decision of the US Government resulted in the freezing of 17 million tons of grain, a decision that largely affected American farmers. In particular, following the Soviet invasion, the Department of Commerce was instructed to terminate shipments to the Soviet Union of agricultural products including wheat and corn with the exception of the shipment of up to 8 million metric tons of wheat and corn provided for by the 1975 Agreement between the US and the USSR on the Supply of Grain.⁵⁷⁵ Furthermore, the US announced: the boycott of the Moscow Olympics and an embargo on all exports intended for the Olympics with the exception of medical supplies; the suspension of exports of high technology and sensitive products; the prohibition and further restrictions on phosphates for fertilizers;⁵⁷⁶ and restrictions on the import of Soviet ammonia. In addition to the above the Department of Commerce suspended all outstanding validated licenses and new applications that were pending regarding the sale of oil, gas field technology and other products.⁵⁷⁷ Provided that there was no agreement to the contrary, these measures were not in violation of international law.

The Legal Adviser of the US State Department, Roberts B. Owen, rejected the Soviet claims that the invasion of Afghanistan was justified under the 1978 Treaty of Friendship, Goodneighborliness and Cooperation between the USSR and Afghanistan, under which the parties undertook the obligation to protect the security, independence and territorial integrity of the two countries (although it also provided for respect of

⁵⁷² US/Digest/1980/398.

⁵⁷³ Ibid/601-02.

⁵⁷⁴ Hufbauer/1985/655.

⁵⁷⁵ Ibid/884.

⁵⁷⁶ Petman/2004/363.

⁵⁷⁷ Hufbauer/1985/603-4.

national sovereignty and the principle of non-interference in the domestic affairs of the other). It was accordingly the US assertion that the Soviet action violated international law and the UN Charter. President Jimmy Carter, referring to the Soviet intervention in Afghanistan said that:

Such gross interference in the internal affairs of Afghanistan is in blatant violation of accepted international rules of behavior.... Soviet efforts to justify this action on the basis of the United Nations Charter are a perversion of the United Nations....the Soviet action is grave breach to peace....⁵⁷⁸

With specific reference to one of the paramount principles of the Charter it was stressed that the USSR had an obligation under article 2 (4) to refrain from the use or threat of force against the territorial integrity or political independence of any state. Pointing out that no treaty could prevail over obligations arising from the Charter it was further noted that:

4. Nor is it clear that the treaty between the USSR and Afghanistan, concluded in 1978 between the revolutionary Taraki Government and the USSR, is valid. If it actually does lend itself to support of Soviet intervention of the type in question in Afghanistan, it would be void under contemporary principles of international law, since it would conflict with what the Vienna Convention on the Law of Treaties describes as a "peremptory norm of general international law" (Article 53), namely, that contained in Article 2, paragraph 4 of the Charter.

5. Moreover, the Soviet action conflicts with the terms of the Soviet-Afghan Treaty, since it is a violation of Afghanistan's national sovereignty.⁵⁷⁹

In justifying the American measures against the Soviet Union President Carter noted that:

our own nation's security was directly threatened. There is no doubt that the Soviet move into Afghanistan, if done without adverse consequences, would have resulted in the temptation to move again and again until they reached warm water ports or until they acquired control over a major portion of the world's oil supplies.⁵⁸⁰

⁵⁷⁸ US/Digest/1979/34.

⁵⁷⁹ Ibid/35. By way of comparison it is noteworthy to point out here that when on 20 July, 1974 Turkey used similar force to intervene in Cyprus and occupy one third of its territory there was no similar reaction by the US Government despite the striking resemblance of both these two examples. More specifically, Turkey had justified its action on the Treaty of Guarantee of 1959-60 in response to the Greek-inspired coup against the democratically elected President, Archbishop Makarios. Not only the US did nothing to prevent the invasion or demand its cessation but it also continued providing Turkey with military and economic assistance in violation of both US and international law.

⁵⁸⁰ Afghanistan/Sanctions in Hufbauer/1985/658.

Although he admitted that he did not expect that the measures would force the USSR out of Afghanistan, he pointed out that they were aimed at making the Soviets pay a price for their aggression and at deterring them from future aggression. He subsequently emphasized that the aim of the US in resorting to these measures was to convince the Soviets by peaceful means that they could not invade a foreign country with impunity and that they must bear the consequences of their action.⁵⁸¹

In his statement before the General Assembly in January 1980 the US Ambassador McHenry noted the following:

For this body to remain silent in the face of open aggression would be for the members of the United Nations to condone a violation of the only principles that small nations can invoke to protect themselves from self-aggrandizement by larger and more powerful states. It is not the United States whose freedom is most threatened by Soviet indifference to the Charter; the small and nonaligned countries, like Afghanistan, are most imperiled.⁵⁸²

The UK government acted on the same footing describing the Soviet invasion in Afghanistan as an “unprovoked act of aggression” that posed “a serious threat to world peace”.⁵⁸³ Canada condemned the atrocities and the gross human rights violations committed by the Soviets against the people of Afghanistan, whilst the Canadian Prime Minister Joseph Clark supported the implementation of measures as a means to impose pressure on the USSR to withdraw from Afghanistan.⁵⁸⁴

Other western countries were very thoughtful in imposing countermeasures against the Soviet Union in violation of their treaty obligations, although it is suggested that it was the economic benefit that was the determinative factor for not taking action against the Soviet Union. The EEC, for instance, replaced the US in the sales of grain to the Soviet Union.⁵⁸⁵ However, the European Parliament did urge the Commission to consider economic, financial and commercial measures against the USSR.⁵⁸⁶ Furthermore, in a common statement by Canada, EC, Argentina and Australia days after the Soviet invasion, those states asserted that they would not attempt to replace the grain that would have been sent to the Soviet Union before the measures announced by the US.

⁵⁸¹ US/Digest/1980/31.

⁵⁸² US/Digest/1979/43.

⁵⁸³ BYIL/1980/Vol.29/473.

⁵⁸⁴ Hufbauer/1985/660. Also CYIL/1987/432.

⁵⁸⁵ Petman/2004/363.

⁵⁸⁶ OJ/1980/C34/28.

However, in later interpretations, the representatives of these countries, with the exception of Argentina, said that the statement “was viewed as a commitment not to allow sales to the USSR to exceed “normal” or “traditional” levels”.⁵⁸⁷ Argentina on the other hand argued that it had no legal basis to interfere in the activities of private traders and thus rejected invitations to join in the economic coercive measures.⁵⁸⁸

What can be concluded from the above discussion is that the US action against the Soviet invasion of Afghanistan offers another paradigm of countermeasures taken by states other than the injured in the name of collective interests, more specifically in response to the unlawful use of force against another country. The prohibition of the use of force is one of the most fundamental principles in contemporary international law the respect for which amounts to an *erga omnes* rule. Subsequently, all states have a paramount interest in the protection of the rule, and therefore they cannot be left unaffected in the event of its infringement. It is in this context that the US action could be justified. The fact that other states did not join in similar action cannot unequivocally lead to the conclusion that they did so because they opposed the possibility to take countermeasures in cases of serious violations of *erga omnes* obligations. Rather, it seems that there existed economic and other considerations which interfered in their decision not to respond with more forceful measures against the USSR.

5.2.4. International Reaction to the Teheran Hostage Crisis (1980)

Hostage-taking has been frequently used as a means for the achievement of mainly political goals, imposing in this manner a threat not only to the lives of the individuals involved but also to international peace and security and therefore being of concern to the international community in its entirety. The SC's resolutions in the Teheran Hostages crisis are indicative of this international concern. On 4 and 5 November 1979 armed groups seized the premises and the staff working at the time in the American Embassy in Teheran and in the American Consulates in Tabriz and Shiraz in protest of the earlier decision by the US to allow the former Shah of Iran to seek medical treatment in the US, the Iranian government was held liable for these actions that, although conducted by non-state actors, bore the government's tolerance,

⁵⁸⁷ Afghanistan/Sanctions in Hufbauer/1985/659-60.

⁵⁸⁸ Hufbauer/1985/660.

encouragement and failure to act duly in order to prevent and terminate them.⁵⁸⁹ In reaction to the attacks against the US embassy and personnel the SC took immediate action by calling for the immediate release of the hostages whilst leaving open the possibility of further measures under articles 39 and 41 of the Charter should Iran fail to comply.⁵⁹⁰ Ultimately these measures were never to be authorized due to the exercise of the Soviet veto.

In view of the SC's failure to take more coercive action against Iran due to the exercise of veto by the Soviet Union, the Foreign Ministers of the EEC issued a statement on 14 April 1980 in which they stressed that the Iranian government continued to be in flagrant violation of international law, ignoring the calls of both the SC and the ICJ to comply with its international obligations.⁵⁹¹ On 22 April 1980 the Foreign Ministers decided to initiate their national procedures for imposing an arms embargo against Iran in accordance with former article 223 of the EEC Treaty, despite the lack of SC authorization, for its continued disrespect of international law in what they determined would constitute a threat to international peace and security.⁵⁹² On 17 May they decided to apply the measures provided under the draft SC resolution of 10 January, despite the fact that this resolution was never adopted. Under this later decision all contracts concluded with Iran after 4 November 1979 were to be suspended, which would bring the EEC member states in violation of their treaty commitments.⁵⁹³

The UK reacted to the Teheran Hostage crisis with the adoption on 15 May 1980 of the Iran (Temporary Powers) Act which came into force two days later.⁵⁹⁴ Section 1 (1) of the Act authorized the Queen to take such decisions about contracts with Iran concerning services or goods as she regarded *necessary* due to Iran's violation of international law in the hostage crisis. The Act was adopted two weeks before the ICJ's judgment on the *Teheran Hostages Case* according to which the seizure of the diplomatic staff constituted a violation of "obligations essential to the international community as a whole".⁵⁹⁵ It is worth mentioning here that in justifying the decision of

⁵⁸⁹ *Teheran/Hostages/ICJReps/1980*.

⁵⁹⁰ *SC/Res/457/1979, SC/Res/461/1979*.

⁵⁹¹ *BYIL/1980/Vol.29/409*.

⁵⁹² *Ibid/477*.

⁵⁹³ *EC/Bulletin/1980/No.4/20-26*.

⁵⁹⁴ "An Act to enable provision to be made in consequence of breaches in international law by Iran in connection with or arising out of the detention of members of the embassy of the United States of America", in *BYIL/1980/Vol.29/413*.

⁵⁹⁵ *ICJReps/1980/42-44/(91-92)*.

the UK government to take action against Iran the Minister of State, Foreign and Commonwealth Office, Mr. Douglas Hurd, made reference to an earlier ruling issued by the ICJ on the case and which the UK regarded as binding in international law, although no firm position was taken on the matter. Furthermore, the UK action against Iran came three days before an embargo was decided by the European Ministers of Foreign Affairs.⁵⁹⁶ A few days later, the UK Government adopted two Orders which imposed a prohibition on the conclusion and performance of any new contracts with Iran, although these measures did not affect already existing contracts.⁵⁹⁷ The position of the UK Government regarding the justifiability of the measures decided against Iran was that Iran could not continue disregarding basic principles of international law.⁵⁹⁸ According to one view the UK Act amounted to "lawful measures" in the sense of articles 42 and 54 of ILC Draft Articles.⁵⁹⁹ Nevertheless, the UK's reaction is not without legal significance as it illustrates the determination of a state not injured by a certain wrongdoing to respond, even by lawful means, to serious violations of obligations owed *erga omnes*, provided of course that the obligations infringed by Iran in the particular incident indeed possessed such character.

With respect to the position of Canada, the Secretary of State for External Affairs, Mark MacGuigan, stressed that the seizure of the diplomatic staff and the premises of the American embassy constituted grave breaches of international law which called "for an unequivocal response from the international community."⁶⁰⁰ Referring to the SC resolutions on the matter, the first of which was adopted even by the Soviet Union, he drew the attention to the threat posed to the international community as a result of the hostage crisis. With respect to the Soviet veto he said:

The cynical Soviet veto, however, cannot obscure the fact that the international community, both then and now, condemns the hostage affair. In addition to the overwhelming support given to the Security Council resolutions on Iran, this condemnation from the international community has been reiterated by the International Court of Justice which, first in December and then again in May, ordered Iran to restore the embassy to the U.S.A. and to free the hostages. These unequivocal judgments by the UN and the International Court of Justice fully satisfy the international community in applying economic sanctions against Iran.⁶⁰¹

⁵⁹⁶ BYIL/1980/Vol.29/413.

⁵⁹⁷ Iran/Sanctions in Picchio Forlati-Sicilianos/2004/102/fn 4.

⁵⁹⁸ BYIL/1980/Vol.29/413-4.

⁵⁹⁹ Picchio Forlati-Sicilianos/2004/102/fn3.

⁶⁰⁰ CYIL/1981/372.

⁶⁰¹ Ibid/373.

He then justified the measures taken by both the EEC and Canada on April 22 and 23 respectively based upon the renewed calls by the US President, Jimmy Carter, for assistance. In response to Iran's intransigence Canada ordered measures of an economic nature imposed upon transport and finance, with other controls concerned with the export of goods to Iran. He then concluded: "I have already explained that the government has been prompted to take these steps out of its concern to uphold a fundamental rule of international law which is vital to the conduct of international relations."⁶⁰²

Even though Canada seemed to rely upon the ICJ rulings and the UN resolutions to justify its own action against Iran, it is necessary to determine whether they could be relied upon for the implementation of countermeasures. In relation to the UN resolutions it is noted that no legally binding resolution was adopted authorizing the application of peaceful coercive measures against Iran. As for the ICJ ruling, it is essential to remember that this creates obligations only towards the parties submitting the dispute before it. Even though it must be respected by all states, it can not authorize the implementation of countermeasures, as its role is confined to adjudicate on what the law is, and not to exceed these judicial powers. Yet, its ruling may have significance to the determination that an internationally wrongful act has been committed. Accordingly, Canada's reaction as a third state to the hostage crisis constitutes another example of state practice supportive of countermeasures or other lawful action as a response to the infringement of common interests shared either by a group of states or the international community.

As for the UK's response, although this was actually confined to "lawful" measures, it seems to this author that the UK government had left open the possibility for further action if "regarded necessary". The emphasis placed upon the seriousness of the wrongful act committed by Iran is indicative of the significance attributed by the UK to the respect for international law, and the international implications that arose from the forceful seizure of the diplomatic premises. However, it is necessary to identify the rules violated by Iran's actions, or rather omissions, and to which states were entitled to react, if at all, by the implementation of economic measures and, even more significantly, countermeasures. One could therefore argue in this regard that the

⁶⁰² Ibid/374.

obligations arising from the general law of diplomatic immunities are of a bilateral nature as between the receiving and sending states, and that as a consequence no other state is entitled to invoke the responsibility of the defaulting state. Whilst this is correct, one could turn to the way that the diplomatic immunities were disregarded in the particular case by Iran, namely the use of force against the American diplomatic premises and personnel. Had the Iranian government chosen to respond to alleged US violations of diplomatic law by declaring the American diplomats as *personae non grata* then no other state would be entitled to react to such decision. It is therefore suggested that it is to the unlawful use of force that Canada, the UK and the other EEC countries were responding, even though they were not directly involved in the dispute. The decision particularly of the EEC member states to suspend all treaties concluded with Iran after November 1979 seems to fall within the category of third-state countermeasures, and for this reason it is regarded important for the purposes of the current examination.

5.2.5. The Falklands Crisis (1982)

When in April 1982 Argentina invaded the Falklands Islands, the SC described Argentina's action as a breach to the peace and demanded it to immediately cease hostilities and to withdraw from the islands, whilst it called upon the two countries involved in the conflict to resolve their differences by diplomatic means. However, no compulsory, military or economic action under Chapter VII was decided. The UK called upon other states to respond to this violation and indeed members of the EEC, Australia, Canada and New Zealand implemented a number of economic measures such as the ban on all imports of Argentine products.

In this regard, the EEC Council determined that the serious situation created by the invasion of the Falkland Islands required immediate and uniform response by all member states of the Communities. As a result, with Regulation 877/82 and later with Regulations 1176/82 and 1254/82, it decided on 16 April 1982 to suspend the import of all products originating from Argentina including the suspension of two agreements regarding textiles and mutton and lamb, invoking both former articles 113 and 224. As seen above, article 113 established a common commercial policy whilst article 224 imposed a duty upon member states, except during an emergency, to consult each other with the view to taking concerted action for the preservation of the common market that

has been affected by measures taken by a member state in compliance with its obligations for the maintenance of international peace and security.⁶⁰³ As noted in the preambular paragraph of the regulation, “the interests of the Community and the Member States demand the temporary suspension of imports of all products originating in Argentina”.⁶⁰⁴ With a subsequent decision of the representatives of the governments of the member states of the European Coal and Steel Community the imports of all Argentinean products falling under the specific agreement were also suspended.⁶⁰⁵ On no occasion did the EEC Council express hesitation about the legitimacy of such action in international law, in contradiction to their stand towards the regime of Idi Amin only few years earlier. Nevertheless, some member states distanced themselves from the implementation of the measures provided for under the regulations above. Denmark seemed to oppose the idea that trade means could be used for political purposes on the basis of article 113. Instead of challenging the above regulations before the ECJ, the judgment of which could undermine significantly such EEC measures, it preferred to announce that since it lacked the legal basis for implementing this form of action it was imperative to enact national legislation giving effect to the measures against Argentina. Italy and Ireland on the other hand relied upon former article 224 not to apply the measures.⁶⁰⁶ Zoller in particular comments that this fact is evidence that the EEC measures were not adopted by the Community as an international organization, nor by a Community institution, but rather as a result of the collective decision of the member states.⁶⁰⁷

Argentina for its part claimed that the EEC action against it was in violation of the UN Charter, the GATT and the Charter of Economic Rights and Duties of States. With respect to the argument that the EEC measures were in violation of the UN Charter it is argued that this rests on the incorrect assumption that economic measures, like the use of

⁶⁰³ Former Article 113 (now Article 133) constitutes the legal basis for the uniform commercial policy of the EC member states, whilst former Article 224 (now Article 297 of the EC Treaty) in particular attempts to reconcile obligations falling under the EEC and obligations arising under the UN Charter. See EC/Reg/1982/No.877. For the text of these agreements see OJ/1979/L298/2; OJ/1980/L275/4.

⁶⁰⁴ In *Kuyper/1982/142*.

⁶⁰⁵ OJ/1982/L102/3.

⁶⁰⁶ *Kuyper/1982/149-50*. Former article 224 has been invoked by member states to justify not only the imposition of sanctions against a third state, but also unilateral deviations from sanctions taken on the basis of former article 113 EC, such as was the case of Italy and Ireland in the EC sanctions against Argentina. For a European law perspective see analysis by Koutrakos/2001/86.

⁶⁰⁷ Zoller/1984/104. It is argued by White and Abass that the confusion between state and institutional practice, namely measures taken by international organizations such as the EEC/EU, on third state countermeasures does not corroborate the existence of a right to third state countermeasures. White-Abass/2003/516.

armed force, falls within the monopoly of the SC.⁶⁰⁸ Regarding Argentina's claims that the EEC measures were in violation of the GATT, it was noted that such measures could fall under the security clause according to which action could be justified for the protection of essential security interests, the determination of which is left to the member states. Along the same lines it was argued that in any case the EEC action was required because a territory associated with the Community had been occupied by the use of force.⁶⁰⁹ Regarding whether the EEC measures violated Argentina's sovereign rights, it was made clear that the Community measures aimed solely at the withdrawal of Argentinean forces from the Falklands.⁶¹⁰ However, the EEC's action was also criticized by other GATT parties⁶¹¹ who argued that the measures were taken for political reasons and not on *bona fide* economic grounds.⁶¹² Furthermore, it has been pointed out that the justification of the suspension of the two agreements between the EEC and Argentina on the trade of textile products on the one hand and of mutton and lamb on the other under the security exceptions of the GATT was rather strenuous. Whilst the first treaty was concluded on the basis of article 4 of the Multi-Fibre Agreement within the GATT, the relationship was more strenuous concerning the second agreement on mutton and lamb. As noted, "though it is a type of self-limitation agreement which is common in the framework of GATT, it does not find a legal basis within the GATT itself or in any instrument based on the GATT".⁶¹³ Furthermore it was stressed that the security exceptions did not necessarily apply to all agreements concluded within the GATT as organization, and that in any case the EEC could not be regarded as the injured party to the dispute.

For this reason it was necessary to attempt to turn attention to other legal grounds that would possibly preclude the unlawfulness of the EEC action. Kuyper in particular, examining whether the EEC measures could be justified as reprisals or countermeasures as the term is used today, finds it difficult to conclude, beyond any doubt that it indeed lays a right upon states not directly injured by a certain wrongdoing to violate their own international obligations in the form of reprisals. With reference to the ILC's conclusions at the time on the matter, Kuyper observes that the ILC rather opted for a collective response to vital collective interests rather than to allow states or a group of

⁶⁰⁸ Kuyper/1982/152.

⁶⁰⁹ *Ibid*/152.

⁶¹⁰ EC/Bulletin/1982/No.4/7.

⁶¹¹ GATT/Communique and the position of Spain/Brazil.

⁶¹² See Ministerial/Declaration/1982, *supra* note 377. Also in Keesing/1983/32169A.

⁶¹³ Kuyper/1982/154.

states acting unilaterally to enforce international law.⁶¹⁴ According to him, third state reprisals tend to disregard the role of the UN system in the maintenance of international peace and security, and entail risks for the EEC itself regarding similar situations against which it does not wish to bring any collective action.⁶¹⁵ As Kuyper points out, the entitlement of the EEC to resort to reprisals against Argentina created difficulties not only because “the EEC would set itself up as some minor policeman of this world” but also due to the fact that:

third party reprisals are looked at askance in international law, although it has been shown above that there are indications in state practice and in the doctrine which tend to support a right to reprisal by third states, if the target state has infringed very fundamental rules of international law, such as the prohibition of the use of force.⁶¹⁶

He thus takes the view that the EEC action was justified under the right of collective self-defence contained in article 51 of the Charter, since the UK had an established right to individual self-defence as the victim of the unlawful military conduct of Argentina. This solution was more preferable as it incorporated the EEC action within the UN system and did not alienate it from it.⁶¹⁷ Zoller also suggests that the EEC action relied rather on a right to collective self-defence. She justifies this on the fact that when addressing the issue before the GATT, the measures were referred as measures taken by the Community and its member states on the basis of their “inherent rights”.⁶¹⁸

In addition to the EEC measures, West Germany imposed a trade embargo against Argentina,⁶¹⁹ Norway prohibited imports,⁶²⁰ whilst France, Belgium, West Germany and the Netherlands banned arms sales to Argentina. Canada, greatly concerned by the use of force by Argentina as a means for settling a dispute over a territory, recognized the UK’s right to self-defence. It was on this basis that Canada decided to impose a ban on exports of war material and on all military shipments to Argentina and introduced restrictions on the import of Argentinean goods to Canada.⁶²¹

⁶¹⁴ Ibid/158.

⁶¹⁵ Ibid/159,162-3.

⁶¹⁶ Ibid/165.

⁶¹⁷ Ibid/158.

⁶¹⁸ Zoller/1984/104-5.

⁶¹⁹ Hufbauer/1985/718.

⁶²⁰ Financial Times, *Latin American Markets*, 10 May 1982, 3; Financial Times, 13 July 1982, 14 in Hufbauer/1985/719.

⁶²¹ CYIL/1983/359-60.

More interestingly, the US, like Argentina a member to the OAS, decided upon the implementation of numerous measures with considerable economic and political effects which contributed to the outcome of the dispute.⁶²² Apart from the logistical and material assistance it was providing to the UK, the US suspended all military exports and security assistance to Argentina, withheld the certification of Argentina's eligibility for military sales, suspended the Export-Import Bank credits and guarantees, and suspended the Commodity Credit Corporation guarantees. The US government justified its position by reference to the principles of law and the peaceful settlement of disputes in consequence of Argentina's refusal to accept a compromisory solution. The US Secretary of State in particular referred to the need to take action in the light of the use of unlawful force for the resolution of disputes.⁶²³ Many states however, especially within the inter-American system, viewed these measures to be in violation of the OAS principles and international law. By Resolution I, adopted during the 20th Consultation of Ministers of Foreign Affairs and by a great number of OAS member states few weeks only after the dispute, the EEC and US measures were deplored since they were neither authorized by the SC nor were consistent with the UN and OAS Charters, or the GATT. The US was called upon to lift the coercive measures and to refrain from providing material assistance to the UK in conformity with the principle of solidarity recognized under the Inter-American Treaty of Reciprocal Assistance.⁶²⁴ In another resolution adopted by the OAS Inter-American Economic and Social Council it was declared that the economic measures against Argentina were in breach *inter alia* of article 19 of the OAS Charter according to which "No state may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another state and obtain from it advantages of any kind",⁶²⁵ and the UN Charter.

Avecedo takes the view that the US unilateral withdrawal of benefits from Argentina was unlawful regarding the grounds upon which it relied, namely, to force Argentina accept contrary to its own wish a compromise on the conflict, and which was punitive in nature.⁶²⁶ Furthermore, Avecedo points to the justification used for the suspension of the Export-Import Bank credits and guarantees in Public Notice 805 and which relied on the US policy and national interest.⁶²⁷ Yet, at the OAS Economic and Social Council

⁶²² Acevedo/1984/323.

⁶²³ See Haig/Statement/1982 in *ibid*/326,340.

⁶²⁴ Avecedo/1984/338.

⁶²⁵ In Avecedo/1984/331/fn23.

⁶²⁶ *Ibid*/337-8,341.

⁶²⁷ *Ibid*/341.

meeting held in October 1982, the US government rebutted that it had been involved in the adoption of coercive measures against Argentina. Rather:

The United States had no legal obligation to keep up the benefits that it withdrew from Argentina, nor did it violate any existing agreement with that country. The measures the United States adopted were not intended to obtain advantages of any kind; quite to the contrary, their purpose was to demonstrate the consistency of the United States vis-à-vis the principle of peaceful settlement of disputes.⁶²⁸ The measures taken by the Government of the United States demonstrated the United States' adherence to the basic principles of international law and were fully in keeping with its international obligations, and particularly with the pertinent resolution adopted by the United Nations Security Council.⁶²⁹

According to Avecedo this legal argumentation seemed contradictory in many respects. More specifically, it denied the existence of US coercive measures against Argentina, something that went beyond the statement of the State Secretary himself on the matter, it contradicted the purpose of Public Notice 805 the purpose of which was to advance US policy and national interests, and lastly it denied that there had been any violation of an agreement existing between the two states, thus implying that the UN and OAS Charters and the GATT were not agreements between Argentina and the US.⁶³⁰

Although the US action arguably did not constitute a breach of specific trade undertakings towards Argentina, it reveals the determination on the part of the US government to respond with economic and other measures to a serious violation of the international legal order, even if no injury was sustained by it. The EEC collective non-forcible measures on the other hand offer a clear example of peaceful remedies taken outside the context of a SC mandate and in violation of specific treaty obligations, in an acknowledgment that the unlawful use of force could not leave it unaffected, even if again the EEC and its member states, with the exception of the UK, were not the direct victims of attack by Argentina. However, if it is shown that the EEC action was the result of collective self-defence, then another significant question is raised, and in particular as to whether the EEC measures could still fall within the category of countermeasures, or whether a different legal characterization would be attached to them as a consequence of the fact that the EEC and the other states, by resorting to the measures under consideration, were acting as belligerent parties.

⁶²⁸ See Piedra/Statement in Avecedo/1984/342.

⁶²⁹ Ibid.

⁶³⁰ Ibid.

5.2.6. Non-Forcible Action against the Soviet Union for the Destruction of a Civil Aircraft in Flight (1983)

In September 1983 the USSR shot down and destroyed a South Korean aircraft which had strayed into Soviet airspace, killing all the people on board including nationals of several states. The USSR justified its act on the allegation that the aircraft had been involved in spying against it, although later it was proved that the aircraft was a civilian and unarmed Korean Airlines plane.

The US responded to this 'heinous' act by: announcing the suspension of Aeroflot's right to sell tickets in the US; the prohibition of US airlines from selling tickets in the US for transportation with Aeroflot; the prohibition of US airlines to carry traffic to, from or within the US where an Aeroflot flight is on the ticket; the instruction of US airlines to suspend any interline service arrangements with Aeroflot; and the prohibition of American airlines from accepting tickets issued by Aeroflot for air travel from, to or within the US. It was the position of the US government that since there were no agreed services under the 1966 US- USSR Civil Transport Agreement the USSR had no right to have the Aeroflot services in the US maintained, making reference to the arguments it advanced when similar action was taken against the USSR for its involvement in the repression in Poland.⁶³¹

Despite the fact that among the passengers killed as a result of the Soviet action were American nationals, thus entitling the US to action as an aggrieved state, the US government placed particular emphasis on the fact that the Soviet action was in violation of both general international law concerning the prohibition of the use of force and its obligations under the International Civil Aviation Organization on the signal, warning and guidance procedures for the interception of civilian aircrafts.⁶³² In particular, President Reagan demanded that the Soviet Union give a full explanation of the circumstances of the shooting, an apology and reparations for the families of the victims. He further stressed that "It would be easy to think in terms of vengeance, but this is not a proper answer. We want justice and action to see that this never happens again."⁶³³

⁶³¹ Cumulative/Digest/1981-1988/II/2190.

⁶³² *ibid*/2199-2209.

⁶³³ Washington Post, 6 September 1983, A4 in Hufbauer/1985/740.

For its part the USSR did not deny the existence of a rule prohibiting the use of force, but rather attempted to justify its action on the basis of another customary norm, in particular the norm concerning the treatment of aircrafts that were involved in an espionage mission.⁶³⁴

In a draft resolution by the SC, subsequently vetoed by the USSR, it was stated that the Soviet action was in violation of “elementary considerations of humanity”.⁶³⁵ In the absence of collective action, certain other states among which West Germany, Spain, Japan, Canada, the UK and other NATO countries (with the exception of France, Greece and Turkey) announced a two-week prohibition on all Soviet Aeroflot flights from and to their territories.⁶³⁶ To the extent that this decision was in breach of specific aviation commitments, and it is very likely that it was, and provided that these states were not aggrieved parties due to the shooting of the aircraft, their decision could be regarded as a violation of an *erga omnes* obligation not to use force and to respect the safety of civilian aircraft.

5.2.7. Countermeasures against the Apartheid Regime in South Africa (1986)

5.2.7.1. Introductory Note

The problem of apartheid had been extensively dealt with by UN organs in the 1960s with the adoption of several resolutions, especially by the General Assembly, in condemnation of the racial policies of the South African regime, whilst many states were calling for a harsher reaction with the implementation of several economic and trade measures against the country. In 1977, amid growing international unrest concerning apartheid, the SC acting under Chapter VII of the Charter imposed a mandatory arms embargo on SA.⁶³⁷

Apartheid was viewed by some authors as a violation of the right to self-determination as incorporated in the 1970 General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States according to which people have a right to be ruled by a government without distinction as to race, creed or

⁶³⁴ HLR/1984/1198.

⁶³⁵ In Kido/1997/1052. Also see Petman/2004/362.

⁶³⁶ Hufbauer/1985/739,741.

⁶³⁷ SC/Res/418/1977.

colour.⁶³⁸ Whilst the Declaration does not create legally binding effects, the right to self-determination not only found expression in customary international law, but it also established obligations *erga omnes* as the ICJ ruled in the *Barcelona Traction Case*. Furthermore, the ICJ itself had found that the South African practices of racial segregation and the denial of fundamental human rights were “a flagrant violation of the purposes and principles of the UN Charter”.⁶³⁹

5.2.7.2. The Indian Reaction

In the World War II era India was the first state in 1946 to take the path of trade measures against SA for its apartheid policies and for what it characterized as an issue that touched the conscience of the world.⁶⁴⁰ It raised the matter before the UN General Assembly, arguing that with the 1946 Asiatic Land Tenure and Indian Representation Act passed by the South African government imposing complete segregation on trade and residence, SA had repudiated the Capetown Agreement between the two countries. SA in response argued that since the question concerned not Indian nationals but rather Indian nationals of SA, it fell within the domestic jurisdiction of its country. However, reference was also made to the Capetown Agreement whose object according to SA was to encourage emigration back to India and to improve the life of those who remained.⁶⁴¹ Although it seems that both states were relying on their obligations under the Agreement, this case may be of some value if it is to be deduced that the segregation imposed by SA was not in violation of the agreement, in which case India would be entitled to resort to countermeasures as an injured party.

5.2.7.3. The Reaction of African States

In the conference conducted by independent African states in Addis Ababa in the summer of 1960, the African states were called upon to react to the ‘shameful’ racial discrimination policies of SA and to take various measures in response. These included the imposition of trade embargoes on all African products, the closure of their ports to all South African vessels, the prohibition of vessels carrying their flags from using South African ports, and the refusal of landing and overflight rights to aircrafts owned

⁶³⁸ GA/Res/2625/1970. See Ferguson Brown/1988-89/61.

⁶³⁹ ICJReps/1971/31.

⁶⁴⁰ Villiers/1995/1.

⁶⁴¹ UNYB/1946-47/144.

by SA. A month after the adoption of this resolution, Ghana was the first state to implement the decision by imposing a total embargo upon all South African products and to close its ports and airports to South African planes and ships. It even required South Africans entering its territory to declare their opposition to apartheid and, if refused, it was denying them entry.⁶⁴²

5.2.7.4. The US Reaction

In an in-depth examination of the US policy on the apartheid regime in SA it is observed that never before had the US been so successful in protecting human rights abroad and leading the racist regime to its slow death. This was achieved by means of both sustaining regional diplomacy and taking into consideration the strategic interests in the African continent, and adopting a more dynamic approach through the implementation of peaceful measures. Nothing was ever so effective to threaten the structures of apartheid policies, not even the multilateral oil and arms embargoes against SA imposed by the UN in the 1960s and 1970s, as the economic measures taken by the US alone in the mid 1980s.⁶⁴³ Only when a firmer approach was adopted by the US, at the time one of the closest trading partners and major investors in SA and in combination with the formulation of strong opposition within SA itself, was the regime induced to bring to an end these policies.⁶⁴⁴ The US decision to take action influenced other economic powers such as Japan and the UK to do the same. Similarly, other smaller states followed with the adoption of what they described as “symbolic gestures”.⁶⁴⁵ The incentive behind the American measures was not to overthrow the regime but rather to reinforce domestic forces fighting apartheid.⁶⁴⁶

Nevertheless, as already seen, the US government was not always favourable to a stronger line with measures of economic character against SA. When in 1976 the SC adopted resolution 392 calling upon the South African government to cease the violence against the African majority and to take measures to eliminate its apartheid policies, the US supported the resolution which was adopted under Chapter VI and not Chapter VII and which purported to terminate the flagrant violations of human rights. At the same

⁶⁴² See New York Times, June 25, 1960, col. 6; July 30, 1960, 1 col. 1.

⁶⁴³ Baker/2004/86.

⁶⁴⁴ Ibid/93.

⁶⁴⁵ Villiers/1995/xiv.

⁶⁴⁶ Baker/2004/104.

time it made clear that it could not support enforcement action in what the US government regarded as falling within the domestic jurisdiction of another state.⁶⁴⁷

Ten years later, with the strengthening at a domestic level of the voices in support of action against SA and with the UK proceeding with limited sanctions in response to more extensive measures announced by the Commonwealth countries, the US Congress in an overwhelming vote overturned President Reagan's veto against economic measures. In this way, the US Congress went beyond its mere role of review in the formulation of foreign policy, and SA received "the strongest psychological and economic blow it had ever received from the international community".⁶⁴⁸

With the Comprehensive Anti-Apartheid Act of 1986⁶⁴⁹ direct air flights between the US and SA ceased, in violation of the Agreement between the two countries relating to Air Services Between their Respective Territories signed in 1947.⁶⁵⁰ More specifically, the right of any South African designated air carrier to provide services under the 1947 Agreement was revoked whilst all US air carriers were prohibited from continuing their services to SA. The American decision was taken pursuant to Article XI (B) of the Agreement which established the right of any party to request consultation with the other party at any time. Accordingly, "[w]hen the procedure for a consultation provided for in paragraph (B)...has been initiated, either contracting party may at any time give notice to the other of its desire to terminate this agreement."⁶⁵¹ Article XI further established that the termination of the agreement would take effect one year after the date of receipt of the notice of termination. However, a few days after the US government announced its intention to terminate the Agreement, it revoked the operating permit of South African Airways and restricted the operating service of US air carriers with SA in accordance with Section 306 of the Act. In contesting the lawfulness of the US action, South African Airways filed a petition before the US Court of Appeals for the District of Columbia Circuit, arguing first that Section 306 did not require immediate revocation of its permit and secondly that in any event, no revocation could be permitted before the end of the one-year period since the notice for termination was given. It was thus the submission of the South African airline that the Final Order authorizing these measures against it was *inter alia* in violation of the 1947 Agreement.

⁶⁴⁷ US/Digest/1976/165.

⁶⁴⁸ Baker/2004/89.

⁶⁴⁹ Anti-Apartheid/Act/1986.

⁶⁵⁰ Petman/2004/371.

⁶⁵¹ See Cumulative/Digest/1981-1988/II/2184.

In making its case before the Court the US government argued that the Court should refrain from adjudicating the case before it because the dispute involved the implementation of international agreements and a foreign policy issue which fell within the powers of the Executive Branch. The Court held that Section 306 was meant by the Congress to be given immediate effect and priority over the 1947 Agreement or any other conflicting domestic law. It further stressed that the Congress had the right to denounce international treaties whenever it sought fit.⁶⁵²

With respect to the other measures adopted under the Comprehensive Anti-Apartheid Act, new investments in SA were banned with the exception of investments made in firms owned by blacks. Loans going to the private sector and to the South African government were also prohibited except for those needed for humanitarian purposes. Imports from SA to the US were prohibited whilst the US government was banned from buying South African goods and services and from promoting tourism to SA. There was also a prohibition against the export of products whilst US nationals were banned from making new investments in SA either directly or indirectly.⁶⁵³ For the first time in US history human rights concerns gained primacy over economic and geo-strategic interests.⁶⁵⁴ The only way for the South African government to escape from its economic isolation was by compliance with the requirements of the Act, or, even more remotely, with a decision by both Houses of the US Congress. Among the requirements that the regime had to fulfill for the termination of the measures against it was the release of Nelson Mandela from jail in addition to the fulfilment of three of the four following conditions: repeal of the state of emergency and the release of all the detained persons; the enhancement of the democratic process with the participation of the political parties banned by the regime; the repeal of the Great Areas Act and the Population Registration Act; and the initiation of good faith negotiations with genuine representatives of the black population.⁶⁵⁵ In the event that no compliance occurred within a period of 12 months additional sanctions could be imposed such as the banning of importation from SA of strategic materials, steel, diamonds, food, agricultural products and military assistance to countries violating the arms embargo against SA.

⁶⁵² *South/African/Airways/Case* Also see *Cumulative/Digest/1981-1988/II/2185-7*. It needs to be said that in opposing the inclusion of aviation sanctions in the Anti-Apartheid Act the American Administration drew the attention to the fact that such decision would be in violation of the 1947 Agreement with SA, and that as a result the US would have to go to solve the dispute through arbitration. In that case, it was mentioned, the US would be in danger of being obliged to award damages to SA.

⁶⁵³ *Law/Restatement/vol. 1/382*.

⁶⁵⁴ *Baker/2004/92*.

⁶⁵⁵ *Villiers/1995/125-6*.

At the same time however the diplomatic and consular relations between the two countries were not terminated. On the contrary, the US government continued diplomatic negotiations with SA with the purpose of encouraging and influencing it towards ultimate change.⁶⁵⁶ The contribution of the US sanctions towards political change and reform in SA with the final abolition of the apartheid regime is not insignificant and for this purpose should not go unnoticed. If none of these measures had been taken the apartheid regime would most possibly still be in place or have ended in violence.⁶⁵⁷ Whilst the intention of these measures was not to overthrow the regime but rather to reinforce domestic forces fighting apartheid, it was pointed out that, “Even the law’s most ardent supporters pointed out that there was no precedent for a ruling elite relinquishing power without force and that sanctions rarely are enough to dislodge a regime that is militarily secure.”⁶⁵⁸

Although the South African example must be viewed in the framework of the surrounding circumstances and its specific characteristics due to both the external and internal changes occurring at the time, it remains undisputed that if no economic measures were taken this would have allowed the racist regime to continue to commit its atrocities with impunity.⁶⁵⁹ In his conclusion about the effect of US sanctions on the historic regime transformation it was about to follow the next years, de Villiers argues that “US and other punitive measures significantly dictated the form, substance, timing, and pace of these reforms.”⁶⁶⁰

For his part, Nelson Mandela, in his first speech before the US Congress after his release from prison, took the opportunity to express his gratitude for the adoption of the “historic” Comprehensive Anti-Apartheid Act “which made such a decisive contribution to the process of moving our country forward towards negotiations”.⁶⁶¹ He insisted that the measures remained in place until the goals of the Act, namely the abolition of apartheid, were met. The measures continued until 1993 when relations between the US and SA were finally restored with the signature of the National Peace

⁶⁵⁶ Baker/2004/94.

⁶⁵⁷ Mullerson/1997/114.

⁶⁵⁸ Baker/2004/98,104.

⁶⁵⁹ Ibid/92.

⁶⁶⁰ Villiers/1995/207.

⁶⁶¹ New York Times and Washington Post, 26 June 1990.

Accord between the government of SA and opposition groups, following which the conditions for the termination of the sanctions were finally met.

In a concluding note, it has been remarked that:

South Africa was not invaded by an outside power and did not descend into full-scale internal war, but it underwent a political transformation from apartheid to democracy that was every bit as radical as that of Afghanistan after the Taliban and that of Iraq after Hussein. The South African state could have collapsed but did not. It thus presents a rare instance of regime change- indeed, it was a system change- that resulted in a dramatic improvement of human rights. Critical external intervention was applied successfully and in a timely way, without the use of military force.⁶⁶²

5.2.7.5. The Reaction of the Dutch Government

When the Dutch Government recommended a number of measures concerning oil supplies to and imports and investments in SA, the Advisory Committee on Questions of International Law was requested to examine the lawfulness of these measures within the UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States. According to the report of the Committee prepared in 1982 and entitled "Measures against South Africa and the Non-intervention Duty", the duty of non-intervention should not be viewed in isolation but on the contrary be examined in the light of other rules of international law. Since apartheid was regarded by an overwhelming majority of states as a flagrant violation of the human rights of the non-white population of SA, it could not be protected within the ambit of the rule of non-intervention. In this case, it was noted, a distinction between lawful and unlawful intervention was necessary. However, the question of whether there exists a duty of non-intervention needs to be distinguished from the question as to whether there exists a right to resort to countermeasures and especially to countermeasures of general interest.

The report further examined the question as to whether intervention needed to be at the initiative of the international community as a whole or whether it could be resorted to by individual states. To conclude that:

it can be established that the Charter was never intended to confer exclusive powers upon the Security Council. Although binding decisions in respect of (military) enforcement measures are a prerogative of the Security Council in the Charter, it does not follow that the general rules of international law relating to

⁶⁶² Baker/2004/109.

the right to take measures against unlawful acts are thereby invalidated. Clear proof of this can be found in the right, also recognized by the Charter, of individual and collective self-defense.⁶⁶³

One could argue of course that the report speaks of the *right* to take measures already recognized in international law, something that cannot be deduced with clarity with respect to an existing right of third states to countermeasures in response to the most flagrant violations of international law. More importantly, it was the defence of the Dutch government that its action was not in violation of a specific obligation under international law. Therefore, the example does not seem to fall within the ambit of countermeasures, provided of course that indeed no duty on the part of the Netherlands was infringed. Nevertheless, the above abstract should be viewed in the entire context of the report which examines the legality of Dutch action in the absence of a SC resolution against the apartheid regime in South Africa and under which the Netherlands had suffered no direct injury.

In the Memorandum of Reply to the First Chamber concerning the Bill on the application of sanctions against states and territories,⁶⁶⁴ it was recognized that there could exist special circumstances to justify measures other than those authorized by the SC for the protection of the international legal order which had nothing more to fear than total inaction in the face of the most grave infringements.⁶⁶⁵ Interestingly, in a note sent by the Dutch Minister for Foreign Affairs to the Second Chamber in 1979 relating to the question of the oil embargo against SA, it was noted that the obligations of the Netherlands under the EEC, the Benelux Economic Union and GATT posed an obstacle to its taking unilateral commercial action against South Africa. The only exception referred to was the existence of a mandatory SC resolution in which case the Netherlands, according to the note, would be entitled to derogate from its other treaty obligations.⁶⁶⁶ However, it seems to be also suggested that in the case of a possible consent of the other parties to the treaties just mentioned, the imposition of measures, even third state countermeasures, would be feasible. As already noted in section 3 of this chapter, the Sanctions Bill introduced in 1976 to enable the Dutch government to conform with its obligations at the international level did not differentiate between lawful measures on the one hand and countermeasures on the other. It could be

⁶⁶³ NYIL/1983/XIV/248.

⁶⁶⁴ NYIL/1977/Vol.8/205.

⁶⁶⁵ NYIL/1981/Vol.12/170.

⁶⁶⁶ Ibid/240-241.

therefore implied that the possibility of even third state countermeasures was not precluded.

The note finally concludes that what has just been mentioned should be taken into consideration for an evaluation of the “political effect of an oil embargo by the Netherlands”, making however no reference to the legitimacy of a unilateral decision of the Netherlands to proceed with the imposition of the oil embargo in general international law. In other words, what is examined in the note is the justification for the Dutch action under specific treaty regimes but not under the general law on state responsibility and the rules concerning the lawfulness or unlawfulness of third-state countermeasures. Furthermore, the possibility of the imposition of sanctions *not* contradictory to Netherlands’s obligations under the EEC and its other obligations, is left open. More notably this is confirmed in the Statement of the Dutch Prime Minister in the Second Chamber of 26 June 1980, which stressed that any action against SA, although desired, would have to be in concordance with the country’s obligations towards its economic treaty partners.⁶⁶⁷

5.2.7.6. Canadian Measures against Apartheid

The Canadian government, despite its hesitant position towards economic action, announced a number of measures to oppose apartheid, including economic. More specifically, it ended the Program for Export Market Development and the global insurance policies written by the Export Development Corporation concerning SA; broadened and widened the UN arms embargo in order to include high-technology items and announced abrogation of their Double Taxation Agreements; introduced a voluntary ban on loans to SA and its agencies; announced a voluntary ban on the sale of crude oil and refined products to SA by asking Canadian companies not to sell these products to SA; and it imposed an embargo on air transport between Canada and SA although there was no bilateral agreement on which previous traffic rights were based. On the contrary, direct air transport between the two countries was limited to occasional charters. With this measure reciprocal air service of charter flights ceased until apartheid was abolished. It seems that with the exception of the abrogation of the Double Taxation Agreements all the other measures decided by the Canadian government were not in contravention of international law.

⁶⁶⁷ Ibid/242-243.

5.2.7.7. Concluding Remarks

The action taken especially by the US in reaction to the discriminatory practices of SA in disregard of specific treaty commitments is another significant example of state practice in support of countermeasures for gross human rights violations. Apartheid was a practice strongly deplored and condemned by the vast majority of countries. The fact that the examination was confined particularly to the US action has only to do with the fact that in the view of the limited scope of the present examination, there was neither the time nor the space to examine thoroughly the measures taken by other countries. At the same time, it is also important to remember that in international politics often other interests, mainly of an economic nature, come into play, resulting in inaction even in response to the most serious violations of international law. This element should not be ignored when examining whether or not states support a right to react when the most valued principles of the international community as a whole are endangered.

5.2.8. The Iraqi Invasion against Kuwait and the EEC Response (1990)

As a result of the Iraqi aggression and invasion of Kuwait in the summer of 1990, the SC adopted resolution 660 on 2 August 1990 within its powers under Chapter VII of the UN Charter demanding Iraq's immediate withdrawal from Kuwait and deciding to meet again for the determination of further action that might prove necessary, although no concrete action was decided at that point. In the light of these developments the Ministers of Foreign Affairs representing the member states of the EC arranged a meeting on 4 August 1990 in the context of the EPC, where they condemned Iraq in the strongest terms, demanding from it to the immediate and unconditional withdrawal of its troops from the territory of Kuwait. Rejecting as unfounded the grounds on which Iraq based its military aggression against Kuwait and noting that they would work systematically for a consensus in the SC on mandatory and comprehensive sanctions should Iraq fail to comply with resolution 660, the Community and its member states took a step further. They decided to impose an embargo on all oil imports from Iraq and Kuwait; to freeze Iraqi assets existing in the territories of Community member states; place a prohibition on arms and other military equipment sales to Iraq; suspend all technical and scientific cooperation with Iraq; and suspend the application of

generalized preferences to Iraq.⁶⁶⁸ This decision came during the time that negotiations were still ongoing within the SC and even before a formal SC resolution authorizing any kind of sanctions was adopted,⁶⁶⁹ although it actually took effect after the adoption of SC resolution 661 (1990) of 6 August with which the SC authorized economic, trade, finance and arms sanctions. In compliance with the EPC's decision the Commission presented to the Council on 8 August various proposals for the adoption of measures against Iraq and for their extension to Kuwait with the purpose of preventing the aggressor from benefiting from its unlawful actions. The proposals concerned the prohibition of the import into Community territory of crude oil and refined petroleum products coming from either Iraq or Kuwait, the suspension of the generalized tariff preferences for products coming from Iraq in accordance with Council Regulations No 3896/89, No 3897/89 and 3898/89, and the suspension of Council Regulation No 3899/89 concerning levy reductions. It is noteworthy to point out that the proposals do not seem to rely for their legitimacy on SC resolution 661. Rather, in the explanatory memorandum emphasis is given to the statement of 4 August made by the Community and its member states in the framework of political cooperation. To take notice in the main body of the proposed regulations *inter alia* of:

the serious situation caused by Iraq's invasion of Kuwait resulted in Resolution 660 (90) of the United Nations Security Council and led to the statement by the Community and its Member States of 4 August 1990 which unreservedly condemned Iraq's invasion of Kuwait and called for the immediate and unconditional withdrawal of Iraqi forces from Kuwait's territory, and also led to the decision to take economic action against Iraq, in accordance with the relevant provisions of the Treaties of the Communities.⁶⁷⁰

Following the Commission's recommendations the EU Council decided the same day to prohibit trade between the Community, Iraq and Kuwait with Regulation 2340/90. With this resolution the Community and its member states agreed "to have recourse to a Community instrument in order to ensure uniform implementation throughout the Community of the measures concerning trade with Iraq and Kuwait decided upon by the United Nations Security Council".⁶⁷¹ Taking cognizance of SC resolutions 660 and 661

⁶⁶⁸ EC/Bulletin/1990/No.7-8/Vol.23/(1.5.11) The EPC provided merely *coordination* among the member states to the EC on matters of foreign relations, for which the member states retained their full sovereign powers and did not transfer such competences to the European institutions like they did with a wide number of economic issues. See OJ/987/L169/1. For more information on the EPC see Stein/1983/49; uttal/1987/211. The EPC was replaced by Title V of TEU which provided for a CFSP.

⁶⁶⁹ Bohr/1993/258. See EC/Bulletin/1990/No.7-8/(1.5.11).

⁶⁷⁰ COM/(90)/375; COM/(90)/376; COM/(90)/391.

⁶⁷¹ OJ/1990/L213/1.

with which it authorized sanctions against Iraq, the Council observed that “in these conditions, the Community’s trade as regards Iraq and Kuwait must be prevented”. Consequently, all trade with Iraq, including imports and exports, and all activities and commercial transactions were banned. It is important to point out that the Regulation, although aiming to comply with the SC decisions, did not rely on article 224 concerning concerted action by the Community member states in compliance of their obligations for the maintenance of international peace and security, but rather on article 113 concerning a common commercial policy.⁶⁷² This could be perhaps interpreted as revealing the intention of the Community to take action irrespective of SC authorization. Moreover, with regulation 3155/90 the EC imposed restrictions on air services. In a similar context lay the prohibition of commodities covered under the ECSC.⁶⁷³ In this way, the member states of the EC decided upon the uniform application of economic and other measures against Iraq and Kuwait, measures that were decided at a Community level and not unilaterally by individual states.⁶⁷⁴

5.2.9. Collective Action against Yugoslavia (1998)

Following further worsening of the humanitarian situation in the Federal Republic of Yugoslavia in 1998 the SC decided to impose an arms embargo against the Federal Republic of Yugoslavia under its Chapter VII competence, whilst not excluding the possibility of additional measures should a peaceful settlement of the conflict in Kosovo fail. The EU Council, through Common Positions and regulations decided the implementation of additional measures in order “to obtain from the Government of the FRY the fulfilment of the requirements of UNSC Resolution 1160 (1998) and of the said Common Positions”.⁶⁷⁵ It needs to be stressed however that Resolution 1160 does not authorize any member state to resort to such measures in order to bring the compliance of the FRY with its international obligations. The only duty it imposes is “that all States shall, for the purposes of fostering peace and stability in Kosovo, prevent the sale or supply to the Federal Republic of Yugoslavia, including Kosovo, by their nationals or from their territories or using their flag vessels and aircraft, of arms and related matériel of all types, such as weapons and ammunition, military vehicles and equipment and spare parts for the aforementioned, and shall prevent arming and training

⁶⁷² Chinkin/1996/199.

⁶⁷³ See OJ/1990/L213/1; OJ/1990/L213/3.

⁶⁷⁴ Chinkin/1996/198.

⁶⁷⁵ OJ/1998/L248/1; OJ/1998/L95/1; OJ/1998/L143/1; OJ/1998/L165/1; OJ/1998/L130/1; OJ/1998/L178/33; OJ/1998/L209/16.

for terrorist activities there”.⁶⁷⁶ In fact, Russia was unwilling to accept the imposition of economic measures upon the FRY. As a consequence, the EU, the USA, Canada and Japan decided to apply unilateral measures.⁶⁷⁷

The EU Council, with Common Positions adopted on 7 May and 29 June 1998 within its powers under the Common Foreign and Security Policy, decided to freeze all Yugoslav assets abroad and to impose a flight ban, which for some states such as Germany, the UK and France meant violation of their bilateral aviation agreements with the targeted country.⁶⁷⁸ This was implemented with regulation 1901/98 where the Council noted that the FRY had not stopped its indiscriminate violence and brutal repression “against its own citizens, which constitute serious violations of human rights and international humanitarian law, and has not taken effective steps to find a political solution to the issue of Kosovo through a process of peaceful dialogue with the Kosovar Albanian Community in order to maintain the regional peace and security.”⁶⁷⁹ This regulation provided that any aircraft operated directly or indirectly by a Yugoslav carrier, or a carrier which had its main place of business or registered office in the FRY, would be banned from flying between the FRY and the EC, thus revoking all existing and new operating authorizations to Yugoslav carriers. This prohibition was limited to landing and taking off rights. With a subsequent Council Regulation the ban was expanded to cover the take off or land in the territory of an EC member state of any civil aircraft which has taken off from or is going to landing in the territory of the FRY.⁶⁸⁰ The implementation of flight ban was later challenged in the *Bosporus* and *Ebony Cases* which are thoroughly examined within the scope of the last chapter.

The regulation raised significant issues of the legality of the measures under international law, especially in view of existing Air Services Agreements between EU member states and the FRY. One such example relates to the Air Services Agreement concluded in 1959 by the Government of the UK and the then Government of the Federal People’s Republic of Yugoslavia.⁶⁸¹ The Agreement specifically provided that

⁶⁷⁶ SC/Res/1160/1998.

⁶⁷⁷ See UK/Parliament/Kosovo/Crisis.

⁶⁷⁸ OJ/1998/L143/1; OJ/1998/L190/3.

⁶⁷⁹ OJ/1998/L248/1.

⁶⁸⁰ OJ/1999/L129/27; OJ/1999/L264/3.

⁶⁸¹ UK/FPRY/Agreement/1959. This Agreement continued to be binding between the UK and the FRY and was the subject of a meeting between representatives of the two countries which took place on 14 October 1996 for the purpose of considering the position of their bilateral agreements. See Command/Paper/1998.

in the event of any dispute arising relating to its interpretation or application it should first be attempted to resolve such dispute with negotiation between the parties. Should such negotiations fail then the parties were entitled (“may”) to request the resolution of the dispute by an arbitration tribunal. Even more significantly, article 17 of the Agreement allowed the termination of the treaty by either party by giving notice to the other party. In such an event, the termination of the treaty would become effective only twelve months after the receipt of the notice.

There apparently existed a real impediment concerning the lawfulness under international law of possible implementation by the UK government of Council Regulation 1901/98 with the adoption of the UK Yugoslavia (Prohibition of Flights) Regulations 1998 which was passed few days after the Council Regulation entered into force and which gave immediate effect to it.⁶⁸² The requirement of the twelve months notice was indeed a matter of concern for the British government as it can be revealed from the response given by the Secretary of State to the Committee on Foreign Affairs enquiry on the matter. Initially the UK government was very reluctant to introduce the ban on flights conducted by Serbian airlines immediately as required by the Council regulation.⁶⁸³ In a confidential memo sent to all the member states of the EU the UK government contended that it possessed no right under international law to resort to “reprisals” and in particular not to comply with existing treaty obligations due to the fact that the human rights violations in Kosovo did not affect the EU member states directly.⁶⁸⁴ However, in the light of fierce criticism, especially from its European partners, the UK government reversed its decision and decided to enforce the ban immediately. The Secretary of State, whilst acknowledging the legal implications from giving immediate effect to the ban in contravention of the Air Service Agreement, especially article 17, went on to point out that “given the continued repressive activities of President Milosevic’s troops in Kosovo, and the sharply deteriorating humanitarian situation, we concluded that it would be right to proceed with an immediate ban on 16 September 1998.”⁶⁸⁵ Asked about the legal grounds on which the 1959 Agreement was to take precedence over the Council Regulation imposing the air ban, the Secretary of

⁶⁸² The Yugoslavia Regulations 1998 were later revoked with Yugoslavia/Regulations/1999 in accordance to Council/Regulation/1064/1999.

⁶⁸³ House of Commons Debates, 24 July 1998, c. 184. The UK Government was faced with the possibility of proceedings before the ECJ in the event that it declined to conform with its obligations under the Community Treaties. See article by Butler in *The Independent*, 16 September 1998.

⁶⁸⁴ Article by Butler in *The Independent*, 16 September 1998.

⁶⁸⁵ UK/Foreign/Policy/Report/1998-99/6.

State replied that the agreement between the UK and Yugoslavia, which preceded the former's accession to the EC, had not been left unaffected. Consequently, the UK Government still had a legal obligation to abide by its obligations under the agreement. As pointed out:

There was always a balance to be struck between our legal obligation under the 1959 ASA....and the need to bring Milosevic to comply with his obligations. That balance had tilted sharply by September given the worsening humanitarian situation on the ground in Kosovo, and in particular the reports of serious human rights abuses committed by the FRY and Serbian security forces. As my statement of 16 September makes clear, I concluded that, on moral and political grounds, Milosevic had forfeited the right to the 12 months' notice period which would normally apply under the terms of the ASA.⁶⁸⁶

It is significant to highlight the fact that the UK government seems to have taken the view that there does not exist in international law a *legal* right upon states not directly injured by a certain breach to resort to countermeasures, no matter how essential to the fundamental interests of the international community as a whole.

Similar concerns were also expressed by Greece, which invoked its bilateral agreement with Yugoslavia for its failure to give immediate effect to the decision of the EU Council, as reflected in its Common Positions and subsequently in the Regulations.⁶⁸⁷ Irrespective of the legal debate as to the legal force of Common Positions adopted under Title V TEU, especially when these are vaguely phrased, it was pointed out that sanctions decided at a Community level are required to be uniformly applied by all members of the EC. As noted by President Santer, "decisions taken by the fifteen Member States have to be applied by fifteen. If one or more countries refuses to play the game, it strips the decision to impose sanctions of any meaning."⁶⁸⁸

On the other hand it was argued that the EU, by resorting to the flight ban, despite the fact that in this way many bilateral agreements existing between the FRY and individual member states would be affected, "broke new ground".⁶⁸⁹ When the flight ban, and in particular Council Regulation 1901/98, was challenged before the Belgian Cour d' Appel de Bruxelles, the latter ruled in favour of the legality of the regulation on the following grounds:

⁶⁸⁶ Letter to the Chairman of the Committee from the Foreign Secretary on the Yugoslavia Flight Ban, 30/11/1998, Appendix 32.

⁶⁸⁷ See Agence/Europe/1998/7286/2; The European, 14-20 September 1998, 6.

⁶⁸⁸ European Voice, 17-23 September 1998, 15 in Koutrakos/2001/88.

⁶⁸⁹ Paasivirta-Rosas/2002/214.

- ces mesures repondent a une violation anterieure du droit international;
- cette violation autorise les contre-mesures;
- ces contre-mesures ne sont pas d'une illiceite absolue;
- elles sont proportionnees a la violation initiale du droit international;
- leur mise en oeuvre est precedee d; une sommation adressee a l' Etat responsable de mettre fin a la violation initiale du droit international.”⁶⁹⁰

5.2.10. Legal Issues Arising from Extradition Agreements

Not infrequently many European and other states, including the UK, Canada and the Netherlands, are faced with questions of conflicts between two international, conventional or customary, norms of international law, one of which evolved around human rights considerations. The issue was raised among others in the well known *Soering Case* where the applicant, a German national who was accused for murder in the US, had been arrested in the UK and was to be extradited to the US in order to stand trial there. However, the ECHR ruled that there were substantial cumulative reasons to believe that should the extradition be carried out, the applicant faced a real risk of exposure to an infringement of article 3 of the Convention regarding the prohibition of torture and inhuman treatment. Hence, although the prohibition of extradition to a place where an individual would be subjected to torture was not specifically spelled out in the EConv.HR, this did not mean that such a prohibition was not inherent in article 3 of the EConv.HR itself. Judge De Meyer, in his concurring opinion said that extraditing an individual to a place where s/he would be exposed to torture or to the death penalty would be “repugnant to European standards of justice and contrary to the public order of Europe.”⁶⁹¹ The significance of this case lays on the fact that the UK and the US were bound by the 1972 Extradition Treaty, and should extradition be refused the UK would be acting in violation of its treaty obligations, raising its international responsibility. The UK was thus confronted with the dilemma to implement a certain international commitment while violating another. In the end, the UK sought and received assurances

⁶⁹⁰ *Jugoslovenski/Aertransport/1999/693* in Paasivirta-Rosas/2002/215. “These measures correspond to a previous violation of international law; this violation authorizes countermeasures; the countermeasures do not constitute an absolute prohibition; they are proportionate to the initial violation of international law; their resort follows requests for compliance to the state responsible to cease the initial violation of international law.” (Translation by author).

⁶⁹¹ *Soering/1989/439*.

from the US that Soering would not be tried on capital murder charges, and subsequently extradited to the US.⁶⁹²

Similar questions were raised in the case *Short v Netherlands* where the applicant, an American citizen, was wanted by the US for murder. The US and the Netherlands were bound by the NATO Status of Force Agreement regarding extradition issues. However, the Netherlands was also bound by the Sixth Protocol to the EConv.HR by which death sentence was prohibited. Refusing to extradite Short the Netherlands justified its decision on the ground that, "in view of the great importance which must be attributed to the right not to suffer the death penalty, the weighing of the various interests in this case must inevitably result in a decision in Short's favour".⁶⁹³

The significance of the questions that these cases raise is invaluable. This is because both the UK and the Netherlands, while acting in agreement with specific treaty obligations, namely those arising from the EConv.HR, they did so even though their action would be in contravention of another treaty obligation. In both cases above, the two countries required to fulfill their extradition obligations towards the US were third countries, not directly injured by a certain infringement, or even by the possibility of an infringement. Rather, the UK and the Netherlands were acting for the protection of collective interests which had been established within the context of the Council of Europe, upholding in this way the public order of Europe even in disregard of other treaty commitments.

6. As Conclusion: State Practice and *Opinio Juris*

There is little doubt that the problem of enforcement of international norms raises significant questions which lie at the very heart of the nature and function of international law. This is particularly so with respect to interests the preservation and respect of which is fundamental for a group of states or the international community as a whole. The problem of implementation of these "superior" norms examined in earlier chapters, could not escape the attention of the ILC in its work on the codification of the law on state responsibility. However, this task was not free from problems owing to the divergent opinions of states regarding the lawfulness of countermeasures in response to

⁶⁹² Lillich/1991/141.

⁶⁹³ NYIL/1991/No.22/433 in Okafor/Obasi/2003/105.

serious violations of international law by states other than the injured. Accordingly, and in the absence of a clear rule establishing a right to resort to countermeasures for the protection of collective interests, the attention in this chapter has unavoidably been turned to whether the practice analyzed above reveals such rule in the form of custom.

Article 38 of the ICJ Statute refers to custom as “evidence of a general practice accepted as law”. One can therefore notice that custom consists of two interdependent elements: state practice, that is what states do, and *opinio juris sive necessitatis*, that is their belief that they have an obligation to behave in a certain way.⁶⁹⁴

For the existence of state practice to be determined it is a well affirmed principle that some form of continuity and uniformity is required,⁶⁹⁵ although not always the existence of state practice will lead to the development of a legal norm. At the same time, a customary norm may “instantly” be recognized if there exists the required *opinio juris* by states.⁶⁹⁶

Difficulties arise in relation to proving the existence of *opinio juris*, that is the belief that a certain state activity is legally obligatory. It is this element that differentiates custom from moral or political principles. Yet, one may wonder how is it ever possible for a new rule to be formulated by way of custom if one of its essential requirements is that the state action must be in accordance with the law. Shaw points out to this effect that the right interpretation would be that *opinio juris* requires that states act in the belief that certain behaviour is law or is moving towards the direction of becoming a law.⁶⁹⁷ He concludes that: “However, states must be made aware that when one state takes a course of action, it does so because it regards it as within the confines of international law, and not as, for example, purely a political or moral gesture. There has to be an aspect of legality about the behaviour and the acting state will have to confirm that this is so, so that the international community can easily distinguish legal from non-legal practices”.⁶⁹⁸

One crucial question arises in the scope of this examination. Does there exist a rule under customary international law prohibiting or not countermeasures of general

⁶⁹⁴ Shaw/2003/71.

⁶⁹⁵ *Asylum/Case/ICJReps/1950/266*.

⁶⁹⁶ Shaw/2003/74.

⁶⁹⁷ *Ibid/83*.

⁶⁹⁸ *Ibid/84*.

interests, meaning that the examples mentioned here were in breach of international law? Similarly, one could also ask as to whether there exists a rule permitting such countermeasures, or whether there exists no rule on this matter at all, and therefore the analysis of state practice has attempted to prove the formulation of a new rule allowing countermeasures by states other than the injured. We would be inclined to conclude that the issue falls within the former category. It seems that states have been hesitant to resort to countermeasures whenever not individually injured because they believed that they had an obligation to refrain from doing so.

Furthermore, the current analysis, which was not confined to new examples but rather it attempted to shed light on the already known cases of third state countermeasures, has revealed that even in these cases the states not only have been reluctant to clearly spell out that they were acting on the basis of a right under international law, but they also stated that doing so would be in violation of international law. When, for instance, the US Congress decided to impose aviation sanctions against SA as a consequence of its apartheid policies, the US government was concerned that such a measure would be in violation of its agreement with SA. It was the same reluctance that made the EEC not violate its agreements against Uganda, despite the international outcry regarding the atrocities taking place there. The UK government itself, in finally consenting to join the other EU members in taking action against the FRY stated that its decision was based on "moral and political grounds", implying that it was not acting on the belief that it was acting in accordance to the law, as required by *opinio juris*.

White and Abass have observed that the state practice on which the ILC based its conclusions regarding the lawfulness of countermeasures of collective interests does not in all cases reveal a response to a violation of an *erga omnes* obligation (see the action taken against Poland), nor has there been in all instances an infringement of an international obligation, whilst some of such practice was the result of action taken in the context of an international organization such as the EU, although they do acknowledge that the line between institutional and state action is not clear.⁶⁹⁹

On the other hand, the legal value of certain other examples must not be ignored either. In particular, when the EEC decided in the 1980s to take action against Poland, the Soviet Union or Argentina in response to serious violations of international law, the

⁶⁹⁹ White-Abass/2003/516.

issue of legitimacy or illegitimacy under international law was never raised as an obstacle. An additional factor that needs to be taken into consideration when studying these examples is that often the human rights or foreign policy of states was drafted on the basis of their economic, political or geo-strategic interests. This consideration has also contributed to the reluctance of states to protect community values by unilateral peaceful means when these were threatened by intransigent states.

Therefore, although the existing practice does not suffice and does not conclusively support a right to third state countermeasures, it says something important about how things may evolve in the future. Still, *opinio juris* plays a pivotal role in the formulation of a customary norm, and consequently more state practice is required for establishing a right permissive of countermeasures for the protection of collective interests.

Having left open the possibility of future formulation of a rule permissive of countermeasures for the protection of collective interests reflected either in *jus cogens* norms or *erga omnes* obligations by states not specifically injured by their infringement, it is imperative to ascertain that such rule will not be subjected to abuse. Proportionality, which is analyzed in the next chapter, fulfils exactly this function, safeguarding not only the rights of the wrongdoing state, but also the interests of the international community.

CHAPTER 5

The Principle of Proportionality

1. Introduction

It has already been stressed throughout this work that in a decentralized legal system where as a general rule no enforcement mechanisms are available, countermeasures become important because they enable the state whose rights and interests have been infringed to remedy the violation and its unlawful consequences by inducing the wrongdoing state to cease its wrongful conduct and to offer reparation for the injury suffered. However, the fact that the determination of whether a violation that would justify countermeasures in the first place has indeed occurred is made unilaterally by the state resorting to them, makes countermeasures vulnerable to abuse and excessiveness. For this reason the international legal system has attached certain conditions for the lawfulness of countermeasures, examined in section 5.2 of this chapter. In this framework, proportionality, which is at the focus of examination of this last chapter, comes as one condition of lawfulness amongst others that intend to restrain the powers of states when resorting to countermeasures.

When in domestic law the state needs to take action through policing measures in order to either prevent or punish the commission of a certain criminal act, it is required that the police abide by specifically defined rules and principles, the aim of which extends primarily to the protection of fundamental, inalienable human rights and the observance of the rule of law applicable in a just state. Any action taken not only must not be taken arbitrarily and in abuse of the powers entrusted by law, but it must also be the result of pressing necessity without which the legitimate objective cannot be achieved. However, the fact that certain action was necessary does not by itself mean that the specific action finally chosen was also proportionate. Proportionality possesses a prominent position in national legal systems where the state and the individual stand in an apparent relationship of inequality. The notion has developed out of the need to regulate and restrict as much as possible the interference of state mechanisms in the sphere of

individuals concerning their rights, whether deriving from the private or public sector, and with the purpose of balancing individual freedoms and community interests.⁷⁰⁰

In international law proportionality may arise in three contexts: as an integral element of the primary norm, in the law of the use of force and in the law of state responsibility. Since the current work is focused on the secondary rather than the primary rules of international law, the first category regarding proportionality as part of the primary rule will be excluded from the scope of the current examination. Having clarified that, proportionality in the international legal system derives its significance from the principle of sovereign equality of states and plays a crucial role not only in the law concerning the use of force (*jus ad bellum* and *jus in bello*) but also in the law of countermeasures. Proportionality therefore becomes relevant in international law whenever the legal balance in the relationship between states has been disturbed as a consequence of a certain wrongful behaviour. Proportionality is used as a means of evaluation of whether the response to the wrongful act, forcible or not, fulfils specific standards of legality, or whether it is excessive. Since often both the initial wrongful act and the response concern the violation of different international legal norms, the function of proportionality lies in the sphere of balancing and prioritizing different conflicting legal interests.⁷⁰¹ In that sense, proportionality does not resemble reciprocity in that the legal balance cannot be re-gained by mere application of equivalence because the rights and obligations in question are different in kind.⁷⁰² At the same time, proportionality seems to have been increasingly influenced by current trends regarding humanitarian considerations.

Although proportionality is a notion synonymous to something that is balanced and not excessive, equipoise but not equivalent, measured and not exaggerated, reasonable and not irrational, symmetrical but not identical, it is generally acknowledged that there is a lack of consensus with respect to the exact scope, definition or even terminology used to define proportionality.⁷⁰³ Despite the fact that proportionality is not a notion independent from the intensity, means, objectives, degree, extent, legal consequences, seriousness, and the principles at stake as a result of the initial act and the act in response, its content is still the object of varied opinions. This is particularly so with

⁷⁰⁰ Feldman/1999/118.

⁷⁰¹ VanGerven/1999/58.

⁷⁰² Zoller/1984/50.

⁷⁰³ VanGerven/1999/47-8.

respect to the concept of proportionality in the law of countermeasures. Whilst considerable attention has been given over the years to the content of proportionality when applied in the law of use of force *lato sensu*, the principle of proportionality in relation to the law of countermeasures has significantly remained under-developed. Much of the expressed hesitation for example in recognizing a right to states other than the injured to resort to countermeasures is the fear that their use may lead to abuses. It is therefore imperative that countermeasures be legally restrained. This can only be achieved if the legal standards by which proportionality is determined are clearly and unequivocally defined. By contrast, the lack of consensus with respect to proportionality in this field makes the search for predictability and foreseeability much more difficult and subjective, whilst it endangers not only the feeling of justice but also these basic values of international peace and security as it leaves the door wide open to more arbitrary and unjustified violations of international law.⁷⁰⁴ The degree of control and review of the legitimacy of countermeasures depends on how precisely the principle of proportionality is formulated.⁷⁰⁵ However, in the formulation of international norms states are reluctant to give way to specifically elaborated definitions which in the future could constrain too much their own course of action. Instead, flexible, general, and often ambiguous terms are preferred.

Moreover, the complexity and perplexity of the question of proportionality in the law of countermeasures is also owed to the fact that the concept is often attempted to be built upon national legal analogies. The substantial difference however is that in domestic law there exist impartial and effective institutions to apply the concept. On the contrary, and as already discussed extensively throughout this thesis, the international legal order lacks similar compulsory institutions and mechanisms.

Accordingly the crucial question that one needs to address with much care is what countermeasures must be proportionate to. Several theories have been developed in this regard, with some placing emphasis on a strict relation between the breach and the response, and with others turning their attention to the aims pursued or the interests at stake in each case. This chapter will therefore attempt to shed some light on the various conceptions formulated regarding the content of proportionality in the context of the EU

⁷⁰⁴ Bowett observes in this regard that, "The principle that, while the critical decision to act must be subjective, the legality of the action must be subsequently evaluated by objective and impartial standards, applies in the case of a State resorting to self-defense and ought to be of general application to any form of coercion". Bowett/1976/98.

⁷⁰⁵ VanGerven/1999/61.

and national legal systems, bearing in mind the observations above. It will however primarily concentrate on an examination of the question in the law of the use of force and the law of countermeasures, and whether proportionality does or should coincide in these two areas of international law. Moreover, the present examination will attempt to touch upon the question as to whether the nature of the infringed obligation, and more specifically whether of a bilateral nature or *erga omnes*, has, or should have, any bearing on the assessment of proportionality, in the light of course of the fact that the notion of countermeasures taken for the protection of collective interests has not yet been finally concluded in international law.

2. The Principle of Proportionality in the Law of the EU

The question of proportionality was not excluded from the context of the EU. Although the Treaty of Rome makes only a brief reference to the principle, proportionality was subsequently developed through the case-law of the ECJ as a general principle of law.⁷⁰⁶ Proportionality in European Law is used as a tool of judicial review concerning not only Community but also national measures of administrative and legislative character.⁷⁰⁷ The Court in applying the proportionality rule has identified three elements, in particular the suitability and the necessity of the measure under review and the absence of a disproportionate character. A measure meets the requirement of suitability whenever the means employed are suitable for the fulfillment of the legitimate goal, whilst it is necessary whenever the adverse consequences of the measure on a legally protected interest are justified in the light of the importance of the pursued goal.⁷⁰⁸

The criterion of proportionality varies according to whether the Court is called to review the proportionality of a specific Community measure or the proportionality of a certain national measure. In the former case what is under review is a private vis-à-vis a public interest and in particular the rights of the individuals affected by the Community measure on the one hand, and the Community interests on the other. In this event, and although proportionality seeks to protect the rights of individuals, the proportionality of the measure is weighted on the basis of whether it is manifestly inappropriate to achieve its objectives or not. Whenever, however, it is the compatibility of a national measure

⁷⁰⁶ *Internationale*/ECR/1970/125; *Nold*/ECR/1974/513-14; *UK/Council*/ECR-I/1996/5755; *Hauer*/ECR/1979/3727.

⁷⁰⁷ *Jacobs*/1999/3; *Tridimas*/1999/66.

⁷⁰⁸ *Tridimas*/1999/68.

with the fundamental freedoms established under Community Law that it is under scrutiny, in the balance of proportionality there exists a national vis-à-vis a Community interest. The test in this case is much stricter and proportionality is measured by way of necessity. What matters here is whether the less restrictive measure has been opted for or not.⁷⁰⁹

Tridimas points out that although there are several factors taken into account when determining proportionality, such as the nature of the action taken, the degree of discretion of the authority taking the decision, the effects of the action and the type of the interests affected, the objective of the measure and the interests the measure aims to protect, the existence of alternative measures and the urgency of the situation, what is essentially the focus of the ECJ is a balance between the objectives sought and the impact of the measure on individual rights. To finally conclude that “in Community law, far from dictating a uniform test, proportionality is a flexible principle which is used in different contexts to protect different interests and entails varying degrees of judicial scrutiny.”⁷¹⁰

The issue of proportionality was also raised in the light of the UN sanctions imposed against Yugoslavia. More specifically, the EC gave effect to the UN measures by passing Regulation 990/93 with which the member states had to comply. In the *Bosphorus Case*,⁷¹¹ one of the main concerns under consideration was the balance of interests. This case concerned an agreement concluded between Bosphorus Airways, a Turkish airline, and the Yugoslav national airline, hereinafter JAT, for the leasing of two aircraft owned by the latter. The aircraft were to be fully managed and controlled by the Turkish airline for a period of four years, and in order not to circumvent the UN sanctions, the two parties agreed that the rent would be paid into blocked accounts belonging to JAT. In one of the journeys of one of the two aircraft in Ireland, the aircraft was impounded by a Ministerial Order under Article 8 of the abovementioned Regulation according to which “[a]ll...aircraft in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro) shall be impounded by the competent authorities of the Member States.” Although the Irish High Court quashed the decision of the Minister, the judgment was appealed and referred to the Supreme Court. The Supreme

⁷⁰⁹ Ibid/66.

⁷¹⁰ Ibid/69,76-7.

⁷¹¹ *Bosphorus*/ECR-I/1996/3953.

Court referred for preliminary ruling by the ECJ the question as to whether Article 8 was also applicable with respect to aircraft owned by a Yugoslav undertaking but leased to a non-Yugoslav undertaking. Bosphorus Airline argued that the Regulation not only infringed its fundamental rights such as its right to peaceful enjoyment of its property and its freedom to contract a commercial activity, but it was also disproportionate and manifestly unnecessary as the owner of the aircraft had already been penalized by having the rent deposited in blocked accounts. The ECJ, having affirmed that the aim and context of the Regulation intended to give effect to UN SC Resolutions on Yugoslavia, concluded that paragraph 24 of Resolution 820 (1993) included all aircraft the majority or controlling interest of which was held by an undertaking operating in the FRY, even if the management and control of the aircraft belonged to a non-Yugoslav company, or an undertaking not operating in the territory of the FRY. It further rejected the claims of the airline pointing out that the rights claimed by Bosphorus did not have an absolute character, and that they could be restricted in the pursuit of the general interest of the Community. According to the ECJ, measures restricting certain rights were the direct result of sanctions being applicable even to parties which are not at fault. As noted, the need to end the war which at the time was ongoing in the region and the massive violations of human rights and humanitarian international law occurring on the territory of Bosnia-Herzegovina, was pressing. Noting that the essential interests of the international community supervened over the rights of Bosphorus in this particular case the Court ruled that the impounding of the aircraft was not inappropriate or disproportionate.⁷¹²

The question of proportionality in the light of the sanctions against Yugoslavia was also raised in the *Ebony Maritime Case*.⁷¹³ The provisions of Regulation 990/93 were also relevant here. More specifically, Article 1 (1) (c) and (d) prohibited the entry into the territorial sea of Yugoslavia by commercial vessels, and any activity that aimed to promote transactions with this country, whilst Article 9 allowed the competent authorities of the member states to detain, pending investigation, all vessels, freight, vehicles, rolling stock, aircraft and cargoes suspected of having violated, or being in violation of the Regulation. Furthermore, Article 10 allowed member states discretion as to the sanctions to be imposed in case of violation of the Regulation, such as for instance forfeiture of vessels and cargoes. The case in question concerned a tanker,

⁷¹² *Ibid*/(26). It should be noted that this case has also been brought before the ECHR, but as of 30 March 2005 it was still pending before a Grand Chamber. See Application no. 45036/98.

⁷¹³ *Ebony/Maritime/ECR-I/1997/1111*.

Lido II, owned by Loten Navigation and flying the Maltese flag which had left Tunisia having as its destination Rijeka in Croatia and carrying a cargo of petroleum products belonging to Ebony Maritime. After an inspection of the vessel and its cargo in Brindisi (Italy) the vessel continued for its final destination. However, during the journey the vessel faced problems with water coming in and announced that it had to change its direction and go to Montenegro for the purpose of fixing the vessel. Before entering the Yugoslav territorial waters the vessel was taken by NATO/WEU forces and was sailed back to Brindisi where it was handed to the Italian authorities. The latter ordered the impounding of the vessel and the confiscation of its cargo in compliance with the national measures taken to give effect to the Community Regulation. In the proceedings brought before the Consiglio di Stato against the judgment dismissing the request for the annulment of the order filed by the owners of the vessel and the cargo, it was argued that the owner of the cargo was punished without proof of fault thus imposing a regime of strict criminal liability and that the decision of the Italian authorities to penalize the owner of the cargo in the same manner as the owner of the vessel irrespective of the degree of their involvement in the infringement was disproportionate. The Court, whilst stressing that it belonged to the discretion of the member states to choose the penalties to be imposed for the violation of the Regulation, noted that they were bound to respect certain procedural and substantial conditions analogous to penalties applicable for the infringement of national law of a similar nature and significance. The Court further emphasized that, notwithstanding the fact that the application of a system of strict liability was not contrary to Community law, a penalty had to be effective, proportionate and dissuasive and that it was up to the national court to decide whether the confiscation of the cargo irrespective of the degree of involvement fulfilled these conditions. To determine this due consideration should be given to the objective of the Regulation which in this case was to bring to an end the humanitarian crisis caused by the war in the region.

It has been very pointedly remarked that the two cases reveal that the Community Court when assessing proportionality gave significant weight to the public interest at stake and aimed to be preserved by the sanctions. Proportionality was therefore assessed on the basis of the objective of the restrictive measures under scrutiny on the one hand, as opposed to the interests and rights affected on the other.

3. The Concept of Proportionality in National Law

From the attention of this section cannot be excluded the perception of proportionality under German law which influenced the development of the principle in the context of European Law. In particular, German law associates proportionality with the suitability of the measure for the fulfilment of the pursued objective, its necessity in the absence of other means available for the achievement of the pursued objective, and the lack of excessiveness/disproportionality with regard to the negative effects the measure creates.⁷¹⁴ More precisely, in order to evaluate whether the measure under scrutiny is necessary and proportionate there is first a weighing of the means used, the aims pursued and the interests the measure seeks to protect, and subsequently these are weighed towards another interest which is safeguarded by another rule. The means used for the achievement of the specific objective are then examined with respect to whether they impose an excessive burden on that other interest. As noted this test does not derive from the principle of proportionality itself but from the values protected under the German Basic Law.⁷¹⁵

In France, proportionality gradually developed as a notion that takes into consideration the motives, the purpose and the content of administrative action along with the balancing of interests, the existence of any discretionary powers and the importance of the protected interests.⁷¹⁶

British courts on the other hand have been extremely skeptical in incorporating the principle of proportionality as an independent principle of law in the exercise of judicial review. Rather, the courts rely on the test of unreasonableness according to which the court will only interfere with a decision if it is so unreasonable that no reasonable public authority could have adopted it.⁷¹⁷ The problem with this approach is that it is equally applicable to all cases irrespective of the nature of the rights involved in each particular case and that the administration is not obliged to specifically justify its action.⁷¹⁸ Despite this general approach, British courts are required to apply proportionality in cases where an issue under Community law arises or whenever a right protected under the EConv.HR is involved. With the coming into force of the 1998 Human Rights Act,

⁷¹⁴ VanGerven/1999/44-5.

⁷¹⁵ Ibid/45.

⁷¹⁶ Ibid/51-2.

⁷¹⁷ Lord/Hoffmann/1999/109.

⁷¹⁸ Craig/1999/99-100.

UK courts must refer to the case-law of the Strasbourg Court, although they are not obliged to follow it.⁷¹⁹ Feldman has pointed out that in so far as proportionality is formed on the basis of the Strasbourg decisions, then the assessment of proportionality will rely upon three factors. The first relates to the nature of the right to be affected with the interference: whilst some rights can be restricted, others cannot. The second has to do with the ground which the authority produces in order to justify its interference. Such grounds may vary from protection of the public order to protection of morals. And the third concerns the source and form of the interference. In other words, interference may be more difficult to be justified if it affects a limited number of persons than a larger number of people as is the case with the adoption of a certain administrative measure.⁷²⁰

4. Proportionality in the *Jus Ad Bellum* and the *Jus In Bello*

4.1. Introduction

There was a time in history when a state possessed a “right to every thing that can secure it from such a threatening danger, and to keep at a distance whatever is capable of causing its ruin”.⁷²¹ As Dinstein put it, “Once it was believed that when the cannons roar, the laws are silent”.⁷²² Nevertheless, the adoption of the UN Charter together with the formulation of international humanitarian law were meant not only to restrict the circumstances under which the use of force would be justified, but also to regulate the conduct and the means allowed during an armed conflict. Going beyond merely having some symbolism in the conception of contemporary international law, and despite the generally acknowledged defects of the international legal system, these norms have made an invaluable contribution to international peace and security and on how the international community should be construed.

It is necessary however to make a clear distinction between the law of the use of force (*jus ad bellum*), which relates to whether a state possesses a right to use force against another state, and the law of armed conflict (*jus in bello*), which concerns the rules applicable in war and more precisely the manner in which a war can be conducted. Both fields are restricted by the principle of proportionality, although in each case proportionality is assessed on the basis of different criteria. The resort to force (*jus ad*

⁷¹⁹ Feldman/1999/121. Human Rights Act section 2.

⁷²⁰ Feldman/1999/137-9.

⁷²¹ Vattel/1916 in Stevens/1989/25.

⁷²² Dinstein/2004/1.

bellum), whether taken in self-defence or after SC authorization, must not be disproportionate to the “legitimate ends of force”.⁷²³ Proportionality in this case is determined on the basis of the reasons of using armed force, in other words whether or not a specific forceful response is justified as self-defence for the purpose of repelling an attack. Here the purpose of proportionality is to allow a state to defend itself while minimizing to the extent possible the effects to international peace and security and to the international community as a whole.⁷²⁴ Proportionality in the *jus in bello* on the other hand is related to the rule that during an armed conflict the parties involved do not have unlimited freedom as to the means and methods they may use and the injury they may inflict upon the enemy.⁷²⁵ Here instead proportionality is built upon humanitarian considerations and a further distinction is made according to which proportionality is viewed under a different lens when concerning combatants and civilians.⁷²⁶ Finally, the fact that proportionality is consistent with the *jus ad bellum* does not preclude responsibility if a response is not at the same time proportionate in the *jus in bello* and vice versa.⁷²⁷

The determination of proportionality in the law of the use of force and the law of armed conflict gains all the more significance, especially in view of the risks envisaged from a possible escalation of the conflict and its tragic effects in respect of loss of lives and destruction caused. Proportionality in this context aims to formulate the scope and intensity of, and the effects to derive from, the lawful use of force in general.

4.2. Historical Perspective

The principle of proportionality in the course of forcible action finds its roots in the Christian theory of just war according to which war would be excused if its cause was just. The principle of proportionality was later elaborated by writers such as Grotius and Vattel on the basis that the justification for war did not suffice and that the overall evil to be caused by war should be counter-balanced by the good to be achieved.⁷²⁸ Nevertheless, during this period not only did there exist no clear distinction between the right to going to war and the means used during an armed conflict (*jus ad bellum* and

⁷²³ Gardam/2004/10-11.

⁷²⁴ Ibid/16.

⁷²⁵ Ibid/391.

⁷²⁶ Ibid/14,16-7.

⁷²⁷ Ibid/11.

⁷²⁸ Johnson/1975/214.

jus in bello), but also, and insofar as the reason for going to war was just, the cause justified the means.⁷²⁹

In the 19th century war was regarded by many authors as a means of pursuing national policy and as such not belonging in the range of international law. During this period however the *jus in bello* made its appearance as a distinctive body of rules according to which the only legitimate objective of war was to weaken the military capabilities of the enemy. This principle was later to find expression in the Hague Conventions of 1899 and 1907 and constituted the basis for the formulation of the modern law of armed conflict which outlaws both the infliction of unnecessary suffering but also the use of means which are not proportionate to the military objective sought. On this footing proportionality developed as a principle to protect both combatants and civilians.⁷³⁰

4.3. *Jus Ad Bellum*

The right to self-defence does not purport to give unlimited powers to the states invoking it. The fact that a state has been the victim of an armed attack does not entitle it to resort to more force than necessary to achieve the lawful objective which in all circumstances must be to repel the attack. Proportionality aims to impose certain legal restraints on this right, the abuse of which would have adverse effects for the rule of law and international peace and security. That the use of force must comply with the principle of proportionality is a principle well established in international law. Proportionality in this respect is not confined to the context of a strict relationship between initial attack and response, since there may be occasions where an equivalent or even identical use of force may not suffice to bring termination of the wrongful act,⁷³¹ but in addition it looks at what is necessary to secure the objectives pursued, namely to halt and repel the attack.⁷³² It may also be argued that the injured state may take such action as necessary to guarantee that its territorial integrity is not threatened again in the future.⁷³³ In relation to this Judge Ago concluded that when measuring the proportionality of specific action taken in self-defence what counted was the relationship between the action and its purpose that is identified to be the repeal and

⁷²⁹ Johnson/1981/xxii,xxiii, 3; Arend-Beck/1993/14; Gardam/1993/395.

⁷³⁰ Gardam/1993/398.

⁷³¹ Kaikobad/1992/316.

⁷³² Eighth/Report/Addendum/Ago/1980/69. Although the view has been expressed that a clearly disproportionate to the initial attack response would entail the danger of escalation of violence. See Mitchell/2001/160-1.

⁷³³ Wicker/2002/18.

cessation of the attack, and not a symmetric comparison between the initial attack and the response.

As noted:

The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the 'defensive' action, and not the forms, substance and strength of the action itself.⁷³⁴

Whilst Judge Ago recognized that the limited use of force by a victim state in response to limited use of armed force could not always be sufficient for the repeal of the attack, he also stressed that self-defence should not be confused with sanctions or reprisals. According to his view, what matters in self-defence is not that the defensive action must be commensurate to the rights affected by the initial attack and the response, like in the case of reprisals, nor that it must be commensurate to the wrongdoing, such as in the case of punitive action. It is stressed in this regard that:

Its lawfulness cannot be measured except by its capacity for achieving the desired result. In fact, the requirements of the 'necessity' and 'proportionality' of the action taken in self-defence can simply be described as two sides of the same coin. Self-defence will be valid as a circumstance precluding the wrongfulness of the conduct of the State only if that State was unable to achieve the desired result by different conduct involving either no use of armed force at all or merely its use on a lesser scale.⁷³⁵

Ago concluded that proportionality in self-defence does not require association of strength and content between attack and response since a "State which is the victim of an attack cannot really be expected to adopt measures that in no way exceed the limits of what might just suffice to prevent the attack from succeeding and bring it to an end."⁷³⁶

Greig in assessing proportionality in self-defence observes that "the amount of force should be commensurate with the objectives that a plea of self-defence might reasonably entitle a State to achieve".⁷³⁷ McDougal and Feliciano also take the view that "concealed in this shorthand formulation of the requirement of proportionality are references to both the permissible objectives of self-defence and the condition of necessity that evoked the response in coercion".⁷³⁸ Accordingly, any action taken in

⁷³⁴ Schwebel/*Nicaragua/Case*/(212). Also Eighth/Report/Addendum/Ago/1980/69.

⁷³⁵ *Ibid.*

⁷³⁶ *Ibid.*

⁷³⁷ Greig/1976/887 in Kaikobad/1992/316-7.

⁷³⁸ McDougal-Feliciano/1994/241-2.

response to an unlawful attack must be restricted in terms of both intensity and magnitude to what is necessary for the fulfilment of the set objectives. As the authors conclude, "Coercion that is grossly in excess of what, in a particular context, may be reasonably required for conservation of values against a particular attack, or that is obviously irrelevant or unrelated to this purpose, itself constitutes an unlawful initiation of coercive or violent change."⁷³⁹ It therefore seems that proportionality in the context of the use of force is assessed on the basis of the objectives pursued by the forceful response. This is also the approach taken by the ICJ in the *Nicaragua Case* which is examined below.

Yet, no unanimity exists on the matter as some authors place the emphasis upon the initial danger,⁷⁴⁰ whilst others on the injury inflicted.⁷⁴¹

Dr Kaikobad suggests that evaluating proportionality is not an easy task. This is because there are a number of other factors to be taken into consideration such as the nature and scale of the attack but also the "vital interests" at stake, thus giving a certain degree of relativity and subjectivity to the notion of proportionality.⁷⁴²

Furthermore, merely looking at the objective of a defensive act may not always give the right solutions, especially in relation to the use of nuclear weapons. Although this issue largely falls within the *jus in bello*, its relevance in *jus ad bellum* cannot be ignored. No matter how justified in going to *jus ad bellum*, the responding state is submitted to the rules of *jus in bello*. In the case concerning the *Legality of the Threat or Use of Nuclear Weapons* the ICJ pointed out that "a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law."⁷⁴³

⁷³⁹ Ibid/243.

⁷⁴⁰ Bowett/1958/269.

⁷⁴¹ Higgins/1994/231.

⁷⁴² Kaikobad/1992/317.

⁷⁴³ ICJReps/1996/245/(42).

4.4. *Jus in Bello*

The *jus in bello*, or international humanitarian law, comprises norms the purpose of which is to balance the military necessity on the one hand and humanitarian considerations on the other. Whilst the *jus in bello* has been formulated out of the need to restrict as much as possible human suffering during an armed conflict, it has also been accustomed to the realities that emerge during a war. As noted, the *jus in bello* “is not absolute mitigation of the calamities of war..., but relief from the tribulations of war ‘as much as possible’: that is to say, as much as possible considering that war is prosecuted for military ends, and the ascendant objective of each belligerent State is to win the war.”⁷⁴⁴

The requirement of proportionality as an essential component of the law of armed conflict can be traced not only in customary international law but also in conventional law and in particular in Protocol I adopted in 1977.⁷⁴⁵ Article 51 (5) (b) of the Protocol in particular provides that “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.⁷⁴⁶ Since this provision comes under the title of indiscriminate attacks it should be construed that an attack that fulfils the requirement of proportionality is not indiscriminate. Furthermore, proportionality should be assessed with respect to a specific attack, whilst from the phrase “may be expected” used in the provision above it seems that what matters in assessing whether a given attack is “excessive” or not is not the actual outcome of the attack but rather what was the initial expectation. This has been criticized as introducing a subjective element in the evaluation of proportionality.⁷⁴⁷

Three factors seem to be relevant in determining the content of proportionality in the *jus in bello*, namely the selection of the target, the means and methods of the attack, and whether unnecessary loss of civilian life has been carried out in comparison to the military advantage pursued. Yet, the weakening of the military advantage of the enemy may not be an adequate or satisfactory criterion in determining proportionality. It is noted in this respect that short-term effects may arguably not be sufficient to lead to the

⁷⁴⁴ Dinstein/2004/17.

⁷⁴⁵ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977, *Laws of Armed Conflicts* 423, 430-1.

⁷⁴⁶ *Ibid.*

⁷⁴⁷ Dinstein/2004/121-2.

conclusion that a certain response was proportionate or not. On the contrary long-term effects on the population, or on the environment, must also be taken into consideration whilst proportionality should be assessed on a case-by-case basis rather than cumulatively.⁷⁴⁸ Gardam observes that:

The key to the dilemma is the subjective nature of assessing proportionality. It requires balancing between two opposing goals: the swift achievement of the military goal with the minimum losses of one's own combatants and the protection of the other party's civilian population.⁷⁴⁹

Proportionality is also raised in another context, that of belligerent reprisals, namely action which would under normal circumstances be contrary to the *jus in bello* but are exceptionally permissible in response to the violation of *jus in bello* by the other party to the conflict.⁷⁵⁰ Provided that belligerent reprisals are not directed against specific targets like the civilian population and other protected persons, or cultural and historical monuments, or the environment, they must always be proportionate to the breach of the law of armed conflict which actually provoked them, which however is not associated with equivalence but rather with excessiveness. Consequently, the reprisals may affect different targets than that affected by the original act as long as they are not excessive.⁷⁵¹

4.5. Proportionality in the Context of Judicial Review

With the decline of the theory of just war which found its roots in divine law and the law of nature (what the law should be rather than what the law is), and the emergence of nation states, war was construed as an instrument for pursuing national policy and as a sovereign right of states. Despite the fact that during this period there existed no body of rules regulating the use of force, it can be revealed from state practice that certain customary rules justifying the resort to force gradually started to emerge such as for example the idea that war should be resorted only as a means of last resort.⁷⁵²

It was against this background that the *Caroline Incident* evolved,⁷⁵³ which is considered to have set the structures for the development of the principles of necessity

⁷⁴⁸ Gardam/1993/409.

⁷⁴⁹ Ibid.

⁷⁵⁰ Dinstein/2004/220.

⁷⁵¹ Ibid/221 and 223.

⁷⁵² Gardam/2004/39-40.

⁷⁵³ *Caroline/Incident*, 29 British and Foreign State Papers, 1129; 30 British and Foreign State Papers, 195.

and proportionality under the UN Charter.⁷⁵⁴ The incident was evoked between the US and Great Britain in 1837 when British forces set on fire to an American vessel which was docked in American waters. More specifically, around 70-80 armed men belonging to the British forces, boarded on the *Caroline* and attacked the people on the vessel with muskets, swords and cutlasses. Once the vessel fell into the hands of the attackers it was set on fire and thrown into the Niagara falls. The vessel had been allegedly involved in providing war assistance, material and other, to rebels who were at the time fighting against the British colonialism in Canada. As a consequence of the British attack on the vessel one American citizen lost his life. Although the US President in his message to the Congress described the incident as a serious violation of American territory, he confined action to enforcing the guarding of the frontiers with Canada in an attempt to prevent similar occurrences in the future, and to seeking reparation by Great Britain. The initial reaction of the US government was mild in fear of further escalation of the crisis.⁷⁵⁵

After the *Caroline* incident the state of New York arrested a British subject, Mr. McLeod, for his involvement in the arson of the vessel and the killing of the American citizen. The reaction of the British government was immediate, asking for his release on the ground that the act with which he was charged had a public character, “empowered by Her Majesty’s colonial authorities to take any steps and to do any acts which might be necessary for the defence of Her Majesty’s territories and for the protection of Her Majesty’s subjects”.⁷⁵⁶ The US government in its response asserted that the principle of the inviolability of the territory of a foreign state could only then be legitimately violated, and therefore justified, if it was the result of “absolute necessity”. By the summer of 1842 the US government was even more determined to resolve the matter for which it had never received an apology from Great Britain. It therefore demanded from the British government to show that there existed:

necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that

⁷⁵⁴ Gardam/2004/40.

⁷⁵⁵ Stevens/1989/18-19. Also see Message from the US President to Congress, January 1838 in British and Foreign State Papers (1837-8) Vol. 26, at 1372-73, 1376-77.

⁷⁵⁶ Correspondence of Mr Fox to Mr Webster, March 1841 in British and Foreign State Papers (1840-41) Vol. 29, 1127.

necessity, and kept clearly within it. It must be shown that admonition or remonstrance to the persons on board the *Caroline* was impracticable, or would have been unavailing; it must be shown that day-light could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some and wounding others, and then drawing her into the current above the cataract, setting her on fire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate which fills the imagination with horror.⁷⁵⁷

Although the American government clearly questioned the necessity of the British response, it can be inferred from the above abstract that it relied also to an element of proportionality in that the British government was required to show that it had done nothing “unreasonable or excessive” and that its action was not only necessary but it also did not go beyond that necessity: “since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it”. Although necessity and proportionality are two notions very close to each other, one must not forget that they are in the end two separate and independent concepts. Accordingly, the fact that the necessity for certain action is proven does not automatically mean that the action is also proportionate either to the injury suffered or to the aim pursued. It seems therefore that what was required by the British government to be shown was primarily that the attack on the vessel was justified in response to the necessity for certain action, which relates to the question whether it was necessary to use force at all, and that the action taken was the most appropriate for achieving the purpose aimed at, which is associated with the question whether the force used was proportionate, and to what. The abstract above may however also imply some reference to the *jus in bello* as it doubts the manner in which the attack was carried out, as to whether alternative action was unavailable and the fact that it was indiscriminate.

Lord Ashburton, in replying to the US demands affirmed that the intrusion in a foreign territory could be accepted when a “strong overpowering necessity” arises, and continued that “It must be so, for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity.”⁷⁵⁸

⁷⁵⁷ Ibid/1138.

⁷⁵⁸ Lord Ashburton to Mr Webster in British and Foreign State Papers (1841-42) Vol. 30, at 196.

He insisted however that the selection of the time and the decision to set the vessel on fire were made in an attempt to limit unnecessary loss of lives and destruction of property.⁷⁵⁹ However, and although the necessity for action has also been disputed,⁷⁶⁰ the question that remains is whether the particular action taken, in its extent and severity, was the most appropriate under the circumstances in order to cease the aggressive activities in which the vessel was allegedly engaged, and as to whether alternative milder means would not be sufficient.

There is a certain degree of disagreement as to the legal characterization of the incident, with Bowett arguing that what was involved was self-preservation rather than a right to self-defence.⁷⁶¹ For Jennings on the other hand, although there was in this incident an attempt to define the content and limits of the right to self-defence, the emphasis was placed on the role of necessity, with the notion of proportionality not clearly being spelled out.⁷⁶² Even long after the *Caroline* incident, the notion of proportionality remained submerged, something that was attributed to the fact that at the period in question, when war was viewed as a sovereign right of states, proportionality was to some extent performed by the rules of *jus in bello* that associated the question of how certain attacks were carried out with the aims of the use of force. As Gardam points out, this falls today within the *jus ad bellum*.⁷⁶³

In the dispute that developed between Albania and the UK in the *Corfu Channel Case*, Albania argued that the minesweeping undertaken by the British Navy without its consent was a violation of its sovereignty. The minesweeping took place a few weeks after the explosion of two mines in the North Corfu Channel which had resulted in the destruction of two ships belonging to the British Navy and the loss of many lives.⁷⁶⁴ Although the Court refused to recognize a right of intervention for the purpose of collecting evidence, since to do so would be a recognition of a powerful weapon in the hands of strong states and violation of the territorial sovereignty of another state, it did hold that the way with which the operation for the minesweeping was carried out was not "out of proportion to the requirements of the sweep.....The responsible naval commander, who kept his ships at a distance from the coast, cannot be reproached for

⁷⁵⁹ Ibid/199.

⁷⁶⁰ Stevens/1989/35-6.

⁷⁶¹ Bowett/1958/59-60.

⁷⁶² Jennings/1938/92.

⁷⁶³ Gardam/2004/42-3.

⁷⁶⁴ *Corfu/Channel/ICJReps/1949*.

having employed an important covering force in a region where twice within a few months his ships had been the object of serious outrages”,⁷⁶⁵ ascertaining that the purpose of the British government was not to exert any kind of pressure to Albania. It seems that the Court, in its consideration of the British action and as to whether it conformed with the requirement of proportionality took into account the objective of the operation which was the minesweeping of the area.

Among the issues examined by the ICJ in the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* concerning US training, military equipment and assistance to military and paramilitary groups acting in and against Nicaragua, was the question of proportionality.⁷⁶⁶ The Court, rejecting the US arguments that it had acted in collective self-defence to armed attack carried out by Nicaragua against El Salvador, Honduras and Costa Rica, in the absence of evidence supporting the existence of an armed attack found that the US had acted in violation of the rule prohibiting the use of force. According to the findings of the Court, this would be so even if the US action had complied with the rules of necessity and proportionality. In the event however that the US action was neither necessary nor proportionate then this would constitute an additional ground for wrongfulness.⁷⁶⁷ Commenting further as to whether the US assistance of the Salvadorian *contras* among which the mining and attacking of Nicaraguan ports and oil installations was proportionate, the Court declined to find that the US action complied with this requirement. More particularly the Court found that although the exact extent of assistance provided by Nicaragua to Salvadorian armed groups remained unclear, the US measures “could not have been proportionate” to the aid given by the Nicaraguan government to these groups, whilst the US activities went well beyond the period the alleged attack had occurred.⁷⁶⁸ As the Court had already proclaimed, “there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law”.⁷⁶⁹ The Court therefore upheld that proportionality in self-defence is linked to what is required to repel the attack, and that

⁷⁶⁵ *ibid*

⁷⁶⁶ *Nicaragua/Case/ICJReps/1986*.

⁷⁶⁷ *Ibid/(237)*.

⁷⁶⁸ *Ibid*. According to the Court the alleged support of the armed opposition in El Salvador, Honduras and Costa Rica by Nicaragua could not justify countermeasures by a third State, nor did it amount to armed attack to justify collective self-defence. Nor the US action could be justified in response to Nicaragua’s intervention in the internal affairs of States other than the United States. In responding further to the US allegations that there were extensive human rights violations in Nicaragua the Court dismissed the use of force as being an appropriate means to address such violations. See paras 249,268.

⁷⁶⁹ *Ibid/(176)*.

accordingly the US action was not in proportion to the act that provoked it, namely the aid and assistance provided by Nicaragua to the Salvadorian *contras*. Gardam observes that it can be deduced from the judgment that the targets, the scale of the attacks and the effects on third states did not comply with proportionality.⁷⁷⁰

Concerns were further expressed with respect to the conformity of the use of nuclear weapons with the principle of proportionality, a question raised before the ICJ in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*.⁷⁷¹ The Court, having concluded that there was no customary or conventional rule of international law prohibiting the threat or use of nuclear weapons, focused its attention on the law of the UN Charter and the law of armed conflict as the most relevant fields for the determination of whether the use or threat of nuclear weapons was permitted, in view of the particularly catastrophic consequences to derive therefrom.

Reaffirming the principle that the right of self-defence was subject to the rules of proportionality and necessity as ruled in the *Nicaragua Case*, the Court stressed that proportionality, by itself, did not outlaw the use of nuclear weapons as the response should be viewed in the light of the armed conflict (*jus in bello*). With specific reference to international humanitarian law the Court highlighted that this finds expression in the Hague Conventions of 1899 and 1907 which include the Regulations Respecting the Laws and Customs of War on Land, and the Geneva Conventions of 1864, 1906, 1929 and 1949 and the Additional Protocols of 1977. These instruments make clear that the right of belligerents to inflict injury upon the enemy is significantly restricted with as a result the limitation of the means that can be used during armed conflict, whilst the civilian population is immune from acts of reprisal. It is derived from these instruments that certain types of weapons are prohibited if they inflict unnecessary suffering in comparison to the pursued legitimate military objectives and make difficult the distinction between combatants and non-combatants. For the Court, the prohibition of superfluous injury or unnecessary suffering upon combatants constitutes a “cardinal principle” which as a consequence bans certain weapons, irrespective of whether this is specifically provided under a treaty or not.⁷⁷² As it pointed out:

It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and “elementary considerations of humanity” as the Court

⁷⁷⁰ Gardam/2004/158.

⁷⁷¹ ICJReps/1996.

⁷⁷² Ibid/(78).

put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (I.C.J. Reports 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.⁷⁷³

The Court deduced that the body of rules of international humanitarian law and the obligations arising therefrom applied also to the use or threat of nuclear weapons (*jus in bello*) and that the use or threat of nuclear weapons should comply with article 2 (4) and 51 of the UN Charter (*jus ad bellum*). However, the Court felt unable to conclude with certainty that the use of nuclear weapons would be incompatible with the rules of humanitarian law (*jus in bello*) although it did recognize that nuclear weapons bore such characteristics that made them “scarcely reconcilable” with the rules prohibiting unnecessary suffering and indiscriminate attacks. At the same time the Court highlighted the right of each state to protect itself, thus leaving it to be inferred that the right to self-defence would prevail over humanitarian law should the need emerge. Undoubtedly, the Opinion left some with a feeling of disappointment since it did not mitigate the fears of a possible nuclear war by *at least* setting the most stringent conditions for the permissibility of nuclear weapons in the light of the considerations and prohibitions under the law of armed conflict. As Dinstein further observes, the inability of the Court to definitely resolve the matter as to whether the use of nuclear weapons “in an extreme circumstance of self-defence, in which the very survival of a State would be at stake”⁷⁷⁴ would be permissible is difficult to accept as “it appears to be utterly inconsistent with the basic tenet that LOIAC (the *jus in bello*) applies equally to all belligerent States, irrespective of the merits of their cause pursuant to the *jus ad bellum*.”⁷⁷⁵

The use of nuclear weapons raises concerns both in respect of unnecessary suffering but also of indiscriminate attacks against civilians and civilian losses. Most important, the Court with its opinion leaves a legal gap with which the requirement of proportionality that is so important both in *jus ad bellum* and especially in the *jus in bello* is circumvented.

It has been argued however that the use of nuclear weapons, if used with certain constraints in respect of the target and location may not automatically be

⁷⁷³ Ibid/(79).

⁷⁷⁴ Ibid/(97).

⁷⁷⁵ Dinstein/2004/78.

disproportionate. It was the British position at the time that the proportionality of the use of such weapons should be viewed in the light of the threat posed against the victim state. In the words of the British Attorney General:

It cannot be right to say that if an aggressor hits hard enough, his victim loses the right to take the only measure by which he can defend himself and reverse the aggression. That would not be the rule of law. It would be an aggressor's charter.⁷⁷⁶

Similarly, Judge Higgins, in her dissenting opinion, in interpreting the terms "unnecessary suffering" made specific reference to the conclusions of the Lucerne Conference of Governmental Experts on the use of Certain Conventional Weapons of 1974 according to which these terms involved an "equation" between the suffering caused and the necessity for choosing a particular weapon. Although Judge Higgins highlighted that even a legitimate target cannot be attacked if the civilian casualties to be resulted will be disproportionate to the military gain from such attack and that a weapon which cannot be directed against military objectives only, "even if collateral harm occurs", will be unlawful *per se*,⁷⁷⁷ also pointed out that:

The prohibition against unnecessary suffering and superfluous injury is a protection for the benefit of military personnel that is to be assessed by reference to the necessity of attacking the particular military target. The principle does not stipulate that a legitimate target is not to be attacked if it would cause great suffering.⁷⁷⁸

She therefore takes the view that it is on the basis of a comparison between the suffering caused and the military necessity that certain weapons have been outlawed by states which judged that there existed other means for achieving certain military objectives.⁷⁷⁹ According to her the use of weapons which are able to cause massive suffering and destruction should be permitted only in exceptional circumstances as a means of last resort and when the life of the nation is threatened.⁷⁸⁰

Although one can see the justification of nuclear weapons under certain circumstances in the law of the use of force where proportionality is measured in accordance with the military objective to repel the initial attack, it is difficult to see how their use can be reconciled with the law of armed conflict. If we were to accept the use of such weapons

⁷⁷⁶ Schwebel/*Nuclear/Weapons/Legality*/1996.

⁷⁷⁷ Higgins/*Nuclear/Weapons/Legality*/1996/(24).

⁷⁷⁸ *ibid*/(17).

⁷⁷⁹ Gardam/2004/73.

⁷⁸⁰ Higgins/*Nuclear/Weapons/Legality*/1996/(21).

in self-defence without respect to the laws regulating conduct in armed conflict, then we would be going years, even hundreds of years, back to when international law justified any means as long as the cause was just. As Judge Shahabuddeen observes, "At the moment, however, there is nothing to suggest that humanitarian law provides for an exception to accommodate the circumstances visualized by the Court. It seems to me that to take the position that humanitarian law can be set aside in the stated circumstances would sit oddly with the repeated and correct submissions on the part of both sides to the argument that the Court should apply the law and not make new law".⁷⁸¹ The same view is taken by Judge Koroma in his own Dissenting Opinion who said that nuclear weapons should not be, and are not exempted, from humanitarian law. As he rightly put it, the question is not concerning whether or not a state may defend itself under extreme circumstances, but as to whether it may use *any* means in order to achieve this.⁷⁸² In the words of the US Military Tribunal at Nuremberg, "the rules of international law must be followed even if it results in the loss of a battle or even a war. Expediency or necessity cannot warrant their violation...".⁷⁸³

It is further the view of the present author that the issue gains significance in the context of peremptory norms. Should the prohibition of unnecessary suffering and the killings of the civilian population on a massive scale be determined as being of a *jus cogens* norm and viewed outside the military objective aimed at, and this is exactly what the *jus in bello* is all about, then the use or threat of nuclear weapons would be unlawful. Moreover, the argument concerning the legality of such weapons in a case of extreme emergency threatening the life of the nation is closely associated with the argument relating to the "ticking" bomb: would we allow the torture of an individual for the sake of humanity if we were sure that he was aware where an atomic bomb had been planted and which would go off any minute?

5. Proportionality in the Law of Countermeasures

5.1 In the Search of International Enforcement

The general prohibition of the use of force as a means of settling state disputes has not eliminated the threats and dangers with which the international community is faced

⁷⁸¹ Shahabuddeen/*Nuclear/Weapons/Legality*/1996.

⁷⁸² Koroma/*Nuclear/Weapons/Legality*/1996.

⁷⁸³ *List/Case/Nuremberg/Military/Tribunal/1950/Vol.XI/1272* in Shahabuddeen/*Nuclear/Weapons/Legality*/1996.

with. Countermeasures in particular may become such a strong weapon in the hands of those states using them that the imposition of the most stringent conditions regarding their use is an essential prerequisite if they are not to become an instrument of vengeance in an international legal community whose main characteristic is the non-existence of compulsory judicial and enforcement mechanisms. It was early acknowledged by former Special Rapporteur Mr Arangio-Ruiz that "the matter has been rightly recognized as also being of great importance in legally controlling resort to non-forcible measures. Although less dramatic and harmful, such measures can be equally detrimental to the preservation of friendly relations and the development of cooperation among States".⁷⁸⁴ Furthermore, in a community which is structured on the basis of sovereign equality of states, because of which it differs substantially from domestic legal orders, no state can claim that it has been entrusted with world enforcement and punitive powers as against the rest. The notion of proportionality comprises an integral part of the law of countermeasures. No response can be regarded as lawful if it is disproportionate, as with it the rights of the wrongdoing state and the international community as a whole are aimed to be protected. The former is protected because proportionality secures that there will be no violation of its own rights in respect of the aims set, the means used and the effects to be derived from the response; and the latter because proportionality is an indication when a certain act ceases to be a reestablishment of legality, and goes beyond seeking to achieve goals which are themselves unlawful, for instance the punishment of the wrongdoer. The latter can never be a legitimate objective, nor can it safeguard international law, peace and security. Quite on the contrary, as history has shown with Germany's exclusion from the League of Nations and the imposition against it of heavy compensation demands and sanctions of a punitive character as a result of its role in the First World War, such action did not prevent it from further pursuing its aggressive policies, leading to more human suffering and devastation born out of the Second World War. This is the reason that in the aftermath of the Second World War the objective was not the punishment but rather the rehabilitation of Germany. Furthermore, the varied interests of states in the international legal arena, but also the in practice real inequality of states make the need for legal restraint even more compelling. This reality is best described in the words of McDougal and Feliciano who pointed out that:

⁷⁸⁴ Third/Report/Arangio-Ruiz/1991/18/(52).

The “establishment of a civil society which generally administers the law” has been described as “mankind’s most difficult problem”. In a community of States afflicted with clashing conceptions of the appropriate ends of law and civil society, whose largest arena is a military arena of multiplying devices that promise both infernal destruction and access to the heavens, the establishment of a society generally administering a law adequately expressing the deepest aspirations of the world’s peoples for freedom, security and abundance – the establishment, in other words, of a world public order of human dignity – is truly a problem of the most heroic proportions.⁷⁸⁵

It is the varied perception of the world order by states that make them fear foreign intervention and strongly upkeep the notion of sovereignty which they refuse to abandon. It is for these reasons that contemporary international law confines itself at establishing a *minimum* order that prohibits unauthorized coercion and violence. As early as 1958 Professor Brierly pointed out that what differentiated municipal from international law was not the lack of sanctions in international law, but the fact that the sanction mechanisms under municipal law are organized and systematic, whilst in international law there is a lack of an organized sanction-imposing system. As a consequence, “The true problem for consideration is therefore not whether we should try to *create* sanctions for international law, but whether we should try to organize them in a system.”⁷⁸⁶

In the absence of such a centralized international legal system, states are empowered to become the guardians of their own rights and are entitled to resort to unilateral, peaceful measures in order to induce termination of the wrong committed against them and the compliance of the wrongdoing state with its obligations that derive as a result. Nevertheless, the international community is now called upon to face new challenges with respect to serious violations of international law, so serious that they attack fundamental principles commonly shared by all states. The lack of compulsory judicial and enforcement mechanisms has put at risk the very effectiveness of international law, and has fed a controversial debate as to whether states not injured are or should be entitled to take action in the form of countermeasures in order to bring to an end these violations. Two mainstreams exist on the matter, the one supporting such countermeasures, and the other opposing it. Professor Koskenniemi argues for example that in view of the unwillingness of states to commit themselves to clear-cut definitions of notions such as *erga omnes* obligations, serious breaches, or the fundamental interests of the international community, which may in the future trigger “automaticity”

⁷⁸⁵ McDougal-Feliciano/1961/261.

⁷⁸⁶ Brierly/1958/202. In McDougal-Feliciano/1961/296/fn71.

of action, and their preference for flexible terminology allowing them discretion for the protection of their national interests should such a need arise in the future, makes the danger of abuse of solidarity measures apparent. It is therefore imperative that resort to such measures is restricted.⁷⁸⁷

Nonetheless, as long as the issue of countermeasures in the name of collective interests remains unresolved the dangers arising from the use of such measures are not eliminated. Furthermore, if the international community is to recognize a right to such countermeasures in the future, it has to make sure that they will not be abused by any state. For this purpose, and in order to mitigate the fears of many states regarding authorization of countermeasures by states other than the injured, it is necessary to reduce the risks of abuse by those states that are favored in terms of military and economic strength.

5.2. The Legal Constraints of Countermeasures

Leaving aside for the time being the question of whether countermeasures by a state other than the injured are permissible or not, it should not be forgotten that countermeasures, constituting an internationally wrongful act themselves, exceptionally entitle a state whose rights have been violated to suspend the performance of its own obligations towards the wrongdoing state with the aim, as article 49 of the 2001 final articles provides, to induce its compliance regarding cessation and reparation.⁷⁸⁸ The final articles also acknowledge that countermeasures need not be reciprocal in character, deviating in this way from the maxim an eye for an eye, as reciprocity, while it could at times comply with the principles of necessity and proportionality, could also collide with them in given circumstances, thus endangering fundamental principles of international law. Countermeasures, which must not involve the use of force, must be temporary in character, a principle affirmed by the ICJ in the *Gabcikovo – Nagymaros Case*. As already seen in Chapter 3, the Court in that case differentiated between the suspension or termination of a treaty as a consequence of a material breach as provided under article 60 of the 1969 VCLT on the one hand, and suspension of the performance of obligations by way of countermeasures under the law on state responsibility on the other. Countermeasures are therefore taken for the fulfillment of a certain aim and must

⁷⁸⁷ Koskenniemi/2001/349-350,355.

⁷⁸⁸ ILCreport/2000/89/(296).

be terminated as soon as this aim is accomplished.⁷⁸⁹ Furthermore, for the legality of countermeasures to remain uncontested, they must solely be directed against the wrongdoing state, they must not be aimed at inflicting punishment, whilst their effects must be reversible as far as possible. The latter means that if the state resorting to countermeasures has to select between many lawful and effective measures, it must select those which would allow resumption of the performance of the obligations once they are terminated.⁷⁹⁰

Moreover, the 2001 ILC articles make clear that countermeasures are prohibited with respect to obligations arising from the UN Charter concerning the prohibition of the threat or use of force, obligations regarding the protection of fundamental human rights, obligations of a humanitarian nature banning reprisals, and obligations arising from *jus cogens* norms.⁷⁹¹ The universal significance of human rights, as this is reflected from the several international instruments existing for their protection, could not really leave unaffected the development of countermeasures.

Special Rapporteur Professor Crawford had also proposed a further provision prohibiting extreme political or economic coercion which aimed to endanger the territorial integrity or political independence of the wrongdoing state, or which would amount to interference in its domestic affairs,⁷⁹² a proposition not finally followed by the ILC. Instead, in the commentary of final article 50 (1) (b) concerning the requirement of respect of international human rights, reference is made to the International Covenant on Economic, Social and Cultural Rights which provides for a distinction between exercising economic and political pressure for compliance with international law and inflicting suffering upon vulnerable groups within the targeted state.⁷⁹³ It can therefore be inferred from this that particularly burdensome countermeasures will be assessed in the context of the obligations requiring respect for fundamental human rights.

Article 50 (2) of the final articles further provides that a state resorting to countermeasures is still under a duty to fulfill its obligations under any dispute settlement procedure existing between itself and the wrongdoing state that is related to

⁷⁸⁹ Crawford/2002/282-3.

⁷⁹⁰ Ibid/283.

⁷⁹¹ Ibid/288.

⁷⁹² ILCreport/2000/102/(333).

⁷⁹³ Crawford/2002/289.

the dispute in question, and under diplomatic and consular law concerning the physical inviolability of diplomatic and consular personnel, premises, documents and archives.

It is within this context that proportionality should be assessed, as the considerations just analyzed narrow significantly what it may be done by way of countermeasures, and they make the scope of proportionality very small. As it can be inferred, when a state has the obligations owed to it violated, there are distinct limits as to what it can do in response. This must be judged within the context of what it has been left to it to do, excluding the restrictions mentioned above. The crucial question therefore is: What is an injured state, or for this matter a state other than the injured, entitled to do in response to an infringement of an obligation owed to it? Is it entitled to anything, irrespective of the cost? Proportionality answers this question by telling us what the state is entitled to get, and by keeping the notion of countermeasures clear from punitive elements.⁷⁹⁴ This is exactly where the principle of proportionality gains significance. As Professor Crawford has pointed out, proportionality is the *sine qua non* of the legality of countermeasures,⁷⁹⁵ while it serves to restrict the intensity and nature of unilateral power that legitimizes what in other circumstances would be illegitimate and therefore safeguarding the own rights of the defaulting state.⁷⁹⁶ At the same time, it aims to bring legal certainty and predictability in international relations by setting the conditions with which excessiveness of a certain action can be measured.

Furthermore, proportionality draws a line between the internationally wrongful act and the countermeasures, whilst it may be related to the purpose pursued by the latter. As the ILC observes in its commentary to article 51 of the final articles a disproportionate response may have been unnecessary in inducing the compliance of the wrongdoer with its international obligations, namely cessation and reparation. Yet, proportionality may render unlawful countermeasures which although necessary to bring the compliance of the defaulting state were not proportionate.⁷⁹⁷

One of the main concerns regarding countermeasures in general and proportionality in particular is that they are assessed by the state resorting to such measures. The view has

⁷⁹⁴ Zoller/1984/135.

⁷⁹⁵ ILCreport/2000/94/(305).

⁷⁹⁶ Cannizzaro/2001/890.

⁷⁹⁷ Crawford/2002/296.

therefore been taken that proportionality should be more precisely formulated.⁷⁹⁸ Here again emerges the question as to what countermeasures must be proportionate. While the earlier sections dealt with an overview of proportionality in the context of EU, national legal systems and the law of armed conflict, the following sections will focus on the content of proportionality in the law of countermeasures. An additional question which will be raised is how proportionality would or should be assessed, should there exist in international law a right to all states to resort to countermeasures in response to a violation of an obligation *erga omnes*.

5.3. The Concept of Proportionality in the Work of the ILC

When with the adoption of article 2 (4) of the UN Charter, as later repeated in General Assembly resolution 2625 on the Friendly Relations of States,⁷⁹⁹ the use of armed reprisals as a means of resolution of international disputes was banned, the notion of countermeasures gained in significance. One of the main concerns that remained however, in view of the non-central character of the international legal order, was the setting of boundaries in the capabilities of states when resorting to countermeasures. As pointed out by Mr Riphagen, no matter how serious the initial wrongdoing, the offender has certain rights that no one can violate in response. In his opinion this rule constitutes a negative statement of the rule of proportionality according to which:

the author state does not, by the mere fact of committing any breach of any obligation, become an "outlaw". Rather, the rules of international law determine the legal consequences of the breach, i.e. the possible responses, including the new obligations of the author State. These responses are not necessarily strictly proportional to the breach. They may involve legal consequences having a serious impact on the sovereignty of the author State, as, for example, in the case of a response against aggression committed by the author State. But the point is that even the most serious "international crime" (in the sense of art. 19 of part 1 of the draft) does not in itself- i.e. automatically- deprive the author State of its sovereignty as such.⁸⁰⁰

It was acknowledged at an early stage of the work of the ILC on the codification of the law on state responsibility that the application of countermeasures as a response to a prior breach in order to preclude the wrongfulness and therefore the responsibility of the

⁷⁹⁸ ILCreport/2000/92/(301).

⁷⁹⁹ GA/Res/2625/1970.

⁸⁰⁰ Second/Rreport/Riphagen/1981/86/(60).

responding state, should be commensurate to the injury suffered by the initial offence.⁸⁰¹

For Mr Riphagen, the source (i.e. customary, conventional or other), the content, and the purpose and the object of an obligation that has been infringed cannot but influence the legal consequences of the breach (qualitative proportionality). Moreover, the factual circumstances under which a breach occurred are also relevant for the response such as the seriousness of the wrongful act and its effects on the interests of another state. Such circumstances may aggravate or extenuate the responsibility of the author state, in other words the legal consequences deriving from the wrongful act (quantitative proportionality). The need to find equivalence between the actual effect of the internationally wrongful act and the actual effects of the legal consequences then becomes for Mr Riphagen apparent. Therefore:

A manifest "quantitative disproportionality" between breach and legal consequences should be avoided, but, while this principle can appear in a set of general draft articles on State responsibility, a further elaboration must be left to the States, international organizations or organs for the peaceful settlement of disputes which may be called upon to apply those articles.⁸⁰²

Mr Riphagen has argued that the criterion is always qualitative in the sense that what is important when examining the lawfulness of a specific countermeasure is the seriousness of the violation on the one hand and the seriousness of the sanction taken on the other, although as argued, there is not in international law a perfect correlation between breach and response.⁸⁰³ Nevertheless, "translating quantity in terms of quality and vice versa", as characteristically was pointed out, is not an easy task especially when the new legal relationship established because of the initial wrongful act does not merely establish an obligation for *restitutio in integrum*, but also authorizes the injured state to resort to countermeasures, or even creates a right or a duty for third states to adopt a non-neutral position towards the defaulting state.⁸⁰⁴ In 1969 the Commission implied about proportionality that:

⁸⁰¹ Eighth/Report/Ago/1979/40/(82).

⁸⁰² Third/Report/Riphagen/1982/46/(1).

⁸⁰³ Second/Report/Riphagen/1981/84-85/(49).

⁸⁰⁴ Preliminary/Report/Riphagen/1980/128/(95).

two factors in particular would guide it in arriving at the required definition: namely, the greater or lesser importance to the international community of the rules giving rise to the obligations violated, and the greater and lesser seriousness of the violation itself.⁸⁰⁵

It was suggested in this regard that in determining the legal regime of responsibility, that is the legal consequences to be derived from an internationally wrongful act, it was not enough to draw a list of the new legal relationships and categorize such legal consequences in a scale of strength. Nor was it satisfactory when choosing which legal consequences are more legally admissible in each particular case to merely draw a line of proportionality as between the breach and the response. It was thus proposed that in addition to the scale of consequences in accordance to their strength, a substantive criterion was also required, and in particular a scale of values affected from both the breach and the response.⁸⁰⁶ Nevertheless, a scale of values necessarily fell within the ambit of the primary rules, something that the Commission repeatedly precluded in Part One of its Draft Articles, with the exception perhaps of article 19 and with what it named as "international crimes". However, as Mr Riphagen noted, even in the case of international crimes there existed different legal consequences to be chosen from for each particular situation.⁸⁰⁷

For the purpose of determining the legal consequences to be applied in a case of a violation and of estimating proportionality, Mr Riphagen recommended to do so by way of approximation taking into account a scale of possible responses on the one hand and the general rule of proportionality between the actual breach and the actual response on the other. At the same time he acknowledged that the seriousness of the situation created as a result of the violation might entail a more serious and stronger response. To achieve that, Mr Riphagen suggested three restrictions in relation to:

- (i) the protection given to the object of the response by the rules of international law;
- (ii) the connection under international law between the object of the breach and the object of the response; and
- (iii) the existence of a form of international organization *lato sensu* covering the situation.

⁸⁰⁵ YBILC/1969/233/81 in Second/Report/Riphagen/1981/84/(47).

⁸⁰⁶ Preliminary/Report/Riphagen/1980/129/(98).

⁸⁰⁷ Ibid/128-129/(98-100).

According to him, these requirements provided for flexibility when determining the question of proportionality.

Nevertheless, it was also suggested that the wrongful act might in fact be of such negligible significance so “its breach” not to entail all the legal consequences provided by the secondary rules for that particular act. As Mr Riphagen remarked, “the mirror-image of this immediate appreciation of a particular set of factual circumstances is the principle of law called the principle of proportionality...”.⁸⁰⁸

When the issue of proportionality was later examined by Mr Arangio-Ruiz the attention was turned to the determination of the real objective of the countermeasures in each particular case.⁸⁰⁹ However, when defining the notion of proportionality in relation to countermeasures, Mr Arangio-Ruiz rejected that it was appropriate to make reference to terms such as “manifestly disproportionate” that his predecessor had accepted, since there was a risk to introducing subjective and ambiguous elements. Instead, he opted for terms such as “out of proportion” or simply “disproportionate”. As for the criteria required for the assessment of proportionality Mr Arangio-Ruiz stressed that it would not suffice to take into account merely the damage caused by the wrongful act (quantitative element). An additional, qualitative, element should also be taken into consideration, and more specifically, the importance of the interest/right protected by the infringed rule, and the seriousness of the breach. As a consequence, Mr Arangio-Ruiz proposed article 13 according to which “Any measure taken by an injured State under articles 11 and 12 shall not be out of proportion to the gravity of the internationally wrongful act and of the effects thereof”.⁸¹⁰

The next Special Rapporteur, Professor James Crawford, turned his attention to the aims to be pursued by countermeasures ascertaining that it was necessary to legally restrict those (the aims). Emphasis was therefore given to the coercive character of countermeasures. Accordingly, the ILC accepted as lawful countermeasures whose purpose is strictly to bring compliance with the obligations of the wrongdoing state born out of its wrongful act. This view is reflected in article 49 of the 2001 articles on state responsibility according to which an injured state is entitled to resort to

⁸⁰⁸ Third/Report/Riphagen/1982/32/(65).

⁸⁰⁹ ILCreport/1992/31/(215).

⁸¹⁰ Ibid/29/(74-75).

countermeasures only for the purpose of inducing the wrongdoer to comply with its obligations, namely the cessation of the wrongful act, the provisions of safeguards of non-repetition, and reparation for the injury caused (part two of the articles). However, Cannizzaro observes that despite the change of perception regarding the nature of countermeasures, article 51 does not correspond to this change because in effect it envisages a relationship between breach and response.⁸¹¹ Therefore, if the ILC wanted to focus on the coercive nature of countermeasures, then it should have defined proportionality as a relation between the intensity of the constraint and the gravity of the initial breach. Moreover, Cannizzaro believes that it is improper to put all countermeasures under the same category, namely that they all aim at the coercion of the wrongdoing party, as it does not give flexibility nor establishes a link between the aim pursued and the means used.⁸¹²

In addition to the above, White and Abass note that if proportionality is assessed on the basis of the injury caused then this would imply that the purpose of countermeasures is to punish the recalcitrant state, something explicitly precluded under the current articles, and that as a result there seems to be a contradiction in the position of the ILC.⁸¹³ Although these thoughts are shared by the present author, it is also important to stress that proportionality cannot be completely disassociated from the initial breach.

5.4. The Development of Proportionality in the Law of Countermeasures

Reprisals, as measures short of war taken by one state against another, developed in state practice in the latter half of the 19th century.⁸¹⁴ According to Oppenheim reprisals constituted “such injurious and otherwise internationally illegal acts of one State against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency”.⁸¹⁵

The question of proportionality was discussed in the *Naulilaa* incident in 1928, although even before that some authors had made reference to the concept of proportionality

⁸¹¹ Article 51 as appears in the Final Articles on State Responsibility reads as follows: “Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question”. In Crawford/2003/294.

⁸¹² Cannizzaro/2001/893-94.

⁸¹³ White-Abass/2003/513.

⁸¹⁴ Gardam/2004/46.

⁸¹⁵ Oppenheim-Lauterpacht/1952/136 in Gardam/2004/46.

pointing out that reprisals out of proportion to the act that provoked them were not lawful.⁸¹⁶ The Arbitration Tribunal which was established by Germany and Portugal was called to determine whether the reprisals taken in that course were grossly disproportionate.

The incident between the two countries was evoked when in October 1914 some members of a Portuguese frontier post in Naulilaa killed three German officers whilst wounding two others. In retaliation the Governor of German South-West Africa ordered German forces to attack and destroy forts and posts in the Portuguese territory which as a result were abandoned and later looted by the native population. The two countries reached an agreement for the establishment of an Arbitral Tribunal in accordance with the terms of the Treaty of Versailles to try claims concerning acts of the German government since July 1914 and before Portugal's accession to the war. The Tribunal, having concluded that the Portuguese action to kill the German officers was a mistake and as a result did not constitute a wrongful act, held that reprisals constituted an act of self-help of the injured state in retaliation to a violation of international law, and that it had to comply with proportionality. More specifically, the Tribunal stressed that reprisals:

have for object to suspend momentarily, in the relations between the two states, the observance of such or such a rule of international law. They are limited by the rules of humanity and good faith applicable in the relations of state to state....They tend to impose on the offending state reparation for the offence or the return to legality and avoidance of new offences. This definition does not require that the reprisal be proportioned to the offence.⁸¹⁷

The Tribunal further noted on the question of proportionality that according to the German doctrine of reprisals, these did not need to be proportionate to the offence. Nevertheless, the Tribunal did acknowledge an existing disagreement among authors on the issue and that the majority viewed that there needed to be a proportion between the offence and the reprisal as a condition of legitimacy.⁸¹⁸ It went further to note that

(2) The necessity of a proportionality between the reprisal and the offence appears to be recognized in the German reply. Even if one admits that international law does not require that reprisals be measured approximately by the offence, one must certainly consider as excessive, and consequently illicit, reprisals

⁸¹⁶ In Zoller/1984/125.

⁸¹⁷ *Naulilaa*/RIAA/1928/No.2/951.

⁸¹⁸ *Ibid*/(1026).

out of all proportion to the act which has motivated them. In the present case....there was an evident disproportion between the incident of *Naulilaa* and the six acts of reprisal which have followed it.⁸¹⁹

The emphasis placed by the Tribunal lay upon the lack of equivalence between the initial wrongdoing and the reprisals. The conclusions of the Tribunal that proportionality was a prerequisite for the legality of reprisals reflected the opinion of writers of the time according to which "reprisals must be in proportion to the wrong done, and to the amount of compulsion necessary to get reparation".⁸²⁰ However, the state practice that followed the *Naulilaa* incident was not always consistent to this approach according to which proportionality had a restraining power. One of the reasons identified for this was the lack of agreement regarding the aims of reprisals, "an established referent against which to measure the reprisal action".⁸²¹ It is therefore observed that if what was aimed for by the reprisals was retribution, then the gravity of the offence could be a relevant factor in evaluating proportionality. Should however the aim have been reparation, then the injury suffered would be essential in assessing proportionality.

In more recent times, Zoller took the view that proportionality becomes relevant whenever the response to the wrongful act goes beyond the suspension or termination of a right or obligation equivalent to the right or obligation that had initially been infringed. In this context, the notion of proportionality implies a harmonious relationship between different things and therefore calls not for mathematical approximation but rather for relative equality.⁸²²

Proportionality in relation to countermeasures was the subject of examination by the Arbitral Tribunal established with the agreement of the US and France in the *Case Concerning the Air Services Agreement of 27 March 1946*.⁸²³ The dispute broke out between the parties when France refused to allow a Pan American aircraft traveling from the US to Paris with change of gauge in London to disembark its passengers and freight, whilst suspending future Pan Am flights to Paris. France argued in particular that the decision of the Pan American Airlines to use smaller aircraft for the route from London to Paris was in violation of the 1946 Agreement. In response the US, for as long

⁸¹⁹ Ibid/953.

⁸²⁰ Oppenheim-Lauterpacht/1952/141 in Gardam/2004/47.

⁸²¹ Gardam/2004/48.

⁸²² Zoller/1984/131.

⁸²³ ILR/1979/Vol.54/304.

as the French authorities enforced the restrictions against Pan Am, ordered two French airlines to file the schedule of their flights. A few days later they prohibited Air France from operating certain flights to the US. Both orders were passed under Part 213 of the US Civil Aeronautics Board's Economic Regulations. In the meantime the two countries by common agreement submitted their dispute to an Arbitral Tribunal requesting it among others to determine whether the US orders were lawful and proportionate.

In assessing the lawfulness of the US action the Tribunal noted that it would have to base its conclusions on the aim actually pursued and whether that was confined to reciprocity, quicker settlement of the dispute, or prevention of future violations by other states.⁸²⁴ The Tribunal re-affirmed in this regard the rule that countermeasures should be equivalent to the breach although it acknowledged that proportionality could be assessed only by approximation. He also added that: "In the Tribunal's view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach."⁸²⁵

The Tribunal stressed that a mere comparison of the losses the parties in the dispute suffered or would have suffered did not suffice for the determination of whether the US action was proportionate. Rather, it gave emphasis to the interests and principles at stake by the initial action of France and its impact on the general air transport policy of the US and on a large number of international agreements with states other than France concerning changes of gauge in third countries. What mattered in this regard was the proportionality between the effects of the initial wrongful act and the effects sought by the countermeasures. Zoller further illustrated this point by associating the case before the Tribunal with the restriction of civil rights by police for the maintenance of public order. The determinative factor for proportionality in this latter case would be to balance the effects of the exercise of the civil rights and the effects of the implementation of the police measure. As Zoller very characteristically points out, this principle is reflected in the 'aphorism' that 'The police may not use machine guns to kill birds'.⁸²⁶ Subsequently, what proportionality measures is not the breach and the response but whether the countermeasures resorted to are proportionate to the purpose aimed at, and

⁸²⁴ Ibid/337/(78).

⁸²⁵ Ibid/338/(83).

⁸²⁶ Zoller/1984/135.

the means used in order to achieve it.⁸²⁷ She also stresses that equivalence may not always be the right answer since even an equivalent response may indeed be disproportionate and cause more harm.⁸²⁸

Should the US action have been evaluated in the light of measures aiming to compel France to lift the ban imposed on Pan Am to land in Paris, the US measures, which resulted to the suspension of any flight between Paris and Los Angeles, would have been disproportionate to the purpose they wanted to achieve. Instead, the US emphasised on the effects of the action taken by it, which it claimed did not exceed the effects that derived as a result of France's initial decision. According to the analysis made by the US:

France has denied a U.S. carrier its right under the Agreement to provide a West Coast- Paris service; Air France's Paris- Los Angeles service was approximately *equivalent* in law to the West Coast- Paris service Pan Am proposed to resume. In fact, Air France operated its Los Angeles- Paris round trip service only three times a week while the Pan Am service would have been six times a week".⁸²⁹

Viewed in this context the Tribunal did not find that the US response was disproportionate in comparison with the French measures.⁸³⁰ It needs to be noted however that in this case the countermeasures resorted to fell within the same field and concerned the same routes as the ones affected by the initial measures to which they were a response, although their economic effects upon the French airlines were more severe.⁸³¹

The principle of proportionality was also examined in the *Case Concerning the Gabčíkovo-Nagymaros Project* between Hungary and Slovakia. Under an agreement signed between them in 1977, Hungary and Czechoslovakia decided the construction and operation of a system of barrage and locks on that part of the Danube shared by them as an international river and boundary.⁸³² When in 1989 Hungary, due to environmental concerns, decided to suspend and finally abandon the works of the

⁸²⁷ Ibid.

⁸²⁸ Ibid/136-7.

⁸²⁹ US/Digest/1978/770 in *ibid*/135-6.

⁸³⁰ In his dissenting opinion Mr Reuter, although he agreed with the legal analysis of the Court on the issue of proportionality according to which this should be assessed not only on the basis of the facts but also in the light of the questions of principle to be born from the facts, he added that these questions of principle should also be considered in view of their probable effects as well. Reuter/*Air/Service/Case/RIAA/1978/Vol.18/448*.

⁸³¹ Crawford/2002/295.

⁸³² ICJReps/1997/.

project, Czechoslovakia responded by diverting the waters of the river Danube within its boundaries, which it justified as a measure of 'approximate application' of the agreement. Looking at the arguments of both parties the Court stressed that with the conclusion of the 1977 Treaty Hungary had accepted the damming of the Danube and the diversion of its waters but only on the condition of common operation and benefit of the project. Consequently, it had not forfeited its rights for the equitable and reasonable sharing of the Danube as an international watercourse. The Court therefore reached the conclusion that Czechoslovakia, *by diverting the waters of the Danube* (but not by constructing the works which would put into operation Variant C during which Hungary suffered no injury), had itself committed an internationally wrongful act. Assessing the lawfulness of Czechoslovakia's response, as later succeeded by Slovakia, the ICJ confirmed the principle that countermeasures should be commensurate to the injury caused with due consideration of the rights in question. The Court, with special focus on the right of all riparian states to enjoy in a regime of full and unqualified equality in a commonly shared river, concluded that:

Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube – with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetkoz – failed to respect the proportionality which is required by international law.⁸³³

The criterion adopted in both those two cases was of qualitative rather than quantitative character, placing the emphasis on the nature of the rights involved. In this same framework article 51 of the 2001 ILC articles is drafted. Accordingly, what matters for purposes of proportionality is not only the injury suffered and the losses, usually material, caused as a result (quantitative element), but also the significance of the interests involved, not only of the injured state but also of the wrongdoing state, and the seriousness of the breach.⁸³⁴

It should be stressed at this point that although proportionality finds proper application regarding violations of customary international law the same does not apply with respect to conventional law where states can agree to anything, provided of course, and this is the only limitation, that it is not in conflict with *jus cogens* norms. From the study of Mr Arangio-Ruiz on self-contained regimes, it derives that states are not precluded from entering into agreements between them which provide for special machinery to be

⁸³³ Ibid/(85).

⁸³⁴ Crawford/2002/295-6.

initiated in the case of an infringement, either as a response to the wrongful act which is related to the obligations under the particular instrument, or “in response to any internationally wrongful act if the particular measures or sanctions contemplated affect the instrument in question in any way”.⁸³⁵ It is thus sustained that proportionality does not come into play in these cases. Rather, “it will suffice to verify whether the measure is admissible under the relevant instrument in the circumstances, assuming, of course, that the target State is a party thereto. This may also happen- as long as *jus cogens* is respected- in derogation from the general rules of the law of treaties on suspension and termination of multilateral treaties.”⁸³⁶

Cannizzaro also distanced himself from the view which wants proportionality to lie in a quantitative relationship between the breach and the response. He believes that ‘in a plurality of instruments and tools of self-redress’⁸³⁷ in the international legal order and which derives from the need of states to protect their legal rights and interests,⁸³⁸ emphasis must be placed upon the function each response fulfils instead. This function can be normative, retributive, coercive or executive. In other words, different countermeasures, different functions, different measurement of proportionality. This conclusion relies on the proposition that in resorting to countermeasures states do not pursue one and the same purpose, and in this sense it is different from the opinion which regards countermeasures as having an instrumental role, namely to bring compliance with the breached obligation or to obtain reparation. The instrumental perception of countermeasures would unavoidably be construed as a relation between the aims and the means of the action. This, according to Cannizzaro, entails the danger to justify excessive in relation to the original breach responses, if proven to be necessary for the accomplishment of the aim.⁸³⁹ Furthermore, it rejects that countermeasures may seek other than a coercive aim, thus “wiping out the richness and variety of the different forms in which reactions to wrongful acts may materialize.”⁸⁴⁰

The proposition that countermeasures are multifunctional in nature seems to correspond with the conclusions of the Arbitral Tribunal in the *Air Services Agreement Case* according to which countermeasures may pursue a variety of aims. Accordingly, “The

⁸³⁵ ILCReport/1992/40/(122).

⁸³⁶ Ibid/40/(113).

⁸³⁷ Cannizzaro/2001/889.

⁸³⁸ Ibid/895.

⁸³⁹ Ibid/891-2.

⁸⁴⁰ Ibid/892.

scope of the United States action could be assessed in very different ways according to the object pursued; does it bear on a simple principle of reciprocity measured in economic terms? Was it pressure aiming at achieving a quicker procedure of settlement? Did such action have, beyond the French case, an exemplary character directed at other countries and, if so, did it have to some degree the character of a sanction?"⁸⁴¹

As a consequence of this mosaic of countermeasures one should also think in terms of a mosaic of proportionality. Therefore, proportionality should not be conceived as a fixed notion, unchangeable and inflexible, applicable to all situations no matter the differences between them. Proportionality must on the contrary be "built" on a case-by-case basis. As noted, the proportionality of a response to the infringement of a bilateral trade obligation cannot be compared with the proportionality required for the response to a violation of an obligation *erga omnes*. Whilst in the first case the reciprocal suspension of rights may suffice, in the latter case the reaction may aim at imposing the compliance of the defaulting state with the infringed rule. Furthermore, and despite the fact that the coercive element may be apparent in both cases, it may have different significance where a measure is taken in response to a violation of an *erga omnes* obligation.⁸⁴² Professor Brierly, writing in 1925 on the principle of non interference in the domestic jurisdiction of another state in accordance with article 15 (8) of the Covenant of the League of Nations, emphasized that a simple violation of immigration law could not be placed on an equal footing with a state act which amounted to "a massacre on a colossal scale even though the victims may be its own nationals".⁸⁴³ Accordingly, the nature and function of countermeasures in each instance varies significantly. Cannizzaro therefore suggests that the emphasis is hereby placed on the appropriateness of the aim/function of the response (external proportionality) and the appropriateness of the adopted measures in light of the result they want to achieve (internal proportionality). He further proposes to divide the response to several bundles of measures and determine the objective pursued, individually rather than cumulatively, by each one of them. In this regard, if a state in response to a wrongful act proceeds to suspend its reciprocal obligations under the infringed treaty and at the same time freezes the assets and goods of the wrongdoing party, it is suggested that proportionality should not be evaluated on the basis of the totality of the measures. Rather, it should be measured on the basis of the objectives pursued by each measure. For this purpose, the

⁸⁴¹ RIAA/1978/Vol.18/442/(78).

⁸⁴² Cannizzaro/2001/896.

⁸⁴³ Brierly/1925/18.

suspension of the treaty will be judged on the basis of the objective regarding the re-establishment of the legal balance disturbed by the initial wrongful act, whilst the freezing of assets will be judged on the basis of the need for compliance or the obtaining of reparation. That proportionality should be evaluated on the basis of the function of the action is reflected according to Cannizzaro in the ruling of the ICJ in the *Gabcikovo- Nagymaros Case*. In other words, should the aim of Slovakia's action have been to adverse the effects of the breach and unilaterally bring the benefits that would derive from the completion of the project, then its action would be proportionate. However, the Court relied its conclusion on a different legal explanation. More specifically, it judged Slovakia's action on the basis of the breached treaty and the proper function of the response. The purpose of the treaty was to create a project the benefits of which would be *commonly* shared by the two countries, and not to grant a right for the unilateral implementation of the treaty and the unilateral exploitation of the river. In conclusion, the diversion of Danube by Slovakia was not the proper function of the response, which should rather be to restore the balance between the parties and seek reparation.⁸⁴⁴

In accordance with the above considerations Cannizzaro suggests that the appropriateness of the aim be determined in the light of the infringed rule and the legal consequences of the breach, whilst the appropriateness of the measures adopted is judged on the basis of the result they want to achieve.

With respect to the functions of countermeasures, Cannizzaro identifies four possible functions: a normative, a retributive, a coercive and an executive. Countermeasures with a normative function aim to re-establish the legal balance of the parties involved. Here the action under scrutiny aims to achieve a balance between the breach and the response and corresponds to the non-performance of the same or equivalent obligation. In a hijacking incident in 1971, India reacted by prohibiting the flying over its territory of Pakistani civil aviation, which resulted in damages greater than the damages caused by the initial infringement. India justified its action by saying that its response was a reciprocal reaction to Pakistan's action which amounted to the suspension of India's flying rights over Pakistan. Similarly, in the *Air Services Agreement Case* the US justified its response by saying that the services in question were equivalent in law and thus its action was proportionate. In the case of countermeasures with retributive

⁸⁴⁴ Cannizzaro/2001/898.

function there is an assessment of the effects of the breach and the response, with the intention of inflicting a certain cost on the wrongdoer for its misdeed. Retributive countermeasures arise in the case of unilateral obligations compliance with which does not rely upon the performance of a certain other obligation. In coercive countermeasures, the response aims at inducing the wrongdoer to reverse the effects of its wrongful conduct and to comply with its obligation. What matters here in respect of proportionality is the breach and the need to re-establish the pre-existing situation. Coercive countermeasures become relevant in relation to the violation of obligations owed to the international community. Proportionality is thus not assessed by comparison of the damages caused but rather by what is appropriate in order to bring to an end the violation, as the most fundamental interests of the international community are at stake. However, even countermeasures with this function are subject to limitations, especially whenever human rights issues are involved.⁸⁴⁵ With respect to the executive function of countermeasures it is noted that this aims to secure the benefits that would derive from the infringed obligation even without the cooperation of the wrongdoing state. The injurious effects of the countermeasures must not supervene the benefits to be achieved whilst the means used are necessary for the accomplishment of the aim.⁸⁴⁶

Cannizaro finally concludes that the function of proportionality is two-fold. first, it serves as an indicator of the means and forms of the response and limits the power of the responding state in the selection of the objective of the response. Secondly it restrains the power to select the measure of reaction and imposes a duty that the response is appropriate to the aim pursued and not disproportionate to the initial breach.⁸⁴⁷

6. A Critical Approach

In view of the great perplexity of the question of proportionality and the varied approaches often followed on the matter, it will now be attempted to clarify the main features of the principle on the basis of all earlier considerations. First, one needs to examine whether proportionality, as applied in the law of the use of force, can be “transplanted” to the law on state responsibility.

⁸⁴⁵ Ibid/910.

⁸⁴⁶ Ibid/911.

⁸⁴⁷ Ibid/916.

It has already been pointed out that proportionality in the use of force is closely associated with the objective of the forceful response which in all cases must be confined to repelling the initial attack. On the contrary, the law of state responsibility is built on the assumption that not all the wrongful acts short of the use of force are of the same gravity and seriousness, and thus, not all bear exactly the same legal consequences. Moreover, in the use of force, the seriousness and gravity of both the initial wrongdoing and the response, but also the interests at stake, cannot be compared to any other violation of international law short of such force. This can be revealed from the fact that with the exception of authorization from the SC, a state may only resort to force in response to a breach of equal gravity, that of armed attack, acting in individual or collective self-defence. In this sense the response is reciprocal in kind to the original misdeed. Of course, this should not undermine the seriousness and gravity of other infringements of international law such as genocide and torture which attack fundamental principles of the international community as a whole. Yet, nothing can endanger international peace and security and the international legal system in its entirety so directly as a state that uses armed force to pursue its policies. The attack of another state is by itself a very serious infringement of one of the most fundamental principles of international law that requires determinative action for its cessation, even if it is more intense and extensive than the initial wrongdoing. It is therefore suggested that due to the different objectives aimed at and interests at stake proportionality cannot have the same content in both the use of force and the law of countermeasures.

As to whether proportionality as applied in the law of armed conflict regarding the means and methods of warfare should be applied in the law of countermeasures, one should not forget that the *jus in bello* is not entirely autonomous from the *jus ad bellum*: even a proportionate response in respect of means and methods, will give rise to responsibility if the resort to force was unlawful in the first place, or if the force used was disproportionate to the military objective pursued. Again, it is submitted, this criterion cannot suffice for assessing proportionality in the law of countermeasures.

It remains to evaluate the different positions formed in relation to the proportionality of countermeasures. It has been seen that the criterion used by the Tribunal in the *Naulilaa* incident was one of comparison between the initial wrongdoing and the response. One wonders whether this could be the right solution, especially in the light of the now well

attested principle that countermeasures must not aim at the punishment of the defaulting state. It is submitted by the present author that a mere comparison of the breach and the response which is equivalent to the maxim an eye for an eye, attaches a punitive element to countermeasures and thus should be rejected. Furthermore, the position that proportionality should be based on the equivalence between breach and response cannot lead to satisfactory results because, as rightly suggested, this would amount to imposing a heavy burden upon the victim state which would be unable to take measures necessary to protect its legitimate rights and interests.⁸⁴⁸

McDougal and Feliciano on the other hand, writing at an early stage, argued that the coercion exercised by one state against another, its intensity and the consequences to derive therefrom are related to the nature and scope of the objectives it sets. In particular they argue that the degree of coercion is equivalent to the scope of the objective set by the responding state and the value it attaches to this objective. Consequently, the limitation of the degree of the coercion relies upon the limitation of the set objectives.⁸⁴⁹ Zoller on her part searches for proportionality in the aims pursued by the countermeasures and the means used to achieve them. Similarly Cannizzaro places all the attention on the appropriateness of the aim, not the subjective aim of the state making use of countermeasures but rather the “legal objective”,⁸⁵⁰ and the appropriateness of the measures to accomplish this aim. Although this author shares the concerns expressed by Professor Crawford who supported the limitation of the objectives of countermeasures, she also considers that the approach proposed by Cannizzaro is not without merit or significance. In particular, his approach seems to turn the attention in the right direction as it establishes objective criteria for the determination of proportionality, and for this reason it should have been reflected in article 51 of the ILC final articles. However, and as already acknowledged, this by itself does not suffice since the more serious the initial wrongdoing the more serious and intensive the response *may* need to be for its cessation. Furthermore, the nature of rights affected by a certain wrong need also to be taken into consideration. These elements will be particularly important when assessing the proportionality of countermeasures taken in response to particularly serious violations of international law such as *jus cogens* norms or obligations *erga omnes*, whether from the position of an injured state or a state other than the injured. At the same time, it should not skip the attention that

⁸⁴⁸ Ibid/908.

⁸⁴⁹ McDougal-Feliciano/1961/33-4.

⁸⁵⁰ Cannizzaro/2001/896/fn20.

countermeasures may not be excessive in relation to the injury actually inflicted. It is accordingly submitted by this author that the aims, the gravity of the wrongful act, the injury suffered and the interests at stake should all be taken into account when deciding whether a certain action was proportionate or not. The theoretical analysis made by Cannizzaro establishes a reasonable approach to the question of proportionality and therefore should be given the attention it deserves, even now that the work of the ILC on state responsibility has been completed.

Finally, the author acknowledges that there still remain specific difficulties that may arise in the context of proportionality should countermeasures for violations of obligations *erga omnes* be permitted.

7. Conclusion

The principle of proportionality has evolved out of the pressing necessity to restrain the use of countermeasures to the maximum extent possible and has developed as an essential element of legality of such measures. However, proportionality gains all the more significance in the light of an "anarchical" society, such as the international, which lacks the mechanisms necessary to monitor its correct implementation by individual states. This, along with the ongoing controversy as to the exact scope of the principle, which is only reflective of the perplexity of the question, elevates proportionality as one of the most difficult problems when it comes to countermeasures. This is only aggravated by the possibility of allowing in the future resort to countermeasures in response to violations of obligations *erga omnes* and peremptory norms, the significance of which extends beyond a merely bilateral relationship between two states since these norms have been established to protect collective interests. The approach adopted by the ILC in article 51 does not seem to quiet these concerns, and therefore re-consideration of the matter may prove essential.

CONCLUSION

One of the main incentives behind the development of the law on state responsibility in the context of the ILC's work as analyzed in the first chapter of the current research, lies in the acceptance that the international system of states has evolved to a normative order which consists not only of rights and obligations but also of rules which deal with possible violations. This has led to the necessity, apart from and complementary to the wide range of norms established through treaties, customs or general principles of international law regarding what states should do and what they should not do - known as primary rules, to also develop a set of rules concerning the legal consequences to arise as a result of the violation of the primary norms - known as secondary and tertiary rules. Accordingly, the law on state responsibility is built upon the understanding that the violation of a primary norm which constitutes an internationally wrongful act, entails new obligations for the defaulting state like the obligation to cease the wrongful act and to offer reparation for the injury caused. Still, the codification of the law on state responsibility did not mean codification of the vast body of primary norms as well - this was simply not feasible in view of the structure and nature of the international legal order.

When the ILC first took up the task to codify the law on state responsibility in 1953, it turned all of its attention to violations of the primary rules on the treatment of aliens, thus restricting the scope and content of state responsibility to violations of this kind. Despite this initial approach it was soon acknowledged that international law consisted of other rules which called for attention and protection in the event of their violation which incurred the responsibility of the state irrespective of the nature, origin, object or content of the infringed rule. Yet, and as the study on state responsibility progressed, a new concept started to make its appearance in the debates of the ILC: that the violation of primary norms did not always have the same significance, weight or effect due to the importance attached to, and the nature of the rights certain primary norms sought to safeguard. Accordingly, whilst the essential nature of many international norms did not extend beyond a relationship of a bilateral nature, others established collective interests fundamental to the international community as a whole such as the prohibition of genocide. The question therefore placed upon the ILC members was how to deal with violations of certain primary rules considered to be, because of the essentiality and

“primacy” of the interests they protect, of a more serious nature: would the legal consequences to be applied as a result of an internationally wrongful act be the same in all instances, or would there be a need to categorize the legal consequences between serious and less serious on the basis of the nature of the rights protected by the infringed primary rule? And would such categorization between primary norms and legal consequences have any bearing on the determination of the state or states entitled to invoke the responsibility of the wrongdoing state or not?

The debate on the categorization of internationally wrongful acts in accordance to the interests they protect became more intense with the revival of the notions of *jus cogens* norms and *erga omnes* obligations. As the second chapter attempted to show, these concepts contributed to the progress of international law insomuch that it is now alleged that the international legal order has developed into something more than merely a voluntarist structure between absolute sovereigns. Rather, it seems to resemble more an international public order which is concerned among others about interests intended to protect the common good of mankind. One could argue that some form of moral, or constitutional status, is now attached to certain rules, although acceptance of these contemporary ideas has not been free from scepticism. Indeed, some states have been extremely reluctant to accommodate such notions (which as already noted may have been perhaps inspired by pure idealism, yet again perhaps not) as they raise significant questions of international legitimacy: who decides which norms qualify as such and for what reasons? Definitely, if the international legal community is to be construed to be based on state consent, then such concepts appear to go against the consensual character of international law and how international law has been traditionally perceived. Furthermore, the abstract and indeterminate content of these and other concepts such as “the international community as a whole” have provoked suspicion among commentators who have even seen in these attempts a new form of colonialism and a threat to legal stability.⁸⁵¹ Moreover, these principles are viewed as compromising state sovereignty since their violation is not anymore considered to fall within the exclusive domain of any state but on the contrary it establishes a legal interest to all members of the international community in their protection.

On the other hand, these developments could not but influence and play a primary role in the work of the ILC. It was precisely in this context that the concept of state criminal

⁸⁵¹ Koskenniemi/ 2005/115.

responsibility, previously supported by what it seemed to be a minority of authors, re-emerged and flourished in the *fora* for the drafting of the law on state responsibility, drawing a distinction between a delictual and a criminal regime of responsibility which was to entail penal sanctions against the recalcitrant state. Although the notion of criminal responsibility was not eventually sustained in the final articles on the law on state responsibility, the understanding that not all violations bore the same gravity did not cease to constitute a common ground of understanding. As discussed, this position is now reflected in articles 40 and 41 of the final articles regarding the legal consequences to derive as a result of serious violations of peremptory norms. At the same time, article 48 confirms that there exist certain interests which, either because they are owed to the international community as a whole or because they are established for the collective interest of a group of states, entitle states other than those which have directly sustained an injury from a given wrongdoing to invoke the responsibility of the defaulting state. One of the most controversial considerations before the ILC however was what could a state other than the directly injured do in response to a violation of this kind, raising thus significant questions of enforcement and implementation. The attention was subsequently turned to the notion of countermeasures which had at an early stage emerged in the draft articles as a means of self-help, as unilateral peaceful measures of redress which, although themselves in violation of international law, their wrongfulness was to be precluded because they were to be taken in response to another, previously committed internationally wrongful act. However states realized from the beginning the powerful effects of countermeasures and for this reason sought to restrict to the extent possible not only their content but also the states entitled to resort to such measures.

The difficulties to be born from these legal considerations are not to be underestimated. On the contrary, there is still an ongoing theoretical debate on how, and on what criteria, one identifies these "special" primary norms as establishing more fundamental rights than others. Even more prominently lies the question as to which state is entitled to do what as a result of the violation of these rules. When the ILC first considered these issues, state practice was very limited, and therefore it had to rely to a great extent on emerging tendencies rather than on concrete and well established rules of international law. Similarly today, more than four decades later, and in the absence of a duty to act in protection of such interests, we are still faced with considerations of implementation of these "different" primary norms. Article 54 of the final articles on state responsibility

has not mitigated these concerns. Yet, the ILC did not wish to take a definite position, therefore leaving the door open for future developments on this issue.

The problem of enforcement of international law raises one of the most difficult challenges not only in international legal theory but also in international legal practice. In the light of the prohibition of the use of force as a means of settling state disputes, enforcement in international law takes the form of countermeasures through the non-performance of obligations arising from conventional or customary rules. Due to the decentralized character of the international legal order and in the absence of institutions empowered to enforce international law, implementation, through the application of countermeasures, is entrusted to each state separately which is called, by its own means, to protect its interests and rights. Still, the enforcement of international law is faced with yet another challenge: that of *lex specialis* or so-called self-contained regimes. More particularly, the growing number of legal regimes which provide not only for primary rules but which also set up their own dispute settlement mechanisms – the EU and the WTO constitute the most prominent examples for this purpose- and sometimes their own enforcement mechanisms, raises questions concerning the impact of these regimes on countermeasures under the general law on state responsibility. Whilst it is a well attested principle of international law that specific rules take prevalence over general rules, questions arise whenever the enforcement mechanisms of a specific regime fail, or they simply do not exist in the first place. This issue, which lies at the heart of examination of the third chapter, gains even wider ramifications with respect to whether the non-performance of obligations provided under a specific regime by way of countermeasures is permissible in response to violations not related to that specific regime. If one accepts the view that such general legal considerations do not fall within the jurisdiction of the specific regime and that as a result they can not be taken into consideration as a defence, then the scope and content of countermeasures as a means of enforcement of international law is significantly narrowed down. However, this position seems to cause some unrest among those who believe that in the absence of other alternatives, the notion of countermeasures plays a pivotal role in the protection of the international legal order. It is accordingly submitted that the traditional mechanism of enforcement of international law, namely unilateral self-help or countermeasures, cannot be paralyzed because of the existence of specific legal regimes, especially economic and trade measures. This is particularly so whenever the fundamental principles of the international community as a whole are endangered, and even if that

would seem to compromise interests in the economic or trade sphere. To say otherwise would mean to undermine enforcement in international law, enhance these regimes with a quasi-peremptory character, and give them prevalence over substantially "higher" principles of international law. At the same time, the existence of parallel and often conflicting rules of international law belonging to various legal systems raises non-negligible concerns regarding the fragmentation of the international legal order. In so long that there is no determinative consideration of this issue, the phenomenon of having diverse opinions and even legal decisions on the same subject on the basis of the angle, or for this purpose, the legal regime being looked at, will become more and more frequent, imperilling the very coherence of the international legal system.

Nevertheless, very few issues have created so much controversy as the question of enforcement of collective interests by states which have not suffered an injury on what we would call their strictly speaking individual interests. There are particularly strong views by states and commentators, especially by those opposing the notion of "solidarity measures", which express concerns that cannot be overlooked. The not so unrealistic fears of abuse of such right by strong states with respect to whether a serious violation of a *jus cogens* norm or an *erga omnes* obligation has occurred and the limits of such reaction, have led many to the conclusion that it is better to do without such measures. It could be argued in this regard that the ILC itself, ambivalent as to the lawfulness of countermeasures by states other than the injured in view of insufficient state practice supporting third-state countermeasures at the time of the conclusion of the final articles, has opted for a provision (article 54) which would allow for the application of such measures in the future, should state practice develop towards that direction.

Indeed, a close examination of the cases studied in the fourth chapter and in which states seemed to be acting in the name of collective interests cannot determinatively lead to the conclusion that there is an established customary or other rule of international law permitting resort to such measures. More specifically, although state practice offers abundant examples of state practice concerning economic and other peaceful measures imposed on grounds of humanitarian considerations which however were consistent with international law, one can distinguish a great amount of reluctance between states, even in the cases which constitute "clear" examples of third-state countermeasures, regarding the lawfulness of measures in violation of specific

international, treaty or other, commitments. States have been extremely cautious firmly to allow the use of countermeasures against another state in the absence of an individual injury. Other examples of state practice on the other hand raise significant questions regarding the validity of claims that a serious infringement of fundamental interests owed to the international community as a whole had in reality taken place. In other occasions states defended their action as not being in violation of any international obligation, or as justified on grounds of national security or fundamental changes of circumstances. At other times state practice is inconsistent. Whilst in certain occasions states were ready to resort to such countermeasures, such as when the EEC decided to suspend the treaties it had concluded with Argentina in reaction to the latter's invasion to the Falkland Islands, only few years before it was concerned that a suspension of its treaty obligations towards Uganda would be in breach of international law. In other occasions of serious infringements states did absolutely nothing, simply because this was in their best geo-strategic, economic or other interests, enhancing in this manner the arguments concerning a double-standard international "morality".

As it can be seen from these observations the current opinion on the question of countermeasures by states other than the injured, far from being unambiguous and conclusive, raises justified doubts about their legitimacy under current international law. This makes the implementation of what have been recognized as fundamental principles of the international community as a whole considerably difficult, to the extent that one questions what is the purpose of distinguishing between essential and ordinary norms if the ordinary norms are more likely to be protected and enforced through countermeasures by an injured state, than norms giving effect to community interests since in most such cases of their violation there is simply no injured state, as defined in the final articles, at all.

Furthermore, the UN Secretary-General Kofi Annan, recently, reminded us that, "without implementation, our declarations ring hollow. Without action, our promises are meaningless."⁸⁵² As the Secretary-General correctly remarks there is no consolation to the population that is being racially discriminated against, tortured, or exterminated, if in the other part of the world a treaty condemning apartheid, torture or genocide has just been concluded, or if a declaration or a resolution has been passed, if there is no way to give these words genuine substance and significance, not merely by the

⁸⁵² Report of the UN Secretary General, Mr Kofi Annan/2005/(130).

assumption that they will be respected, but also by providing implementation mechanisms in the event of not being respected. Professor Koskenniemi, repeating Pascal, once revealed the significance of enforcement in international law in one single sentence: "Do not command what you can not enforce".⁸⁵³ Whilst most of the times most states comply with most of the international norms,⁸⁵⁴ the international community now needs to turn its attention to the problem of enforcement, especially whenever its most fundamental interests are at stake.

In this regard, many authors, fearing "the unilateral, world-ordering politics of a self-appointed hegemon",⁸⁵⁵ place the emphasis to collective, *institutionalized*, action as the appropriate answer to the problem of enforcement. Along the same lines the UN Secretary-General points out that states need to make a commitment towards "collective strategies, collective institutions and collective action".⁸⁵⁶ According to him, the goals of development, security and human rights cannot be advanced by states individually, but rather only as the result of concordant efforts, whilst the UN could play a significant role to this effect. Even more progressively, the Secretary-General turns our attention to an emerging need of *responsibility* to protect. Although he acknowledges that this position is still very much premature, he points to this direction in the future, where the international community will have the responsibility to protect people should the national authorities fail to do so.⁸⁵⁷ Nevertheless, this position unavoidably raises the question as to whether the UN possesses the legal capacity to assume the role of a supranational government, with the SC acting as a world police and the Charter being the Constitution of the international legal community. The debate on this matter grows deeper with the SC assuming more responsibilities in a wide number of areas – terrorism, genocide, war crimes, ethnic cleansing to name some- and elaborating more coercive mechanisms against states in the last 15 years than ever before in its entire history.

Whilst there has been a growing opinion in the literature, particularly after the cessation of the Cold War era, to attach a constitutional role to the UN, such efforts come as a result of the wrong assumption that the international legal order must and can be built

⁸⁵³ Koskenniemi M., Erik Castren Institute of International Law and Human Rights Seminar on The Enforcement of International Law, August 2002 quoting Pascal.

⁸⁵⁴ See Franck/1990.

⁸⁵⁵ Habermas/2003/706 in Koskenniemi/2005/118.

⁸⁵⁶ Report of the UN Secretary General, Mr Kofi Annan/2005/(3).

⁸⁵⁷ Ibid/(135).

upon the same structures as national legal systems. Whilst the entrustment especially of the enforcement of international law to independent and impartial international institutions would be the ideal solution in an ideal world, it is currently neither feasible nor desired by states. This is because states are very reluctant to concede too much of their sovereign powers to international institutions that could in the future turn against them with enforcement action. The persistence of the five permanent member states to the SC to uphold their veto powers constitutes perhaps the most prominent example. Most important, the role of the SC itself is restricted to the maintenance of international peace and security. If the UN, and the SC in particular, is ever going to undertake the role of international governance, it would first have to be legally empowered to do so, and it would have to accommodate to modern realities, with its institutions being reinforced, the international community equally represented, and the determination and will to take effective action whenever this is needed.

Until then, and in view of the almost unequivocal prohibition of the use of force, international lawyers worldwide will be faced with one very substantial dilemma, to strike a balance between the necessity not to use the notion of fundamental principles as a shield for international injustice, and the need to address serious infringements of international law that affect every state.

Whilst there does not currently seem to exist a rule permissive of a right to third-state countermeasures, one can only speculate about how the law on state responsibility and state practice may develop in the future. As it can be revealed from the increase of human rights clauses in trade and economic agreements, human rights considerations are at the centrefold of contemporary legal developments. It is therefore the possibility that a rule in support of solidarity measures for the violation of these and other norms establishing community interests will finally emerge that makes it imperative not to overlook the dangers to be entailed from such a right, and imposes the need to reconsider ways of dealing with such threats. This is owed to the fact that in the absence of a compulsory judicial jurisdiction or an international executing body to observe the law, it is the state taking the countermeasures that assesses whether a serious infringement has been committed and whether such measures fulfil certain conditions of legality. One of the criticisms for example of article 19 of the ILC draft articles introducing the notion of state crimes was that it was worded in an open-ended way, allowing states to take action without any constraints, compared, for instance, with the

obligation to go to judicial settlement imposed by the VCLT on a state invoking the claim of *jus cogens*.

Having already in mind that countermeasures by states other than the injured are defended only by way of response to a limited category of internationally wrongful acts, and thus their scope is restricted significantly only as a means of peaceful coercion to infringements of collective interests, this thesis has also attempted to stress that countermeasures of this nature must comply with the principle of proportionality. This finds justification upon the realization that the recalcitrant state, by committing a certain violation, no matter how gross this may be, does not cease to be a member of the international community with rights and obligations. It is therefore through proportionality that not only the rights of the defaulting state are guaranteed, but also that the right to countermeasures for the protection of common interests will not be manipulated by any state. It follows that proportionality should strike a balance between the initial wrongdoing – its gravity, its injurious consequences, and the nature of rights it affects on the one hand, and the response – the legal aims it seeks to pursue and the means, methods and intensity used to fulfil these aims on the other. The principle of proportionality, which is examined in the final chapter of this thesis, has developed through literature, practice and judicial review, as a legal instrument of constraint, a tool for determining the legality of a given action. Nevertheless, the proportionality test becomes even more compelling if, in seeking to protect interests owed *erga omnes*, more than one state decide to take action against the violator. The assessment of proportionality in this event unfolds to a challenging legal question that raises significant legal considerations. This is because whilst a given state action, examined in isolation, may meet the requirement of proportionality, multiple independent state action, if viewed in its totality, may be disproportionate, thus significantly undermining the rights and interests of the wrongdoing state, and seriously damaging the rule of international law.

The mandate of the ILC is the “codification and progressive development” of international law. “Progressive development” has its limits. By adopting the formula it used in Article 54 of the articles on state responsibility, the ILC left open to the states the possibility of “progressive development” of countermeasures powers for not directly injured states – if that is what the states want to do.

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